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# TRANSFORMING LAW, CONTESTING EXCLUSION, SHAPING INCLUSION

Nancy Levit, Judith Resnik, and Laura Rothstein\*

This symposium builds on the many efforts that preceded it and aims to be helpful amid current challenges. This introduction provides a brief account of what prompted us to invite contributions; we then sketch the richness of the results.

First, a word on origins. At the 2024 American Association of Law Schools (AALS) annual meeting, the Section on Women in Legal Education (WLE) gave Martha Minow an award named after Ruth Bader Ginsburg, who had decades earlier been a law professor and a Chair of the WLE Section before becoming a judge and then a justice on the U.S. Supreme Court. We realized at the session that, while we three knew of Justice Ginsburg's connection to WLE and of the efforts that she and others made to reshape the law, legal education, and institutions like the AALS, people who had entered teaching more recently might not.

Aspects of that history can be found in various articles, including Herma Hill Kay's *The Future of Women Law Professors*, written for the 1991 Iowa Law Review's *The Voices of Women*; included were papers from a conference, held at NYU Law School, which was jointly sponsored by the AALS and the ABA's Commission on Women.<sup>1</sup> Another symposium, *Reflections of Women in Legal Education: Stories from Four Decades of Section Chairs*, was hosted by this Law Review. Articles by twenty-one of WLE's past chairs, including Justice Ginsburg, Dean Kay, and ourselves, gave glimpses of the years from the early 1970s, when WLE was founded, through 2011.<sup>2</sup> One thought we had in 2024 was to update that work by asking the section leaders from 2012 to 2025 to contribute essays. Yet the diversity of scholarship, teaching, and debates over several decades suggested another route—welcoming participation from an array of scholars on a host of issues, including but not necessarily focused on the impact of gender on the legal academy.

We sent invitations for submissions for this new compendium, provisionally called “Why Now? Women, Equality, and Legal Education.” In the fall of 2024, we understood ourselves as having to *explain* why revisiting ideas and practices about gender, in and out of the legal academy, would be useful. Since 1970, and, indeed, since 2012, doors that were once shut have opened. In the United States, as in many other countries, at a formal level, women can take on

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\* Nancy Levit, Curators' and Edward D. Ellison Professor of Law, University of Missouri-Kansas City School of Law. Judith Resnik, Arthur Limon Professor of Law, Yale Law School. Laura Rothstein, Emerita Professor of Law and Distinguished University Scholar, University of Louisville Louis D. Brandeis School of Law. This introduction and the articles that follow are the views of individuals and not those of the institutions with which authors are affiliated.

<sup>1</sup> See, e.g., Eleanor M. Fox & Norman Redlich, *Introduction to The Voices of Women: A Symposium on Women in Legal Education*, 77 IOWA L. REV. 1, 1 (1991); Herma Hill Kay, *The Future of Women Law Professors*, 77 IOWA L. REV. 5, 5 (1977).

<sup>2</sup> See, e.g., Ruth Bader Ginsburg, *In the Beginning*, 80 UMKC L. REV. 663 (2012); Linda Jellum & Nancy Levit, *Introduction: Reflections of Women in Legal Education: Stories from Four Decades of Section Chairs*, 80 UMKC L. REV. 659 (2012); see also HERMA HILL KAY, PAVING THE WAY: THE FIRST AMERICAN WOMEN LAW PROFESSORS (Patricia A. Cain ed., 2021). Justice Ginsburg had chaired in 1972 and was in 2012 the oldest WLE chair then living.

various roles in law—as litigants, witnesses, lawyers, law professors, legislators, administrative agency executives, and judges.

A few dimensions of change can be seen from some of the numbers about women in the legal profession. Reports from 2024 concluded that four out of ten lawyers in the United States identified themselves as women, and 56% of law students did.<sup>3</sup> In practice, not all doors are open, not all women have access, and work at all levels of authority is not evenly distributed.<sup>4</sup> For example, in 2023, women were 28% of law firm partners. About 40% of justices on state supreme courts identified as women, as did about a third of Article III judges.<sup>5</sup> Nonetheless, some commentators see the array of achievements as the basis for assuming that any need to focus on gender as a category of analysis has receded, especially given the competing demands on time, the opportunities to participate in the “mainstream” of legal activities, and the many obligations of wage work as well as of household work. Moreover, as our wording in this paragraph reflects, concerns about essentializing sexual identities and gender are ever-present. Scholars and commentators inside and outside the academy have developed a substantial body of work on intersectionality—examining whether, how, and why to foreground gender, given the many dimensions of identity that intersect with the category “woman.”

Moreover, and in part because of decisions of the U.S. Supreme Court and contemporary social movements, contestation about women’s bodies, women’s liberty, and women’s opportunities accelerated as we planned this symposium. The U.S. Supreme Court’s 2022 overturning of a constitutional right to abortion circumscribed decision-making on reproduction; the Court’s preclusion in 2023 of affirmative action in higher education cut back on educational autonomy.<sup>6</sup> Hence, we wanted to use WLE, a gender-based legal organization, to invite discussion about equality’s meaning now—long after WLE’s 1970s beginnings when only a handful of women held teaching positions in law schools.<sup>7</sup>

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<sup>3</sup> See *A.B.A. Profile of Legal Profession 2024*, A.B.A., <https://www.americanbar.org/news/profile-legal-profession/> (compilation of statistics and trends about lawyers, judges and law students gathered from within the ABA); see also Danielle Braff, *Still They Rise: It’s Been a Complicated Road, but Numbers for Women in the Legal Profession Are Rising*, 111 ABA J. 52, 52 (June 2025).

<sup>4</sup> See, e.g., Marina Angel, *Women in Legal Education*, 80 UMKC L. REV. 711 (2012); Laura M. Padilla, *The Black-White Paradigm’s Ongoing Erasure of Latinas: See Women Law Deans of Color*, 99 DENV. L. REV. 683 (2022); Laura M. Padilla, *A Gendered Update on Women Law Deans: Who, Where, Why, and Why Not?*, 15 AM. U. J. GENDER SOC. POL’Y & L. 443 (2007); Laura M. Padilla, *Presumptions of Incompetence, Gender Sidelining and Women Law Deans*, in PRESUMED INCOMPETENT II: RACE, CLASS, POWER, AND RESISTANCE OF WOMEN IN ACADEMIA 13, 117 (Yolanda Flores Niemann et al., eds., 2020); Laura M. Padilla, *Women Law Deans, Gender Sidelining and Presumptions of Incompetence*, 35 BERKELEY J. GENDER, L. & JUST. 1 (2021).

<sup>5</sup> See *A.B.A. Profile of Legal Profession 2024*, *supra* note 3.

<sup>6</sup> See *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022); *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181 (2023).

<sup>7</sup> See, e.g., KAY, *supra* note 2; Marie Failing, *AALS Section on Women in Legal Education Oral History Project*, ASS’N OF AM. L. SCHS., <https://www.aals.org/sections/list/women-in-legal-education/aals-section-on-women-in-legal-education-oral-history-project/> (last visited Nov. 8, 2025).

By 2025, we had dropped the word “why” in this symposium’s title. After a new federal administration took office in January of 2025, the importance of gender became all the more vivid, as officials seek to prevent consideration of the effects of gender (or what the administration termed “gender ideology”) and as Executive Orders impose new rules on trans people, immigrants, families, science, equality, health care for pregnant women, reproductive rights, human dignity, universities, judges, agencies, and much more.<sup>8</sup> For us, no explanation is required about the *need* to think more about gender’s role within and beyond the academy. Rather, the challenges are *how* to be generative in painful times.

Analyses and answers come from the fourteen essays that follow, with their diversity of methodologies and subject matters.<sup>9</sup> A recurrent theme is that, despite warnings by some not to be “visible” in addressing gender and inequality, all the contributors document the importance of gender in a range of domains. A first set of reflections addresses issues of health, safety, well-being, and vulnerability. In *Engendering Human Rights Through Clinical Legal Education*, Carrie Bettinger-Lopez provides a painful account of the longstanding toleration of and limited remedies for violence against women. As Bettinger-Lopez recounts, her understanding of how to gain legal recognition of that violence came from working with her client, Jessica Gonzales Lenahan, who was steadfast in believing that law could respond. Connecting with human and civil rights organizations, local, national, and global, Bettinger-Lopez and her clinical students joined in generating recognition of gendered violence, both transnationally and locally. Her discussion highlights the impact of global networks, some of which are self-defined as progressive, while others seek to limit “gender ideology.”

Rights within and across borders are the issues that David Cohen and Rachel Rebouché examine as they analyze another set of remedies aiming to protect bodily autonomy—“shield laws,” which some states have enacted to try to protect abortion providers, patients, and those working with them from laws in other states aiming to punish those same people. These provisions have high saliency in light of the U.S. Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization*, and the interstate conflicts over abortion—enabled by the new technologies of telehealth and of medical abortions through pills that can be mailed—are one example of the divides in debates about health care and gender.

Geography, economic and other resources, and technology are also central to Lisa Pruitt, who addresses the situations of rural women who reside in health

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<sup>8</sup> See Exec. Order No. 14151, *Ending Radical and Wasteful Government DEI Programs and Preferencing*, 90 Fed. Reg. 8339 (Jan. 20, 2025).

<sup>9</sup> We invited individuals whom we knew to be working on the diverse array of issues and, through various routes, we also called for papers. We are grateful that we received about 35 proposals, which we had to winnow down to meet the requirements of the law journal. We thank the Symposium Editor, Kaylee Popejoy, for welcoming us as the symposium coordinators and for her work in moving the drafts received to completion. Many more arenas of scholarship and analyses of the import of the intersections of gender with other facets of identity are the subject of discussion than the set of essays in this volume.

“deserts” in her essay, *Canaries in the Coal Mine: Rural Women, Maternal Health, and the Future of Feminist Coalition Building*. She documents the hardships faced by rural women and families of limited means as they seek to maintain reproductive health and safety, in light of maternal mortality risks. That crisis, Pruitt argues, provides opportunities to build coalitions that cross race, class, and ethnicity and that underscore a continuum between the experiences of rural and urban communities, rather than a divide. As Pruitt makes plain, problems abound, based in infrastructure deficits, inadequate funding, and inequalities built in and by politics.

The interactions among government policies, markets, and family life are Deborah Dinner’s topic, as she, too, hones in on a sense of “crisis.” In *The Future of Working Families in a Riven Political and Moral Economy*, Dinner examines how assumptions about gender and race shaped the choices made by the federal government when providing some support for families, and how class influenced those policies. New Deal programs reinforced the model of a male “breadwinner” and a female “homemaker.” While individuals outside of two-parent households could obtain aid, they were subjected to forms of government oversight. Dinner unpacks the history of the term “working families” and shows that people affiliated with conservative and progressive policies share a view that a “crisis of care” exists. Solutions, however, are not shared. Some propose returning women to unpaid household labor, while others seek to reinvigorate earlier efforts to secure government support for daycare and health care.

Precariousness is a theme taken up by other contributors, focusing on new risks to institutional structures and to democratic commitments to the integrity of knowledge, the autonomy of the bar, and the independence of judges. In *Women, Knowledge Institutions, and Constitutional Law*, Vicki C. Jackson explains the roles of “truth-oriented press, universities, and government offices responsible for data collection and reporting” which, along with public and private organizations dedicated to the arts, science, and innovation, generate and preserve information without censorship. She argues that such institutions have been central for historically disadvantaged groups, as research has been one means of undermining stereotypes that undermine equality.

Judith Resnik is likewise focused on how altering the structure of institutions affects opportunity and can reframe law, courts, the legal profession, and the academy. In *Engendering Authority: Social Movements, Legitimacy, and Gender*, she explores the transformations that identity-based legal organizations, such as the NAACP, the National Association of Women Judges, and WLE, have made in reshaping practices about who can serve in all legal roles and about the substance of equality rights. She maps the impact of affirmative action, such as when state and federal judiciaries chartered “gender bias task forces” and “race bias task forces” to address concerns about exclusion in law and practice. Resnik also examines the challenges of realizing aspirations of inclusion and safety, as well as the tensions that arise when “women”—without engagement in intersectional questions—is used as a category of analysis.

The role of the internet and new technologies of connection are brought into sharp relief by Bridget J. Crawford in her analysis of *Sex, Gender, and the*

*Blogosphere: Looking Back at the Feminist Law Professors Blog, 2006–2024.* During almost two decades, this self-identified feminist space invited collaboration and critique. Crawford probes its impact, provides insight into the labor that went into it, and demonstrates how this form of communication has potential to build community while also putting individuals at risk of aggressive responses. Her account is a powerful reminder of the utility of inventions, even when not all continue to be used in their original form.

Other contributors take the academy as their topic as they raise concerns about how to gain power, who is empowered, and who is marginalized. *Inclusivity in Corporate Scholarship* is the subject of the essay by Afra Afsharipour, Naomi Cahn, June Carbone, and Darren Rosenblum. They map how the field of corporate law has shifted with the entry of professors who are women, people of color, and people who identify as LGBTQ. New agendas—at risk in 2025—emerged about corporate goals and the role and aims of shareholders. Illustrative are debates about legislative initiatives that call for diversity, equity, and inclusion (“DEI”), supported by some scholars as enhancing profitability through welcoming all relevant talent, and objected to by others as beyond corporate missions. Conflict over equality’s mandates is also central to Serina Mayeri’s *What Do We Have to Lose? The Lasting Legacies and Lost Promise of Feminist Legal History*. Mayeri analyzes the work of Pauli Murray, whose family included both people who were enslaved and those enslaving. Murray navigated the Depression and obtained a law degree in 1944 from Howard University Law School; her work serves as both an exemplar and a reminder that visions for justice can be pursued and steps made toward lessening harms at times when injustices abound.

Two essays burrow into the legal academy and, using metaphors of “ceilings” and “cliffs,” take up the topic of access to deanships and the risks of assuming leadership roles when organizations are wobbly. Angela Onwuachi-Willig and Kellye Testy titled their essay, *The Other Side of the Glass Cliff*, as they document the substantial efforts undertaken through networks that put women of all colors and identities on paths that made becoming academic leaders possible. As they explain, the idea of a cliff, borrowed from literature on corporate power, posits that people at margins are able to reach power when institutions are in crisis; once in power, they are at risk of becoming vulnerable to critiques of not measuring up. Onwuachi-Willig and Testy use data on the legal academy to argue that deliberate interventions to open opportunities are underappreciated factors in access to power. In contrast, in *Glass Cliff Off an Ivory Tower*, Katharine Traylor Schaffzin and Katie Kempner argue that the glass cliff aptly describes the experiences of some leaders in higher education. They offer pragmatic strategies for advancing women in the legal academy that may help avoid the glass cliff phenomenon.

Responses to risk and marginality are the issues that Torey Dolan, Jamelia Morgan, and Meera E. Deo address. Dolan’s essay, *The Indian Law Aunties*, maps the work of American Indian women who have generated programs, scholarship, and institutes, and thus applied a “native auntie” ethic of community building in the legal academy and profession. Dolan sees that work as a model to emulate. Morgan offers *Some Thoughts on “Outsiders Within” the Legal Academy*. She

relies on Patricia Hill Collins’s concept of an “outsider within,” which Collins used to discuss the dual status of Black women who may have been included at a formal level and yet were marginalized in a myriad of ways. Morgan describes both the difficulties of marginality and its potential, as those excluded do not necessarily take conventions for granted. Deo’s *Resisting Overcompliance* is framed by a 2025 federal government effort to end diversity, equity, and inclusion in education. She proffers the term “overcompliance” to describe ways in which institutions have moved beyond what law requires, and she describes a set of activities and programs on which to build inclusive academic environments. Taken together, these essays continue to examine the saliency of gender, as struggles are underway across a range of perspectives about whether and how to shape agendas responsive to the diversity of experiences and opportunities within and beyond the legal academy.

In the opening of this introduction, we reflected on those who had paved the way for this volume. We conclude with appreciation for those who have enabled us to launch this project. The history of women in the law is laden with accounts of individuals interacting with structures that were often not welcoming. We provide a “shout out” to one—Betsy Levin—as an exemplar; as we share some information about her, we welcome others to add others who enabled women in the academy to be at this juncture. Levin has a special place in the history of women in legal education because of her mix of brilliance and courage, which enabled her to take on diverse roles, including serving as the first woman to lead the AALS as Executive Director.<sup>10</sup>

Levin, who graduated from Bryn Mawr College and from Yale Law School, was one of the few women then (in the class of 1966) to be on the Yale Law Journal and in its leadership as Topic Editor. Thereafter, she was unusual for that era to be selected for a clerkship on a federal appellate court, to find work in Washington and, in 1973, to become a law professor at Duke University. At Duke, Levin was the first woman to be tenured and, breaking another gender barrier, she taught constitutional law, then seen as the purview of men.

Prescient, Levin took the question of education to be a subject of importance to constitutional law. Her articles from the 1970s and 1980s include *Current Trends in School Finance Reform Litigation, A Commentary*;<sup>11</sup> *The Courts, Congress, and Educational Adequacy: The Equal Protection Predicament*,<sup>12</sup> and *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights In Public Schools*.<sup>13</sup> Reading them now, several decades after she wrote them, we find a roadmap to many of today’s conflicts. In addition to pioneering a course and joining in shaping a casebook on education

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<sup>10</sup> JEAN WATERMAN & JUDITH AREEN (ART DIR. BETH SINGER), THE FIRST 125 YEARS: AN ILLUSTRATED HISTORY OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS 60-61, 68-69 (2025) (discussing structure and function of the AALS, including efforts at diversity).

<sup>11</sup> Betsy Levin, *Current Trends in School Finance Reform Litigation: A Commentary*, 6 DUKE L.J. 1099 (1977).

<sup>12</sup> Betsy Levin, *The Courts, Congress, and Educational Adequacy: the Equal Protection Predicament*, 39 MD. L. REV. 187 (1979).

<sup>13</sup> Betsy Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1646 (1986).

law,<sup>14</sup> in 1980, Levin was appointed by President Jimmy Carter to be the first General Counsel to the newly created Department of Education. She pioneered again when she became the first woman Dean at the University of Colorado, where she served from 1981 to 1987; in two of those years, Levin was one of two women deans throughout the country.

As noted, Levin was the first woman appointed as the Executive Director of AALS, a position she held from 1987 to 1992, during which she created pathways for other women to become law professors and deans. In addition, within the AALS, Levin broadened membership and encouraged diversity in appointments within dozens of AALS sections, special committees, and at annual and special programs. Moreover, Levin was elected in 1978 to membership in the American Law Institute and in 1983 to serve on its Council. Levin used that position—as she did in all her roles—to increase the number of women who were nominated to be members and, once there, to expand opportunities for participation. Levin was honored in 1988 by the WLE for her mentorship, scholarly contributions, and concern for the future of others. She died in 2024. Levin, like others described in these essays and elsewhere, persevered—resilient and undaunted by unfair treatment. Dealing with challenges and living in difficult times, she aimed to alter the world for others. Levin’s scholarship and teaching contributed to shaping a new legal topic—education law—just as this volume’s contributors pioneer new arenas of research, as they analyze how to improve safety, well-being, and security for diverse communities and discuss differing approaches to the paths forward.

We write in 2025, when the legal academy and universities are at a critical juncture; an energetic movement opposing “gender ideology” is contesting efforts to increase inclusive equality as part of institutional legitimacy, and the premises of independent thought and research are under attack. Some of that aggression aims to undercut the many ways in which legal scholars have made remarkable strides in reshaping what is studied, who is heard, and which injustices must be confronted. Hard-won rights and institutional commitments to gender equality and racial justice—which once appeared to many to be robust—are under siege, often under the banner of dismantling “diversity, equity, and inclusion.”<sup>15</sup>

In contrast, this symposium, *Women, Equality, and the Legal Academy*, analyzes how legal scholars have documented and reimagined legal structures, altered practices once assumed to be conventional and, over decades, sought continually to interrogate the steps taken, resisted attempts to undermine innovations, and been critical about their own efforts as well as others. This array of legal scholars, with various affiliations and different methodologies, probes areas of doctrine and regulation, institutions, and the structure of legal education to understand what has shaped the contemporary landscape and how to think

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<sup>14</sup> See MARK G. YUDOF, BETSY LEVIN, RACHEL MORAN, JAMES E. RYAN, & KRISTI L. BOWMAN, *EDUCATIONAL POLICY AND THE LAW* (2011).

<sup>15</sup> See Exec. Order No. 14151, *Ending Radical and Wasteful Government DEI Programs and Preferencing*, 90 Fed. Reg. 8339 (Jan. 20, 2025).

constructively about the present and future challenges of taking gender seriously as a category requiring interrogation and analysis.

# ENGENDERING HUMAN RIGHTS THROUGH CLINICAL LEGAL EDUCATION

Caroline Bettinger-Lopez\*

## I. INTRODUCTION

Clinical legal education serves a unique role at the crossroads between the academy, social and political movements, and legal practice; this space has proven ripe for generating new human rights norms and praxis concerning gender-based violence (GBV). This Essay provides an example, by analyzing how law school clinics, through international litigation and advocacy before the Inter-American Commission on Human Rights (IACHR) in *Jessica Lenahan (Gonzales) v. United States*,<sup>1</sup> can work alongside survivors and advocates to engage with and engender international human rights norms, including “due diligence” standards to prevent, investigate, and punish human rights violations and protect and compensate victims.<sup>2</sup>

Moreover, clinics can contribute to the development of new norms identifying violence against women and GBV as a form of intersectional discrimination. These international efforts, in turn, can spur changes in domestic policy at the federal, state, and local levels, including supporting best practices in trauma-informed, culturally specific, and survivor-centered lawyering. In the United States, although the U.S. Supreme Court has not followed the approach taken by the IACHR, local governments have implemented *Lenahan* through “freedom from domestic violence” ordinances and resolutions and the Cities4CEDAW movement.<sup>3</sup> At the national level, in May of 2023, the Biden/Harris administration issued a first-ever U.S. *National Plan to End Gender-Based Violence: Strategies for Action* (“National GBV Plan”) that was rooted in a human rights-based approach and cited to international human rights norms in both its definition of GBV and its larger vision statement. Having served as lead counsel in *Lenahan* and a principal drafter of the U.S. National GBV Plan, and having worked closely with law clinic students every step of the way, I reflect in this Essay

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\* Professor of Law and Director, Human Rights Clinic, University of Miami School of Law. I benefited tremendously from thoughtful comments and edits on drafts of this Essay by Judith Resnik, Nancy Levit, and Laura Rothstein, from excellent research assistance by Lezah Richardson and Brittany Findley, and from careful editing by *UMKC Law Review* members Lukas Hudson and Matt Champagne.

<sup>1</sup> *Jessica Lenahan (Gonzales) v. United States*, Merits, Case 12.626, Inter-Am. Comm’n. H.R., Report No. 80/11 (July 21, 2011) [hereinafter *Lenahan*, Case 12.626].

<sup>2</sup> See generally G.A. Res. 34/180, U.N. Convention on the Elimination of All Forms of Discrimination against Women, art. 2, (Dec. 18, 1979) (describing measures to increase de facto equality between men and women); U.N. Secretary-General, *Report of the Secretary-General on the In-depth Study on All Forms of Violence Against Women*, ¶¶ 255–57, U.N. Doc. A/16/122/Add.1 (July 6, 2006) (describing state responsibility for international human rights violations, violence against women, and due diligence); Dinah L. Shelton, *Private Violence, Public Wrongs, and the Responsibilities of States*, 13 *FORDHAM INT’L L.J.* 1, 21–23 (1990) (describing due diligence standard and liability of international states).

<sup>3</sup> See CITIES FOR CEDAW, <https://citiesforcedaw.org> (last visited Jan. 16, 2026); see also CEDAW RISING, <https://cedawrising.org/> (last visited Jan. 16, 2026).

on how law school clinics, in collaboration with others, can help to ensure that the local, national, and global impacts of *Lenahan* continue, and that the National GBV Plan will continue to have staying power, in light of the change in administration.

## II. THE *LENAHAN* CASE AND ITS BOOMERANG EFFECT

### A. *Castle Rock* and the U.S. Supreme Court's Refusal to Constitutionalize Protection and Response

This case study begins with a domestic tragedy and a legal failure: the case of *Castle Rock v. Jessica Gonzales*,<sup>4</sup> in which the Supreme Court held in 2005 that a domestic violence victim had no constitutional right to enforce a state law requiring police enforcement of her restraining order. I became involved in *Castle Rock* as a young lawyer at the ACLU Women's Rights Project, where, in 2004, I helped to coordinate nine amicus briefs filed before the Supreme Court. After Jessica Lenahan's devastating loss before the Supreme Court, my ACLU colleagues and I filed *Jessica Lenahan (Gonzales) v. United States* before the Inter-American Commission on Human Rights (IACHR) in 2005, alleging the federal government was internationally responsible for the due diligence failures of both the Colorado police and federal judiciary. I entered clinical law teaching in 2006 and brought the *Lenahan* case with me (continuing to co-counsel with the ACLU). For over a decade, my Human Rights Law Clinic students at Columbia, University of Chicago, and University of Miami represented Jessica Lenahan before the IACHR. Ultimately, the case produced new standards in the Inter-American Human Rights System on state responsibility to exercise due diligence in cases of domestic violence and other forms of GBV.

These are the tragic facts of the case. On June 22, 1999, Rebecca, Katheryn, and Leslie Gonzales were abducted by their father, Simon Gonzales, in violation of a judicial restraining order issued by a Colorado court as part of a divorce proceeding.<sup>5</sup> The restraining order had limited Simon Gonzales's access to the girls and their mother, Jessica Gonzales (who remarried and changed her last name to Lenahan).<sup>6</sup> Colorado, like many states, had a "mandatory arrest" law, which directed officers to attempt to arrest the restrained person upon finding probable cause of a restraining order violation.<sup>7</sup> In the months leading up to the abduction, Jessica—a Latina and Native American woman who had worked as a janitor at, among other places, the Castle Rock Police Department (CRPD)—called repeatedly to report Simon breaking into her house and threatening her and the children, and Simon had at least seven run-ins with the police during this time period.<sup>8</sup> He was ticketed for "road rage" while the girls were in the truck and for

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<sup>4</sup> *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005).

<sup>5</sup> *Lenahan*, Case 12.626, at ¶¶ 20, 24 (2011).

<sup>6</sup> *Id.* at ¶ 20.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at ¶¶ 24, 71.

trespassing in a private section of the Castle Rock police station and trying to flee after officers served him with the restraining order.<sup>9</sup>

On June 22, after she discovered the girls were missing, Jessica Gonzales called and met in person with the CRPD on nine separate occasions, telling them she feared for her daughters' safety and at one point identifying their location.<sup>10</sup> The police repeatedly told her to wait for the return of her daughters, to call back later, or to wait for further police action that never materialized.<sup>11</sup> The dispatcher who took her call even chided her for being "a little ridiculous," a sentiment subsequently echoed by the town's police chief in an interview with *60 Minutes*.<sup>12</sup> Nearly ten hours after the abduction, Simon Gonzales, armed with a semiautomatic handgun, drove his truck to the police department and opened fire.<sup>13</sup> The police shot him dead and subsequently discovered the deceased bodies of the three girls inside his truck.<sup>14</sup> Local authorities did not conduct a proper investigation into the children's deaths; as a result, uncertainty remains about when, where, and how they died.<sup>15</sup>

Lenahan, represented by a solo practitioner with a big heart but no civil rights litigation experience, filed a lawsuit under the federal civil rights statute, 42 U.S.C. § 1983, alleging violations of the Fourteenth Amendment's guarantee of due process of law.<sup>16</sup> She argued that Castle Rock's duty to enforce the restraining order against her estranged husband created a property interest under Colorado law, and that she was entitled, at the very least, to the Town's reasoned consideration and an explanation for its inaction as a matter of procedural due process (PDP).<sup>17</sup> She also argued that the police violated her and her children's substantive due process (SDP) rights when they failed to take reasonable steps to protect her children from the real and immediate risk posed by their father, whom the state itself had identified as a threat to them when it issued the restraining order.<sup>18</sup>

Before discovery, the district court dismissed both claims.<sup>19</sup> On appeal, the Tenth Circuit Court of Appeals affirmed on SDP but reversed the district court's ruling that Gonzales had failed to state a PDP claim.<sup>20</sup> In rejecting the SDP claim, the Tenth Circuit relied on *DeShaney v. Winnebago County Dep't of Social Services*,<sup>21</sup> which held that the substantive guarantees of the Due Process Clause do not generally require the government to protect an individual from third-party

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<sup>9</sup> *Id.* at ¶ 19.

<sup>10</sup> *Id.* at ¶¶ 72-74.

<sup>11</sup> *Lenahan*, Case 12.626, at ¶¶ 77-78.

<sup>12</sup> *Id.* at ¶ 76.

<sup>13</sup> *Id.* at ¶ 81.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at ¶¶ 82, 84-85.

<sup>16</sup> *Gonzales v. City of Castle Rock*, Civ. Action No. 00-D-1285, 2001 U.S. Dist. LEXIS 26018 (D. Colo. Jan. 22, 2001); *see also* *Gonzales v. City of Castle Rock*, 366 F.3d 1093, 1098 (10th Cir. 2004) (en banc); *Lenahan*, Case 12.626, at ¶ 86.

<sup>17</sup> *Gonzales*, 366 F.3d at 1098.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 1117.

<sup>21</sup> *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989).

acts of violence, absent the rare circumstances when state actors either created or exacerbated the danger faced by an individual. Castle Rock appealed, and the Supreme Court granted certiorari on the PDP claim.

The Supreme Court's decision to hear *Castle Rock* worried many women's and civil rights advocates in the U.S. The Court rarely took on cases concerning private acts of violence—and when it did, it usually ruled against the victim.<sup>22</sup> After a series of strategic planning calls with leading anti-violence, women's rights, children's rights, and civil/human rights organizations, the ACLU Women's Rights Project (WRP) offered to coordinate an amicus brief effort and assist with developing a communications strategy.

Writing for a 7-2 majority, Justice Scalia reversed the Tenth Circuit's *en banc* decision, and held that Gonzales had no personal entitlement under the Due Process Clause to police enforcement of her restraining order.<sup>23</sup> Despite the Colorado legislature's repeated use of the word "shall" in the mandatory arrest law, the Court explained, "[w]e do not believe that these protections of Colorado law truly made enforcement of restraining orders mandatory."<sup>24</sup>

In dissent, Justice Stevens, joined by Justice Ginsburg, chided the majority for ignoring the language and intent of the Colorado statute, which, like other domestic violence mandatory arrest statutes, was passed in response to a persistent pattern of non-enforcement of domestic violence laws. The language of the statute, they asserted, was "unmistakabl[y]" intended to remove police discretion over whether to arrest perpetrators. "[T]he crucial point," the dissent argued, "is that, under the statute, the police were required to provide enforcement; they lacked the discretion to do nothing."<sup>25</sup>

The decision in *Castle Rock* was retraumatizing for Jessica Gonzales, and marked a watershed moment for many advocates.<sup>26</sup> Legal experts expressed outrage that the Supreme Court would characterize a domestic violence victim's entitlement to enforcement of her restraining order as "vague and novel," considering the prevalence of legal protections for victims in the United States, and the express language of—and clear legislative history behind—mandatory arrest laws, including that of Colorado. Advocates feared that, after decades of (often successful) efforts to get law enforcement to take domestic violence seriously, the *Castle Rock* decision would send a signal to the police that they need

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<sup>22</sup> See, e.g., *id.*; *United States v. Morrison*, 529 U.S. 598 (2000) (striking down as unconstitutional a private right of action for victims of gender-motivated crimes against their abusers).

<sup>23</sup> *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005).

<sup>24</sup> *Id.* at 760.

<sup>25</sup> *Id.* at 784 (Stevens, J., dissenting).

<sup>26</sup> See Caroline Bettinger-López, *A Client's Crisis Becomes a Legal Crisis: A Domestic Violence Ruling Goes Global*, in *LAWYERING THROUGH CRISIS: UNDERSTANDING THE PROFESSIONAL ROLE OF LAWYERS AS PROBLEM SOLVERS IN EMERGENCIES* 23-49 (Eric K. Stern & Ray Brescia eds., 2021); see also Caroline Bettinger-López, *The Long Arc of Human Rights: A Case for Optimism*, 97 *FOREIGN AFF.* 186 (May/June 2018), <https://www.foreignaffairs.com/reviews/review-essay/2018-04-16/long-arc-human-rights>.

not enforce restraining orders and would nourish an all-too-prevalent U.S. culture of impunity for lazy, rogue, or misguided officers.<sup>27</sup>

### **B. The Inter-American Pivot: A Client-Driven Campaign for Accountability, Due Diligence, and New Standards**

The next month was marked by a slew of legislative, litigation, and public policy strategy calls, and discussions between the ACLU legal team and Jessica Lenahan, her mother Tina Rivera, and her lawyer, about the case. While expressing profound disappointment, Lenahan and her mother quickly shifted their gaze forward. “What’s next?” they asked, pressing for some form of accountability for the Supreme Court’s unjust and poorly reasoned decision.

Jessica Lenahan and Tina Rivera’s persistence and vision pushed me and the rest of the ACLU team to look to international human rights law as a potential site of justice. This lesson in active listening to one’s client, and in creative use of human rights strategies, proved essential to me in subsequent years, as a clinical law professor.

After careful consideration, the ACLU legal team turned to the Inter-American Commission on Human Rights (IACHR), which, together with the Inter-American Court of Human Rights, form the Inter-American human rights system (IAHRS) in the Organization of American States (OAS). Though largely unfamiliar to U.S. lawyers and advocates, the IAHRS is regularly used by civil society and lawyers in other parts of the Western Hemisphere to hold governments accountable for corruption, abuse, negligence, and violence committed by both state actors and private individuals.

Because the U.S. government has not ratified any Inter-American human rights treaties, human rights complaints against the United States are brought before the Commission under the American Declaration on the Rights and Duties of Man and the OAS Charter. Unlike contemporary human rights treaties, the Declaration, drafted in 1948, does not contain a “general obligations” clause, which requires states to respect, ensure, and promote guaranteed rights and freedoms through the adoption of appropriate or necessary measures. However, signatories to the Charter (including the United States) are legally bound by the Declaration’s provisions, and the Commission has consistently applied “general obligations” principles when interpreting the wide spectrum of rights set forth in the Declaration. Moreover, Inter-American jurisprudence directs governments to provide special protections to particularly vulnerable groups, such as children, the mentally ill, undocumented migrant workers, indigenous communities, and domestic violence victims.

The Inter-American human rights system has produced groundbreaking human rights reports and recommendations and has made a significant impact in on-the-ground change in many countries. When an aggrieved individual has exhausted her domestic legal remedies or has nowhere to turn for relief in her home country, she may submit a human rights petition to the IACHR. Ultimately, the

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<sup>27</sup> *Id.*

Commission may hold hearings and issue a “merits decision” that analyzes the facts in light of international human rights law and includes recommendations to the state. While no enforcement mechanism exists to ensure state compliance with Commission decisions, these reports do carry significant moral and political weight and contribute to international standard setting.

*Castle Rock* presented a perfect “test case” that merited the IACHR’s reasoned consideration: a horrific set of facts that represented a deplorable nationwide pattern and practice, a widely-criticized U.S. Supreme Court decision, an international human rights standard upholding affirmative duties to protect against private acts of violence that directly conflicted with domestic precedent, a community of advocates and supporters asking “what can we do?,” and a petitioner who would not rest until justice was done. Alongside our client, the legal team weighed the possibilities and limitations of the IACHR as a forum for providing Lenahan her “day in court,” and establishing international jurisprudence that directly contravened *DeShaney* and supported a “due diligence” approach under international human rights law—which means that governments are obliged to protect rather than adopt a “laissez faire” attitude. Having exhausted her domestic remedies, Lenahan could petition the Commission for relief, claiming that the United States was responsible for human rights violations resulting from the CRPD’s inaction and the Supreme Court’s decision.

But the Inter-American system had its drawbacks. Although the Commission is an important institution in many parts of the Americas, it is not well-known within the United States, and its enforcement limitations make it—from U.S. advocates’ vantage point—potentially far less desirable than a U.S. court. Moreover, the Commission is underfunded and prone to prolonged delays in decision-making. The chances of getting a hearing at the IACHR are slim and unpredictable, and cases can drag on for years.<sup>28</sup> Further, the U.S. government, having declined to ratify the American Convention on Human Rights, routinely opposes IACHR cases brought against it on jurisdictional grounds. Although the Commission is an important institution in many parts of the Americas, its lack of recognition in the United States and enforcement limitations make the Commission far less desirable avenue than a U.S. court for pronouncing rights violations and providing remedies.

When Jessica Lenahan learned of the Inter-American human rights system, she was hopeful that framing her case as a human rights violation could give her a forum to seek redress for her personal tragedy and initiate important

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<sup>28</sup> Santiago Canton & Angelita Baeyens, *Polishing the Crown Jewel of the Western Hemisphere: The Inter-American Commission on Human Rights*, in RECLAIMING HUMAN RIGHTS IN A CHANGING WORLD ORDER (Christopher Sabatini ed., 2022) (“On average, from the moment of filing to the publication of a decision on the merits or its referral to the IACtHR, the process of an individual case before the IACHR takes seventeen years”); *IACHR Reports Good Results in 2020, the Fourth Year of Its Program to Overcome Procedural Backlog*, OAS (Feb. 1, 2021), [https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/media\\_center/PReleases/2021/019.asp](https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/media_center/PReleases/2021/019.asp); see also *IACHR Seeks to Reduce the Backlog in the System of Petitions and Cases*, OAS (Oct. 18, 2016), [https://www.oas.org/en/iachr/media\\_center/preleases/2016/150.asp#:~:text=Washington%2C%20D.C.%20%E2%80%93%20One%20of%20the,the%20plenary%20of%20the%20Commission.](https://www.oas.org/en/iachr/media_center/preleases/2016/150.asp#:~:text=Washington%2C%20D.C.%20%E2%80%93%20One%20of%20the,the%20plenary%20of%20the%20Commission.)

legislative and policy reforms in the United States. Yet she and her lawyers, including myself, were wary of a system that has weaker “teeth” and far less credibility in the United States than a domestic court.

After I presented these pros and cons, Lenahan chose to move forward. She was inspired by the transnational nature of the IACHR, thought it could shame the United States into doing right by her and future victims, and felt that no other viable options were available. And so, in 2005, after getting the green light from Lenahan, the ACLU Women’s Rights Project and ACLU Human Rights Program filed *Lenahan v. United States* before the IACHR, alleging violations of the American Declaration by the United States.

Lenahan’s was the first international human rights case brought by a victim of domestic violence against the United States. Over the next decade, she was represented by faculty and students at law school human rights clinics alongside the ACLU. International human rights NGOs and U.S. civil rights and domestic violence advocacy groups, academics, and law clinics filed amicus briefs with the IACHR, engaged with the United Nations and other international bodies, and led public policy advocacy at federal, state, and local levels.

In many respects, the Lenahan story fits what Margaret Keck and Kathryn Sikkink dubbed “the boomerang effect” of human rights advocacy, which posits that, when civil society groups and activists fail to persuade their government to take action or change its policy, they often find international allies who can exert external pressure and contribute to at least a partial victory.<sup>29</sup> While the theory may only effectively work in a more friendly, progressive political environment that is willing to catch the boomerang, it proved true in *Lenahan*.

In *Jessica Lenahan (Gonzales) v. United States of America*, the IACHR, relying on due diligence jurisprudence that had evolved from the landmark *Velásquez Rodríguez v. Honduras* case (a case focused on enforced disappearances by private actors, completely outside the gender-based violence (GBV) context)<sup>30</sup> and other human rights instruments,<sup>31</sup> issued a merits report finding the U.S. government responsible under the American Declaration on the Rights and Duties of Man for violations of the rights to life (Art. I), non-discrimination (Art. II), due process (Arts. XVIII and XXIV), and special protections for children (Art. VII). The IACHR emphasized that the local authorities were “not duly organized,

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<sup>29</sup> MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 210 (Cornell Univ. Press 1998).

<sup>30</sup> *Velásquez-Rodríguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 172 (July 29, 1988) (finding that a private act “can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it” in a manner appropriate under the circumstances).

<sup>31</sup> See, e.g., Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, adopted June 9, 1994, 33 I.L.M. 1534; see Judith Resnik, *Comparative (In)equalities: CEDAW, the Jurisdiction of Gender, and the Heterogeneity of Transnational Law Production*, 10 INT’L J. CONST. L. 531, 538 (2012) (situating violence against women as a core issue in the development and implementation of CEDAW and emphasizing the treaty’s role in shaping both international and domestic legal responses to GBV, while also acknowledging the ongoing challenges of achieving substantive equality and protection for women worldwide).

coordinated, and ready to protect [Lenahan and her children] from domestic violence by adequately and effectively implementing the restraining order,” which the IACHR declared was a violation of the due diligence obligations and positive rights that stem from the American Declaration.<sup>32</sup> These findings stood in sharp contrast to Supreme Court precedent. The IACHR recommended that the United States investigate the systemic failures that took place, adopt legislation at the federal and state level to protect women and children from imminent acts of violence, and adopt public policies aimed at shattering stereotypes of domestic violence victims.

### C. The Boomerang Home: International Impact and Federal, State, and Local Uptake Without Formal Compliance

Because the United States has not ratified the American Convention on Human Rights or otherwise consented to the jurisdiction of the Inter-American Court of Human Rights, the IACHR is the “end of the line” for cases brought against the United States in the Inter-American human rights system. And although the U.S. government, as an OAS member state, participates in proceedings and engages in dialogue before the Commission, it does not treat IACHR decisions as legally binding and has historically maintained that the American Declaration is not a treaty and therefore does not impose enforceable obligations. For example, in *Lenahan*, the United States had argued “that it is not bound by obligations contained in human rights treaties it has not joined and the substantive obligations enshrined in these instruments cannot be imported into the American Declaration.”<sup>33</sup> And, after the IACHR issued its merits report, the U.S. State Department issued an official response where it reiterated the above arguments and, after responding to the Commission’s specific recommendations, concluded: “we respectfully disagree with the conclusions contained in the Commission’s report.”<sup>34</sup> (This, it should be acknowledged, was more developed than the U.S. government’s typical official response to IACHR merits reports, which typically consists of a one-paragraph letter stating that the United States supports the IACHR but “respectfully declines to implement the recommendations of the IACHR in this case.”<sup>35</sup>). And while the IACHR’s (and most other human rights bodies’) recommendations are not enforceable in any traditional sense, the

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<sup>32</sup> *Lenahan*, Case 12.626, at ¶¶ 115-25; see also Julie Goldscheid & Debra J. Liebowitz, *Due Diligence and Gender Violence: Parsing Its Power and Its Perils*, 48 CORNELL INT’L L.J. 301, 302 (2015) (noting the due diligence obligation includes the obligation of the state “to prevent gender violence, to prosecute and punish perpetrators, and to protect and provide redress for its victims”); Int’l Covenant Civ. & Pol. Rts., Human Rights Committee, Concluding Observations on the Fourth Periodic Report of the United States of America (2014).

<sup>33</sup> *Lenahan*, Case 12.626, at ¶ 55.

<sup>34</sup> Response of the Government of the United States to the July 21, 2011 Report No. 80/11 Case No. 12.126 (Jessica Lenahan (Gonzales) et al.), 2012 [no date], at 1-2 (on file with author).

<sup>35</sup> Letter from Caroline Bettinger-López, Sandra S. Park, Lenora Lapidus & JoAnn Ward to Santiago A. Canton, Executive Secretary Inter-American Commission on Human Rights (Mar. 19, 2012) (on file with the American Civil Liberties Union), [https://www.aclu.org/wp-content/uploads/document/iachr\\_working\\_meeting\\_03\\_24\\_12\\_-\\_petitioners\\_letter\\_final.pdf](https://www.aclu.org/wp-content/uploads/document/iachr_working_meeting_03_24_12_-_petitioners_letter_final.pdf).

potential exists—as this case demonstrated—for creative, non-linear implementation.

In the years since, the *Lenahan* case has had regional and global impacts. Several years ago, a representative from the IACHR told Jessica Lenahan at an open forum at the University of Colorado that her case had created groundbreaking international jurisprudence and is regularly invoked by the IACHR's Rapporteurship on Women when considering new cases, drafting merits reports, and engaging with regional human rights advocates and international counterparts. The case has been cited in subsequent Inter-American jurisprudence on GBV, with cases like *Paola Guzmán Albarracín v. Ecuador* (2020) and *Brisa de Angulo v. Bolivia* (2023) expanding and applying its principles to a range of contexts involving state responsibility for preventing and responding to GBV, especially involving children and adolescents.<sup>36</sup> Outside of the Americas, the *Lenahan* case has been cited by a high court in Kenya in a case addressing police failure to respond to widespread rape of girls.<sup>37</sup> It has been referenced in a domestic violence case before the European Court of Human Rights<sup>38</sup> and in a landmark decision by the International Criminal Court recognizing sexual violence as both a war crime and a crime against humanity.<sup>39</sup> *Lenahan v. United States* is taught in textbooks and law schools around the world.

Moreover, while the United States rejects the IACHR's jurisdiction over it and declined to implement the Commission's recommendations in *Lenahan*, the case has had an undeniable effect on U.S. federal law and policy.<sup>40</sup> In 2007,

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<sup>36</sup> See *Paola Guzmán Albarracín v. Ecuador*, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 405, ¶¶ 14–26 (June 24, 2020) (holding Ecuador responsible for failing to protect a student from sexual violence in an educational institution and recognizing the right to education free from gender-based violence); see also *Brisa de Angulo v. Bolivia*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 475, ¶¶ 1–5, 80–85, 217 (Nov. 18, 2022) (finding Bolivia violated rights to integrity, judicial protection, and equality by failing to respond adequately to sexual violence against a child and recognizing the impact of re-victimization through the justice system).

<sup>37</sup> See *Petition, C.K. (A Child) & 11 Others v. Commissioner of Police/Inspector General of the National Police Service & 2 Others*, High Court of Meru (2013) (holding that the failure of Kenyan police to investigate complaints of sexual violence against girls violated their constitutional and international human rights, and affirming that state inaction in GBV cases constitutes discrimination and denial of access to justice).

<sup>38</sup> See *Valiulienė v. Lithuania*, App. no. 33234/07, Eur. Ct. of H.R. (Mar. 26, 2013) (holding that Lithuania violated the European Convention on Human Rights by failing to conduct an effective investigation into repeated acts of domestic violence and affirming that psychological harm and the cumulative nature of abuse are critical elements in assessing state obligations under international human rights law).

<sup>39</sup> Case Information Sheet on *Situation in the Central African Republic: The Prosecutor v. Jean-Pierre Bemba Gombo* ICC-01/05-01/08, INT'L CRIM. CT. (Oct. 17, 2016), <https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/BembaEng.pdf> (establishing command responsibility for atrocity crimes, including rape and sexual violence, committed by subordinates under international criminal law, and marking one of the first major ICC convictions for sexual violence as a war crime and crime against humanity).

<sup>40</sup> See, e.g., Elizabeth M. Schneider et al., *Implementing the Inter-American Commission on Human Rights' Domestic Violence Ruling*, 46 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 113 (July-Aug. 2012); see also Caroline Bettinger-Lopez, *Introduction: Jessica Lenahan (Gonzales) v. United States of America: Implementation, Litigation, and Mobilization Strategies*, 21 AM. U. J. GENDER SOC. POL'Y & L. 207 (2012).

Representative Jerry Nadler sponsored an amendment to the Violence Against Women Act (VAWA) called the Jessica Gonzales Victim Assistance Act, to commit \$5 million to placing special victim assistants to act as liaisons between local law enforcement agencies and victims of domestic violence, dating violence, sexual assault, and stalking in order to improve the enforcement of protection orders. This Act, Nadler emphasized, was created to “restore[] some of the effectiveness of restraining orders that the Supreme Court took away with its [*Castle Rock*] ruling.”<sup>41</sup> Prior to the IACHR decision, Nadler privately told Lenahan and me that he thought it would be an international embarrassment “for an international body to call the United States a violator of the rights of women and children.”<sup>42</sup> Indeed, State Department representatives told me privately over the years that *Castle Rock* created diplomatic obstacles in U.S. foreign policy work, as the United States got pushback when it sought to hold foreign governments to higher accountability standards for protecting domestic violence victims than the standards created by the U.S. Supreme Court.

Beginning in 2011, the U.S. Department of Justice began stepping up its § 14141 civil rights investigations into discriminatory law enforcement responses to GBV in several cities—the exact type of government action that the IACHR had called for—albeit without referencing *Lenahan*.<sup>43</sup> In 2014, the U.S. government reported to the United Nations Human Rights Committee that the U.S. Department of Justice and the State Department were co-hosting, for the first time, a *Roundtable on Domestic Violence, Sexual Assault, and Human Rights*.<sup>44</sup>

In 2015, U.S. Attorney General Loretta Lynch released official guidance to law enforcement agencies on how to prevent gender bias in their response to such crimes—a step originally proposed by advocates who supported Lenahan’s lawsuit.<sup>45</sup> The guidance overlaid neatly on the facts and legal issues present in the *Lenahan* case:

Gender bias in policing practices is a form of discrimination that may result in LEAs [law enforcement agencies] providing less protection to certain victims on the basis of gender, failing to respond to crimes that disproportionately harm people of a particular gender or offering reduced

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<sup>41</sup> *Floor Statement on the Jessica Gonzalez Victim Assistance Program*, CONGRESSMAN JERRY NADLER (July 25, 2007), <https://nadler.house.gov/news/documentsingle.aspx?DocumentID=390661>.

<sup>42</sup> See Caroline Bettinger-Lopez, *Human Rights at Home: Domestic Violence as a Human Rights Violation*, COLUM. HUM. RTS. L. REV. 19, 64 (2008); Caroline Bettinger-López, *Jessica Gonzales v. United States: An Emerging Model for Domestic Violence & Human Rights Advocacy in the United States*, 21 HARV. HUM. RTS. J. 183 (2008).

<sup>43</sup> See generally Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C. L. REV. 1287 (2016) (describing the pitfalls of police failure to investigate assaults and the subsequent efforts to increase investigation post § 14141 enactment; noting the absence of reference to *Lenahan*).

<sup>44</sup> See ACLU Women’s Rights Project, Colum. L. Sch. Hum. Rts. Inst., & Univ. Miami Sch. L. Hum. Rts. Clinic, *Domestic Violence & Sexual Assault in the United States: A Human Rights-Based Approach & Practice Guide* 8 (Aug. 2014) [hereinafter *Human Rights-Based Guide*], [https://hri.law.columbia.edu/sites/default/files/publications/dv\\_sa\\_hr\\_guide\\_reduce.pdf](https://hri.law.columbia.edu/sites/default/files/publications/dv_sa_hr_guide_reduce.pdf).

<sup>45</sup> U.S. DEP’T OF JUST., IDENTIFYING AND PREVENTING GENDER BIAS IN LAW ENFORCEMENT RESPONSE TO SEXUAL ASSAULT AND DOMESTIC VIOLENCE (2015), <https://www.justice.gov/opa/file/811156/dl?inline=>.

or less robust services due to a reliance on gender stereotypes. . . . In the sexual assault and domestic violence context, if gender bias influences the initial response to or investigation of the alleged crime, it may compromise law enforcement's ability to ascertain the facts, determine whether the incident is a crime, and develop a case that supports effective prosecution and holds the perpetrator accountable.<sup>46</sup>

One year later, the U.S. Department of Justice (DOJ) established a nearly \$10 million grant program to implement the 2015 guidance through nationwide demonstration projects and technical assistance and training programs.<sup>47</sup> In 2022, DOJ updated the guidance to emphasize trauma-informed approaches, address intersectional bias, and expand on the need to prevent officer-perpetrated violence.<sup>48</sup> In 2024, DOJ released similar guidance—accompanied by a \$6 million grant program<sup>49</sup>—for prosecutors to build “provable cases in a trauma-informed manner” with a focus on achieving “better outcomes for victims, safer communities, and greater accountability for perpetrators.”<sup>50</sup> The boomerang that Jessica Lenahan had tossed abroad had returned to the United States.

The *Lenahan* decision, and the increasing federal engagement with gender bias in institutional responses to domestic and sexual violence, has also had an effect on local and state levels. Following the 2011 IACHR decision, more than thirty municipalities adopted resolutions and publications recognizing “freedom from domestic violence is a basic human right;” many of them cite to *Lenahan*'s case.<sup>51</sup> These resolutions have been linked to concrete law and policy changes that

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<sup>46</sup> *Id.*

<sup>47</sup> See U.S. DEP'T OF JUST., FY 2015 PERFORMANCE BUDGET: OFFICE OF JUSTICE PROGRAMS (Mar. 2014), <https://www.justice.gov/sites/default/files/jmd/legacy/2014/02/12/ojp-justification.pdf>.

<sup>48</sup> See *Law Enforcement Guidance: Improving Law Enforcement Response to Sexual Assault and Domestic Violence by Identifying and Preventing Gender Bias*, U.S. DEP'T OF JUST.: OFF. ON VIOLENCE AGAINST WOMEN (May 10, 2024), <https://www.justice.gov/ovw/law-enforcement-guidance>.

<sup>49</sup> See U.S. DEP'T OF JUST.: OFF. ON VIOLENCE AGAINST WOMEN, OMB No. 1122-0020, OVW FISCAL YEAR 2025 DEMONSTRATION PROGRAM ON TRAUMA-INFORMED, VICTIM-CENTERED TRAINING FOR LAW ENFORCEMENT ON DOMESTIC VIOLENCE, DATING VIOLENCE, SEXUAL ASSAULT, AND STALKING (ABBY HONOLD) PROGRAM NOTICE OF FUNDING OPPORTUNITY (NOFO) (2025), <https://www.justice.gov/ovw/media/1400561/dl?inline>.

<sup>50</sup> Press Release, U.S. Dep't of Just.: Off. on Violence Against Women, Framework for Prosecutors to Strengthen Our National Response to Sexual Assault and Domestic Violence Involving Adult Victims (May 20, 2024), <https://www.justice.gov/archives/opa/pr/justice-department-announces-framework-prosecutors-strengthen-national-response-sexual>.

<sup>51</sup> *Freedom from Domestic Violence as a Fundamental Human Right Resolutions, Presidential Proclamations, and Other Statements of Principle*, CORNELL L. SCH. (Feb. 2018) [hereinafter *Freedom from Domestic Violence*], <https://www.lawschool.cornell.edu/academics/experiential-learning/clinical-program/gender-justice-clinic/freedom-from-domestic-violence-as-a-fundamental-human-right-resolutions-presidential-proclamations-and-other-statements-of-principle/>.

remain in place in Ithaca, New York;<sup>52</sup> Austin, Texas;<sup>53</sup> and Miami-Dade County, Florida.<sup>54</sup> For instance, the Miami-Dade County Commission issued a “Freedom from Domestic Violence” human rights resolution, affirming that freedom from domestic violence is a fundamental human right.<sup>55</sup> Subsequently, domestic violence victim status was added to the list of protected classes in the county’s Human Rights Ordinance, which prohibits discrimination in employment and housing.<sup>56</sup> In Illinois, the state legislature passed the Illinois Sexual Assault Incident Procedure Act, which addresses gender bias in law enforcement and medical responses to victims.<sup>57</sup>

These state and local developments can also, in turn, influence federal policy. Former Illinois Attorney General Lisa Madigan, for instance, developed protocols on rape kit testing that were informed by Human Rights Watch and other partners; Madigan cited to these state protocols and practices when she participated in roundtables that informed the development of the DOJ gender bias in policing guidance.<sup>58</sup>

In addition to the legal and policy developments described above, Lenahan’s message has been captured through a documentary film, *Home Truth*, about Lenahan’s life and her case, which premiered at the Human Rights Watch

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<sup>52</sup> RESOLUTION NO. 002-2015: Resolution of the Tompkins County Council of Governments Declaring Freedom from Domestic Violence as a Human Right, TOMPKINS CNTY. COUNCIL OF GOV’TS (2015), <https://www.tompkinscountyny.gov/files/assets/county/v/1/legislature/documents/tccog/actionsresolutions-tccog/resolution-no-002-2015-declaring-freedom-from-dv-as-human-right.pdf>.

<sup>53</sup> RESOLUTION NO. 20140417-055, AUSTIN CITY COUNCIL (Apr. 17, 2014), <https://law.utexas.edu/wp-content/uploads/sites/11/2015/04/2014-HRC-USA-Freedom-from-DV-CityResolution.pdf>.

<sup>54</sup> Resolution Expressing the Board’s Intent to Declare that the Freedom from Domestic Violence is a Fundamental Human Right, MIAMI-DADE CNTY. (2012), <https://www.miamidade.gov/govaction/matter.asp?matter=121380&file=true&yearFolder=Y2012FL.pdf>.

<sup>55</sup> *Id.*

<sup>56</sup> See Columbia L. Sch. Hum. Rts. Inst. & Univ. of Miami Sch. of L. Hum. Rts. Clinic, *Recognizing Freedom from Domestic Violence and Violence Against Women as a Fundamental Human Right* (2014), <https://media.law.miami.edu/human-rights-clinic/pdf/2014/local-resolutions-2014.pdf>.

<sup>57</sup> 725 ILL. COMP. STAT. 203/15 (LexisNexis 2025); *Human Rights-Based Guide*, *supra* note 44; Advocates for Hum. Rts. et al., *ICCPR Shadow Report: Written Statement on Domestic Violence, Gun Violence, and “Stand Your Ground” Laws* (Oct. 2013), [https://www.law.miami.edu/\\_assets/pdf/hrc-projects-cases/iccpr-shadow-report-domestic-violence.pdf](https://www.law.miami.edu/_assets/pdf/hrc-projects-cases/iccpr-shadow-report-domestic-violence.pdf); see generally THE CENTER FOR HUMAN RIGHTS AND HUMANITARIAN LAW AT AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, HUMAN RIGHTS IN THE U.S. HANDBOOK FOR PUBLIC INTEREST ATTORNEYS (2026), <https://drive.google.com/drive/folders/1oozemJxjMcAXIagVTBOcu1V4afXUatZH>.

<sup>58</sup> *Illinois Attorney General Lisa Madigan: The State’s Human Rights Lawyer*, COLUM. L. SCH. (Mar. 21, 2016), <https://www.law.columbia.edu/news/archive/illinois-attorney-general-lisa-madigan-states-human-rights-lawyer>. In my capacity as White House Advisor on Violence Against Women, I participated alongside Illinois Attorney General Lisa Madigan in a Roundtable on Gender-Based Violence and Policing sponsored by the U.S. Department of Justice in 2015. It was at this Roundtable that General Madigan proffered her views on gender bias in policing, which were formative in the subsequent policy discussions of the issue within the federal government.

Film Festival in 2017 and on PBS in 2018.<sup>59</sup> The film has been featured at conferences and screened at universities across the United States and around the world; Jessica, the filmmakers, and I have spoken before thousands of people at post-film “talk-backs.” The *Castle Rock* decision is also criticized in the 2019 Broadway hit, *What the Constitution Means to Me*. As described in a *New Yorker* article, the show’s playwright and star, Heidi Schreck, “draws connections . . . between her mother’s abusive childhood and *Castle Rock v. Gonzales*.” For one performance, on June 20, 2019, the twenty-year anniversary of the death of the Gonzales children, Schreck dedicated the show to Jessica Lenahan. Lenahan’s friends, family, and supporters from around the country—even several generations of law students who worked on her case—attended the play and honored her afterwards.<sup>60</sup> For Lenahan, these moments of public recognition and narrative change about domestic violence create a counterbalance to the ongoing impact of her deep loss, and the ways in which the U.S. judicial system exacerbated the harms she experienced.

#### D. From Case Strategy to National Policymaking to Historic Backsliding

When I served as the White House Advisor on Violence Against Women in 2015-17, I often witnessed the gulf between U.S. domestic and foreign policy on GBV, and sought to bridge the divide whenever possible—such as through the establishment of a Trilateral North American Working Group on Violence Against Indigenous Women and Girls.<sup>61</sup> I also proposed to my boss, Vice President Joe Biden, an idea that my students, colleagues, and I had incubated through the *Lenahan* litigation: The United States should develop a national action plan on GBV that embraced the sentiment of the 2012 U.S. Global Strategy to Prevent and Respond to Gender-Based Violence Globally that, “[r]egardless of the form that gender-based violence takes, it is a human rights abuse.”<sup>62</sup> In 2021, that dream came to fruition when President Biden issued Executive Order 14020, which established the White House Gender Policy Council and called for the development of a national action plan to end GBV and for a parallel update to the Global GBV Strategy—and for individuals leading these efforts to work “in

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<sup>59</sup> See generally HOME TRUTH, [www.hometruthfilm.com](http://www.hometruthfilm.com) (last visited Feb. 14, 2026) (providing a preview of the documentary of Jessica Lenahan’s life story).

<sup>60</sup> Michael Schulman, *Heidi Schreck Takes the Constitution to Broadway*, NEW YORKER (Feb. 11, 2019), <https://www.newyorker.com/magazine/2019/02/18/heidi-schreck-takes-the-constitution-to-broadway>; Miami Law Staff Report, *Broadway Play Commemorates Human Rights Clinic Case Town of Castle Rock v. Jessica Gonzales 20th Anniversary*, UNIV. MIAMI (July 2, 2019), <https://news.miami.edu/law/stories/2019/07/broadway-play-commemorates-human-rights-clinic-case-town-of-castle-rock-v.-jessica-gonzales-20th-anniversary.html>.

<sup>61</sup> See generally Carrie Bettinger-Lopez, *Inaugural Meeting of the North American Working Group on Violence Against Indigenous Women and Girls*, WHITE HOUSE: PRESIDENT OBAMA (Oct. 26, 2016, 5:15 PM), <https://obamawhitehouse.archives.gov/blog/2016/10/26/inaugural-meeting-north-american-working-group-violence-against-indigenous-women-and> (describing the White House initiative to end violence against indigenous women and girls).

<sup>62</sup> U.S. Dep’t of State & U.S. Agency for Int’l Dev., *United States Strategy to Prevent and Respond to Gender-Based Violence Globally: 2016 Update* (Mar. 2016), <https://www.state.gov/wp-content/uploads/2019/03/258703.pdf>; see also *Human Rights-Based Guide*, *supra* note 44.

conjunction with” one another.<sup>63</sup> Through these joint efforts, the federal government was explicitly articulating a connection between domestic- and international-facing GBV issues and federal priorities to prevent and end GBV at the national and global levels. I returned to the federal government in late 2021 to help research, draft, and implement the National GBV Plan.

In 2023, the United States released its first-ever National GBV Plan.<sup>64</sup> Informed by more than 25 U.S. civil society-organized listening sessions that included over 2,000 individuals representing diverse groups and organizations, the Plan proudly built upon U.S. and international laws that “frame freedom from GBV as a human right and prioritize prevention, intervention, measurements of effectiveness, accountability for those who perpetrate harm, and redress for survivors.”<sup>65</sup> The Plan adopted a survivor-centered, trauma-informed, culturally specific, and equity-driven framework that brought the United States further into alignment with international human rights norms and global best practices on preventing and addressing GBV, including the principles enshrined in the *Lenahan* case. Indeed, the Plan cites to the Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the Inter-American Convention of Belém do Pará, among others. With the adoption of the Plan, the United States joined more than one hundred countries located on every continent except Antarctica that have adopted national strategic plans to combat GBV.<sup>66</sup>

On January 22, 2025, two days after the second Trump administration took office, the National GBV Plan disappeared off the White House website.<sup>67</sup> In the week thereafter, documents related to intimate partner violence, sexual violence, and other forms of GBV disappeared from many federal websites.<sup>68</sup> Agency heads

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<sup>63</sup> Exec Order No. 14020, 86 Fed. Reg. 13797 (Mar. 11, 2021), <https://www.federalregister.gov/documents/2021/03/11/2021-05183/establishment-of-the-white-house-gender-policy-council>.

<sup>64</sup> See generally *U.S. National Plan to End Gender-Based Violence: Strategies for Action*, Nat'l Archives (May 2023) [hereinafter *U.S. National Plan to End GBV*], <https://bidenwhitehouse.archives.gov/wp-content/uploads/2023/05/National-Plan-to-End-GBV.pdf> [<https://perma.cc/LY7Y-HD47>] (laying out the national plan to end gender-based violence).

<sup>65</sup> *Id.* at 23-24.

<sup>66</sup> Caroline Bettinger-Lopez, Rosemarie Hidalgo, & Lynn Rosenthal, *A National Action Plan to End Gender-Based Violence in the United States: New Directions Building on Strong Foundations*, Violence Against Women (forthcoming); see generally UN WOMEN, HANDBOOK FOR NATIONAL ACTION PLANS ON VIOLENCE AGAINST WOMEN (2012), <https://www.unwomen.org/en/digital-library/publications/2012/7/handbook-for-national-action-plans-on-violence-against-women> (crafting guidance for international states to implement nationally as a coordinated effort to end GBV); UN WOMEN, TOGETHER FOR PREVENTION: HANDBOOK ON MULTISECTORAL NATIONAL ACTION PLANS TO PREVENT VIOLENCE AGAINST WOMEN AND GIRLS (2023), <https://www.unwomen.org/en/digital-library/publications/2023/10/together-for-prevention-handbook-on-multisectoral-national-action-plans-to-prevent-violence-against-women-and-girls>.

<sup>67</sup> See *U.S. National Plan to End GBV*, *supra* note 64 (showing the link now inactive and appearing with error).

<sup>68</sup> See, e.g., *HRSA's Strategy to Address Intimate Partner Violence*, HRSA, <https://www.hrsa.gov/sites/default/files/hrsa/owh/2023-2025-hrsa-ipv-strategy.pdf> (last reviewed Oct. 2023) (providing that court-required restoration of the website; former page titled *HHS Intimate*

renounced diversity, equity, inclusion, and accessibility (DEIA) programs, staff, and sympathizers, and Secretary of State Marco Rubio issued a memorandum to State Department employees that rejected any “official actions” connected to “concepts” presented in the National GBV Plan, among other executive documents associated with the Biden and Obama administrations.<sup>69</sup> All of this was done—in some cases explicitly, in other cases, presumably—in accordance with President Trump’s January 20, 2025 Executive Orders that redefined federal language and policy to exclude gender identity, dismantled institutional DEI frameworks, redefined civil rights enforcement to exclude identity-based initiatives, and asserted biological sex and merit as foundational principles of governance.<sup>70</sup> These attacks on “gender ideology” follow a global playbook that has supported movements in Europe and Latin America aiming to restore traditional gender norms and hierarchies.<sup>71</sup>

Following the Executive Orders, the DOJ imposed new conditions on VAWA grant recipients, requiring the recipients to certify they are not supporting and will not support diversity, equity, inclusion and accessibility programs, discuss “gender ideology,” or serve undocumented immigrants, even when those services are required by law or essential to survivor care.<sup>72</sup> Seventeen nonprofit state domestic violence and sexual assault coalitions filed suit in federal court, arguing that the new requirements are unconstitutional and force organizations to choose between losing critical funding or facing severe legal and financial risks under the

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*Partner Violence Strategy*); *Reports and Publications*, CDC: NAT’L INTIMATE PARTNER & SEXUAL VIOLENCE SURV. (Sept. 29, 2025), <https://www.cdc.gov/nisvs/documentation/index.html>; *United States Strategy to Prevent and Respond to Gender-Based Violence Globally*, U.S. DEP’T OF STATE, <https://www.state.gov/reports/united-states-strategy-to-prevent-and-respond-to-gender-based-violence-globally-2022/> (displaying the notice “We apologize for the inconvenience...” indicating that the page’s content has been removed); *FARE Grants*, U.S. DEP’T OF LAB.: WOMEN’S BUREAU, <https://www.dol.gov/agencies/wb/grants/fare> (displaying a “Page Not Found” message).

<sup>69</sup> Scott Pilutik, *The Real Goal of Trump’s Emails Ordering Federal Employees to Narc on DEI Sympathizers*, SLATE (Jan. 23, 2025, 5:20 PM), <https://slate.com/news-and-politics/2025/01/trump-dei-emails-rubio-federal-employees-narc-snitch.html>; *see also* Ken Klippenstein (@kenklippenstein), X (Jan. 22, 2025, 3:20 PM), <https://x.com/kenklippenstein/status/1882176558884069426/photo/3>.

<sup>70</sup> *See, e.g.*, Exec. Order No. 14168, 90 Fed. Reg. 8615 (Jan. 20, 2025), <https://www.whitehouse.gov/presidential-actions/2025/01/defending-women-from-gender-ideology-extremism-and-restoring-biological-truth-to-the-federal-government/>; Exec. Order No. 14151, 90 Fed. Reg. 28339 (Jan. 20, 2025), <https://www.whitehouse.gov/presidential-actions/2025/01/ending-radical-and-wasteful-government-dei-programs-and-preferencing/>; *see also* Exec. Order No. 14148, 90 Fed. Reg. 8237 (Jan. 20, 2025), <https://www.whitehouse.gov/presidential-actions/2025/01/initial-rescissions-of-harmful-executive-orders-and-actions/>; Exec. Order No. 14173, 90 Fed. Reg. 8633 (Jan. 21, 2025), <https://www.whitehouse.gov/presidential-actions/2025/01/ending-illegal-discrimination-and-restoring-merit-based-opportunity/>.

<sup>71</sup> Saskia Brechenmacher, *Trump’s “Gender Ideology” Attacks Are Following a Global Movement*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Feb. 14, 2025), <https://carnegieendowment.org/emissary/2025/02/trump-gender-ideology-global-trend-women-lgbtq-rights?lang=en>.

<sup>72</sup> *See* U.S. DEP’T OF JUST.: OFF. ON VIOLENCE AGAINST WOMEN, OMB No. 1122-0020, OVW FISCAL YEAR 2025 *REVISED* RESEARCH AND EVALUATION (R&E) INITIATIVE (2025) (emphasis added).

False Claims Act.<sup>73</sup> On August 8, 2025, a federal judge in Rhode Island issued a preliminary stay, temporarily blocking the DOJ from enforcing the new restrictions on VAWA grant applications.<sup>74</sup>

### **E. Durability, Diffusion, and the Role of Law Clinics in the Plan's Afterlife**

The U.S. National GBV Plan effectuated concrete changes in the federal government during the Biden administration, and its transformative effects can and will continue to have staying power, despite the sea-change brought on by the Trump administration. Even if the National GBV Plan does not currently exist on a working U.S. government website, and even though the programs and policies it generated are now being actively dismantled by the current administration, the groundwork and bidirectional conversations that created the Plan, and that the Plan created, can allow its ideas to continue to flourish in non-federal spaces. Municipalities, states, private actors, and other nations can now adopt, adapt, hone, and implement the goals, framework, and intentions of the National GBV Plan, creating new ripple effects.

And law clinics can be there to support these efforts every step of the way. In this way, students and faculty can help to serve as both custodians and interpreters of the National GBV Plan, help it to evolve as a living document that continues to inform and interact with a dynamic local-to-global conversation, and be available for further adaptation and re-adoption by the U.S. government when it is ready to *really* defend women and embrace an intersectional gender agenda again.

## **III. CRITICAL CLINICAL PEDAGOGY IN ACTION: THE *LENAHAN* CASE AND TRANSFORMATIVE HUMAN RIGHTS LAWYERING**

Law school clinics—especially those focused on law reform and public policymaking—are not only vehicles for experiential learning but also serve as laboratories for norm generation and legal transformation. When intentionally designed to embrace a critical lens that interrogates power and structural

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<sup>73</sup> R.I. Coal. Against Domestic Violence v. Bondi, No. 1:25-cv-00279 (D.R.I. June 16, 2025); see also Vanessa Mauss, *Nationwide Coalition Files Lawsuit to Challenge Administration's Attempt to Withhold Violence Against Women Grants that Support Survivors*, WISC. COAL. AGAINST SEXUAL ASSAULT (June 16, 2025).

<sup>74</sup> Memorandum and Order, R.I. Coal. Against Domestic Violence v. Bondi, No. 25-279 WES, at 26-27 (D.R.I. Aug. 8, 2025); *RI Judge Grants Motion to Block Trump-Vance Administration's Unlawful Restrictions on Funding for Critical Services for Survivors, LGBTQI+ Youth, and Unhoused Communities*, ACLU R.I. (July 25, 2025), <https://www.riaclu.org/news/ri-judge-grants-motion-to-block-trump-vance-administrations-unlawful-restrictions-on-funding-for-critical-services-for-survivors-lgbtqi-youth-and-unhoused-communities/>.

inequality, clinics can move beyond doctrinal mastery to cultivate a praxis rooted in social justice, community engagement, and transnational solidarity.<sup>75</sup>

This critical approach advocates for a pedagogy that is participatory, reflective, and justice-oriented, and challenges traditional hierarchies in legal education and practice that position the lawyer or advocate as the sole expert or savior. Clinics, in this model, become spaces where students and faculty co-create knowledge with affected individuals and communities, rather than imposing legal solutions from above. Clinical pedagogy informed by critical theory encourages students to see lawyering as an aspect of movement building—in movements on both the left and the right. It emphasizes collaboration, humility, and the amplification of community voices, while also engaging with the transnational dimensions of human rights advocacy.<sup>76</sup> Students are prepared to advocate before international mechanisms such as the IACHR, United Nations treaty bodies, and regional courts.

The *Lenahan* case exemplifies how clinical pedagogy can drive survivor-centered, transnational, and multidimensional advocacy. Students in the Human Rights Law Clinics where I have taught—at Columbia, University of Miami, and University of Chicago—engaged directly with Jessica Lenahan and other GBV survivors, grassroots organizations, and international bodies to shape legal norms and policy on GBV. Their work spanned litigation, policy reform, public education, and survivor-led storytelling. At Columbia, students prepared legal analyses for the IACHR proceedings, coordinated amicus briefs, and helped draft testimony that authentically reflected the Lenahan family's lived experiences.<sup>77</sup> They also organized academic events that bridged theory and practice, engaging faculty across disciplines to explore the case's implications for civil rights, constitutional law, and family law.<sup>78</sup> These collaborations reinforced the pedagogical value of clinical education in bridging theory and practice. They deepened students' understanding of trauma-informed advocacy and helped center survivor voices in international legal proceedings, pedagogy, and public discourse. This work informed both the trajectory of the *Lenahan* case and the principles underlying the National GBV Plan.

This advocacy extended beyond the courtroom into policy spaces, media platforms, and community campaigns. Students at Miami and Chicago co-authored

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<sup>75</sup> See Caroline Bettinger-López, Davida Finger, Meetal Jain, JoNel Newman, Sarah Paoletti, & Deborah M. Weissman, *Redefining Human Rights Lawyering Through the Lens of Critical Theory: Lessons for Pedagogy and Practice*, 18 GEO. J. ON POVERTY L. & POL'Y 337, 339 (2011).

<sup>76</sup> See Benjamin Hoffman & Marissa Vahlsing, *Collaborative Lawyering in Transnational Human Rights Advocacy*, 21 CLINICAL L. REV. 255, 277-78 (2014).

<sup>77</sup> See Erin St. John Kelly, *Some Scars Never Fade*, COLUM. L. SCH. (Mar. 7, 2008), <https://www.law.columbia.edu/news/archive/some-scars-never-fade>.

<sup>78</sup> See generally *Jessica Lenahan's Quest for Justice Continues 10 Years After Her Daughters Were Killed*, COLUM. L. SCH. (Oct. 29, 2009), <https://www.law.columbia.edu/news/archive/jessica-lenahans-quest-justice-continues-10-years-after-her-daughters-were-killed> (describing student involvement in Lenahan's case).

implementation briefs,<sup>79</sup> participated in federal roundtables,<sup>80</sup> and met with members of Congress and their staffers as well as UN officials.<sup>81</sup> They supported Jessica Lenahan's public speaking engagements, amplifying her voice as a global advocate for survivors. Miami Law students published articles in legal and policy journals<sup>82</sup> and co-authored op-eds with policymakers underscoring the connection between domestic violence and human rights.<sup>83</sup> These efforts helped catalyze a nationwide movement among law school clinics—including direct service, impact litigation, and human rights-oriented clinics at Miami, Cornell, Cincinnati, and Maryland—to promote local government “domestic violence-human rights resolutions” and related public policy initiatives grounded in human rights principles.<sup>84</sup> This work connected international litigation and advocacy to policy reform and public education, demonstrating how law clinics of various stripes contribute to norm-building in diverse spaces and systemic change.

Clinical students also led community-based research and engaged in international litigation and advocacy that built upon *Lenahan* and subsequent jurisprudence. Miami Law Human Rights Clinic students authored briefs before the European Court of Human Rights<sup>85</sup> and the African Court on Human and

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<sup>79</sup> *Human Rights-Based Guide*, *supra* note 44; Brenda V. Smith, Ashley Prather & Jamie M. Yarussi, *Violence Against Women in the United States and the State's Obligation to Protect: Civil Society Briefing Papers on Community, Military and Custody Submitted to the United Nations Special Rapporteur on Violence Against Women, Rashida Manjoo, in Advance of her Mission to the United States of America*, U.N. Doc. A/HRC/17/26/Add.5 (Jan. 24, 2011), [https://digitalcommons.wcl.american.edu/fasch\\_rpt/50](https://digitalcommons.wcl.american.edu/fasch_rpt/50). Students also drafted briefs to the IACHR concerning U.S. government's implementation of the IACHR's recommendations in the case.

<sup>80</sup> *Human Rights-Based Guide*, *supra* note 44 (describing how the DOJ and DOS held a roundtable on domestic violence, sexual assault, and human rights).

<sup>81</sup> This included Clinic faculty-student meetings with Rep. Jerrold Nadler, Rep. Lois Capps, Senator Kirsten Gillibrand, and UN Special Rapporteur on Violence Against Women, Rashida Manjoo, as well as their staffers in 2010-14. See *Jessica Lenahan (Gonzales) v. United States of America*, UNIV. MIAMI SCH. L., <https://www.law.miami.edu/academics/experiential-learning/clinics/human-rights/gonzales-usa/> (last visited Feb. 16, 2026); *International Human Rights Clinic to Appear Before Inter-American Commission on Human Rights*, UNIV. CHI. SCH. L. (Oct. 23, 2014), <https://www.law.uchicago.edu/news/international-human-rights-clinic-appear-inter-american-commission-human-rights>.

<sup>82</sup> See, e.g., Averil Andrews & Jenny Khavinson, *From International to Domestic Approaches: Battling DV in the United States*, 17 DOMESTIC VIOLENCE REP. 17, 17-18 (Dec.-Jan. 2012); Charlotte Cassel, Dan Kinney, Caroline LaPorte, & Maxim Tsoy, *Innovative Perspectives on Domestic Violence: Using a Human Rights Framework*, DOMESTIC VIOLENCE REPORT, 20 DOMESTIC VIOLENCE REP. 35, 35 (Feb.-Mar. 2015); Farrah Elchahal, Rachel Oostendorp, & Caroline Bettinger-Lopez, *Domestic Violence Is a Human Rights Violation*, N.Y. STATE OFF. FOR THE PREVENTION OF DOMESTIC VIOLENCE (Fall 2011), [https://nysl.ptfs.com/#!/s?a=c&q=\\* &type=16&criteria=field11%3D897240411&b=0](https://nysl.ptfs.com/#!/s?a=c&q=* &type=16&criteria=field11%3D897240411&b=0).

<sup>83</sup> See Sally Heyman & Michael R. Stevenson, *Government Has a Role in Ending Domestic Abuse*, MIAMI HERALD (July 24, 2012), [https://www.law.miami.edu/\\_assets/pdf/hrc-projects-cases/hrc-herald-op-ed-072412.pdf](https://www.law.miami.edu/_assets/pdf/hrc-projects-cases/hrc-herald-op-ed-072412.pdf).

<sup>84</sup> *Freedom from Domestic Violence*, *supra* note 51.

<sup>85</sup> See Miami Law Staff Report, *Human Rights Clinic Address Officer-Perpetrated Gender Violence Before European Court of Human Rights*, UNIV. MIAMI SCH. L. (Dec. 5, 2018), <https://news.miami.edu/law/stories/2018/12/human-rights-clinic-address-officer-perpetrated-gender-violence-before-european-court-of-human-rights.html>; see also Intervention Brief in *Toradze*

Peoples' Rights,<sup>86</sup> citing *Lenahan* to argue for heightened state responsibility in cases of officer-perpetrated violence and discriminatory vagrancy laws. They further built upon this work through partnerships with Canadian organizations to advance protections for Indigenous women and contributed to Canada's National Inquiry into Missing and Murdered Indigenous Women and Girls.<sup>87</sup> Locally, they applied *Lenahan*—particularly its focus on state response to marginalized GBV survivors—to challenge Florida's anti-immigrant law SB 168, through an amicus brief, law review article, op-ed, and a report submitted to the United Nations Human Rights Council.<sup>88</sup>

Recently, the Miami Law Human Rights Clinic has initiated a new phase of work that builds on the legal, policy, social fabric initiated through the *Lenahan* case, and draws upon the strengths of a unique interdisciplinary collaboration. The Clinic's COURAGE initiative brings together scholars and researchers with local and national leaders, community-based organizations, state actors, and others to improve governmental and community responses to domestic violence and sexual assault, and other forms of harm experienced by GBV survivors and their families.<sup>89</sup> COURAGE projects have local, national, and international components, aiming to connect efforts to stop GBV with advocacy for racial and economic equity, immigrant justice, and LGBTQI rights.

The COURAGE in Our County: Miami-Dade Safety Project is the latest initiative under the COURAGE umbrella, led by an interdisciplinary team of legal academics and sociologists. Miami-Dade Safety is a social policy project designed to promote laws, policies, practices, and funding that enhance safety from GBV in Miami-Dade County. In line with the COURAGE Initiative, the Miami-Dade

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v. Georgia, App. No. 12699/18 (Jan. 13, 2022), [https://hudoc.echr.coe.int/fre#%22itemid%22:\[%22001-215095%22\]](https://hudoc.echr.coe.int/fre#%22itemid%22:[%22001-215095%22]); A and B v. Georgia, App. No. 73975/16 (Feb. 10, 2022), ¶48, [https://hudoc.echr.coe.int/fre#%22itemid%22:\[%22001-215716%22\]](https://hudoc.echr.coe.int/fre#%22itemid%22:[%22001-215716%22]); see also Miami Law Staff Report, *Clinic Claims Victory in European Court of Human Rights*, UNIV. MIAMI NEWS (Feb. 7, 2023), <https://news.miami.edu/law/stories/2023/02/human-rights-clinic-contributes-to-successful-challenge-in-european-court.html>.

<sup>86</sup> See Miami Law Staff Report, *Victory in the African Court on Human and Peoples' Rights: Human Rights Clinic Contributes to a Successful Challenge to Vagrancy Laws*, UNIV. MIAMI NEWS (Feb. 3, 2021), <https://news.miami.edu/law/stories/2021/02/victory-in-the-african-court-on-human-and-peoples-rights-human-rights-clinic-contributes-to-a-successful-challenge-to-vagrancy-laws.html>.

<sup>87</sup> See *Missing and Murdered Aboriginal Women and Girls in Canada*, UNIV. MIAMI SCH. L. (last visited Feb. 16, 2026), <https://www.law.miami.edu/academics/experiential-learning/clinics/human-rights/projects/aboriginal-women-canada/> (describing the collaboration between the Native Women's Association of Canada, Canadian Feminist Alliance for International Action, and Univ. of Miami Hum. Rts. Clinic); Miami Law Staff Report, *Human Rights Clinic Addresses Crisis of Missing and Murdered Indigenous Women in Canada*, UNIV. MIAMI NEWS (Feb. 20, 2019), <https://news.miami.edu/law/stories/2019/02/human-rights-clinic-addresses-crisis-of-missing-and-murdered-indigenous-women-in-canada.html>.

<sup>88</sup> See, e.g., *City of S. Miami v. DeSantis*, 561 F. Supp. 3d 1211, 1287 (S.D. Fla. 2021); see generally *COURAGE Initiative*, UNIV. MIAMI SCH. L., <https://www.law.miami.edu/academics/programs/human-rights/initiatives/courage/> (last visited Oct. 31, 2025) (describing efforts to “work with local and national leaders, community-based organizations, state actors, and others to improve governmental and community responses to domestic violence and sexual assault, and other forms of harm experienced by GBV survivors”).

<sup>89</sup> *COURAGE Initiative*, *supra* note 88.

Safety Project addresses GBV from a socio-legal, human rights, public health, and economic justice perspective. It integrates these different frameworks to improve support and access to justice for survivors from marginalized communities. Rooted in community-engaged social research, Miami-Dade Safety focuses on strengthening prevention and local responses to GBV and facilitating survivors' healing. The project uses a trauma-informed approach by acknowledging the impact of widespread trauma among GBV survivors throughout the life course. Miami-Dade Safety draws attention to the exacerbating effect of inadequate institutional responses and addresses the current crisis in services resulting from stringent immigration policies and funding cuts.

Aligned with the National Plan to End GBV, the Miami-Dade Safety Project highlights areas that require attention, including access to permanent and affordable housing, economic security and self-sufficiency, and labor protections. It incorporates insights from community partners to create a GBV safety agenda that reflects the social, economic, and cultural dynamics specific to South Florida. This project aims to reduce re-traumatization by assessing institutional responses and enhancing trauma-informed protocols that take into account intersectional bias. To date, students and faculty in the Safety Project have launched multilingual surveys, roundtables, listening sessions, and community forums, with a specific focus on housing, economic security, and labor protections for immigrants and other marginalized groups.<sup>90</sup> They are preparing a human rights analysis of their findings, to be presented in a human rights report and presentations at the United Nations and other local, state, domestic, and international forums.

Transnational collaborations and convenings can also lift up these threads. The Miami Law Human Rights Clinic recently undertook such a collaboration with the Inter-American Commission on Human Rights, when we hosted in Miami—a city that has been described as the “crossroads of the Americas”<sup>91</sup>—the *Human Rights in the Americas Symposium: An Examination of Past, Present, and Future*, an interdisciplinary symposium consisting of hearings by the IACHR for its 194<sup>th</sup> Period of Sessions, as well as a series of thematic panels on the intersection of human rights with democratic institutions and the rule of law, migration, housing justice, sports, gender justice, racial justice, and the environment.

Clinic students were deeply engaged in every step of the symposium process, including the development of panels on Gender Justice and Human Rights, a COURAGE Roundtable that brought together the IACHR Rapporteur on Women's Rights, students, faculty, and local grassroots anti-GBV advocates, and a screening and discussion panel surrounding the film *Brisa*. The film features the story of Brisa de Angulo, a Bolivian survivor of sexual violence who has become

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<sup>90</sup> *See id.*

<sup>91</sup> Jean-François Deluchey, *Miami, Ville Carrefour des Amériques*, 96 PROBLÈMES D'AMÉRIQUE LATINE 105 (2015), <https://shs.cairn.info/journal-problemes-d-amerique-latine-2015-1-page-105?lang=en>; William J. Clinton, *Remarks on Goals of the Summit of the Americas in Miami* (Dec. 9, 1994), <https://www.presidency.ucsb.edu/documents/remarks-goals-the-summit-the-americas-miami>; *see also* ALEJANDRO PORTES & ALEX STEPICK, CITY ON THE EDGE: THE TRANSFORMATION OF MIAMI (1993); MIAMI NOW!: IMMIGRATION, ETHNICITY, AND SOCIAL CHANGE (Guillermo J. Grenier & Alex Stepick III eds., 1992).

a global leader in the fight for justice and healing and whose landmark decision<sup>92</sup> from the Inter-American Court of Human Rights advance transformative approaches to supporting child survivors of sexual abuse and challenging cultural and legal impunity for GBV. Jessica Lenahan sat proudly beside Brisa de Angulo on this discussion panel, as they discussed—on a panel crafted by clinic students and faculty—the ways in which the *Lenahan* case paved the way for the *de Angulo Lozada* case, and their lasting impact on international jurisprudence and domestic law and policy.<sup>93</sup>

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Today, in 2025, law school clinics are especially well-positioned to help local communities adapt national and international human rights frameworks to their specific contexts. As GBV survivors and advocates face renewed threats from an anti-immigrant executive and legislative branch, law clinics can support the development of local action plans modeled on and inspired by Chicago’s Citywide Strategic Plan to Address Gender-based Violence and Human Trafficking;<sup>94</sup> collaborate with campaigns like Cities for CEDAW, including developing strategies to address GBV;<sup>95</sup> and help municipalities implement strategic plans that reflect the principle that “freedom from domestic violence is a fundamental human right.”<sup>96</sup> When “going local,” clinics should intentionally draw upon the insights of both the “usual suspects”—i.e. domestic violence shelters, rape crisis centers, GBV-oriented legal services—but also engage groups who may not be as obviously linked, like housing and immigration advocates, batterers’ intervention programs, and organizations focused on racial justice, gun violence, and financial protection. The variegations that will naturally arise from these local engagements will offer fresh perspectives and iterative approaches to addressing GBV, reinforcing the National Plan’s message that there is no one-size-fits-all solution.

#### IV. CONCLUSION

The *Lenahan* case offers a powerful blueprint for how clinical legal education can engender justice. Despite the tragedy and legal failures, the case illustrates how a multidimensional strategy—integrating legal advocacy, media engagement, and public mobilization—can support client-centered lawyering to

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<sup>92</sup> Brisa Liliana de Angulo Lozada v. Bolivia, Case 13.080, Inter-Am. Comm’n H.R., Report No. 141/19, OEA/Ser.L.V.II.173, doc. 156 rev. (2019)

[https://www.oas.org/en/iachr/decisions/court/2020/BO\\_13.080\\_EN.PDF](https://www.oas.org/en/iachr/decisions/court/2020/BO_13.080_EN.PDF).

<sup>93</sup> Bettinger-Lopez, et. al., Human Rights in the Americas Symposium: an Examination of Past, Present, And Future, U. MIAMI. INT’L & COMP. L. REV. (forthcoming 2026).

<sup>94</sup> *Citywide Strategic Plan to Address Gender-based Violence and Human Trafficking*, CITY CHI. (2021), <https://www.chicago.gov/content/dam/city/sites/public-safety-and-violenc-reduction/pdfs/GBV%20strategic%20plan%20FINAL.pdf>.

<sup>95</sup> See CITIES FOR CEDAW, *supra* note 3; CEDAW RISING, *supra* note 3; Susanne Zwingel, *Women’s Rights Close to Home? The Miami-Dade County CEDAW Ordinance as Local Practice*, 20 POL. & GENDER 54 (2024) [<https://doi.org/10.1017/S1743923X2300034X>].

<sup>96</sup> *Freedom from Domestic Violence*, *supra* note 51.

drive transformative change across both legal systems and public discourse. At their most effective, national GBV plans around the world are similarly grounded in survivors' experiences and can serve as vital frameworks to strengthen local efforts. Today, these forms of advocacy are increasingly facilitated by digital tools and global networks that make it easier to connect with international bodies, mobilize public support, and amplify survivor voices across borders.

The United States is not alone in experiencing setbacks, backlash, and democratic erosion.<sup>97</sup> Across the globe, countries are grappling with similar tensions.<sup>98</sup> In this context, transnational collaborations between law clinics and advocates—particularly in multi-leveled government spaces—can foster solidarity, create shared learning spaces, and even prove to be an antidote to concentrations of power.

But there are limitations to the transformative potential of this model, and to *Lenahan* and the National GBV Plan, in any political environment, be it progressive or, as is the case in 2025, regressive. For one thing, while international bodies like the IACHR have embraced robust due diligence standards, U.S. courts remain constrained by narrow procedural doctrines and a reluctance to impose affirmative duties on the state. This divergence raises important questions about the capacity of U.S. law to respond to structural gender violence—and whether transnational legal strategies can help fill the gap.

Moreover, state laws such as Florida's SB 168 exemplify a broader trend in which state governments weaponize immigration enforcement and anti-DEI rhetoric to undermine protections for GBV survivors. This backlash not only threatens individual rights but also challenges the viability of national frameworks like the GBV Plan. The challenge thus becomes how to shape strategies for local resistance.

The rapid dismantling of the National GBV Plan under the Trump administration underscores the fragility of commitments to gender justice. It shows that gender justice is not always a story of linear progress, but of layered struggle—across jurisdictions, political regimes, and legal cultures. This dismantling raises urgent questions about how to institutionalize human rights principles in ways that can withstand political backlash and administrative turnover. To ensure durability,

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<sup>97</sup> McKenzie Carrier & Thomas Carothers, *U.S. Democratic Backsliding in Comparative Perspective*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Aug. 25, 2025), <https://carnegieendowment.org/research/2025/08/us-democratic-backsliding-in-comparative-perspective>.

<sup>98</sup> Robert R. Kaufman, *Backsliding and Democratic Resilience: Prevention, Resistance, and Recovery* (Inst. on Glob. Conflict & Coop., Working Paper Nov. 8, 2025), <https://escholarship.org/uc/item/4kd1r7v5> [<https://perma.cc/3QAM-6VET>]; Erica Shein and Dr. Cassandra Emmons, *Paths to Democratic Resilience in an Era of Backsliding* (Int'l Found. for Electoral Sys., 2023); Larry Diamond, *Democratic Regression in Comparative Perspective: Scope, Methods, and Causes*, 28 DEMOCRATIZATION 1, 2 (2021); Khabele Matlosa, *Global Trends and Impact of Democratic Recession: Hard Choices for the Global South*, 30 S. AFR. J. INT'L AFF. 337, 340-341 (2023); Radhika Viswanathan, *Learning from Practice: Resistance and Backlash to Preventing Violence Against Women and Girls*, U.N. TRUST FUND TO END VIOLENCE AGAINST WOMEN 14-15 (2021), [https://untf.unwomen.org/sites/default/files/2025-06/synthesis\\_review\\_7\\_-\\_resistance\\_and\\_backlash\\_v2\\_compressed.pdf](https://untf.unwomen.org/sites/default/files/2025-06/synthesis_review_7_-_resistance_and_backlash_v2_compressed.pdf).

gender justice frameworks must be embedded in legislation, institutional practices, and community norms at local, state, and federal levels, and they should curb executive discretion.

Indeed, the “boomerang effect” operates within a contested global terrain. As transnational anti-gender movements gain traction, the same international forums that once served as sites of accountability are increasingly pressured and weakened. Law school clinics can play a vital role as spaces for critical pedagogy, survivor-centered lawyering and advocacy, and strategic engagement with local, national, and international mechanisms. In doing so, law school clinics that center rights-based approaches will not only train the next generation of lawyers but also, one hopes, help shape a more just, inclusive, and engendered legal landscape.



# THE ORIGIN AND FUTURE OF SHIELD LAWS

David S. Cohen and Rachel Rebouché\*

## I. INTRODUCTION

This Essay describes the origin and future of so-called shield laws—novel state legislation designed to protect legal abortion care from out-of-state attack. These laws have facilitated an increase in the number of abortions even in the wake of the Supreme Court overturning *Roe v. Wade* in *Dobbs v. Jackson Women’s Health Organization*.<sup>1</sup> The Essay, after detailing shield laws’ origins (Part II) and content (Part III), highlights how shield laws have operated and succeeded over the last three years (Part IV) as well as the challenges mounted against shield laws and shield providers (Part V).<sup>2</sup> Although state lawsuits and the possibility of federal action may, in the future, upend shield provision, the average number of abortions in this country have increased since *Dobbs*, in large part due to providers living under and utilizing the protections of state shield laws. The movement to end abortion by overturning *Roe* has—so far—failed, and shield laws have played a key role.<sup>3</sup>

## II. SHIELD LAWS’ ORIGINS

Since the Supreme Court overturned *Roe v. Wade* in 2022, the emerging legal landscape increasingly is punctuated by interstate conflict, particularly as states seek to impose their policy choices as widely as possible.<sup>4</sup> Consider bans on assisting minors in crossing state lines to get an abortion that Idaho and Tennessee have passed, which seek to penalize people for transporting minors in-state who have had an abortion out-of-state.<sup>5</sup> Or take the threats issued by a cohort of attorneys general to apply their state abortion laws against those who assist state residents traveling to another state to get an abortion.<sup>6</sup>

Currently, twelve states ban abortion from conception and four states have a six-week gestational limit; four additional states prohibit abortion before viability

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<sup>1</sup> *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

<sup>2</sup> For additional commentary on shield laws, see David S. Cohen et al., *Understanding Shield Laws*, 51 J.L. MED. & ETHICS 584 (2023) [hereinafter Cohen et al., *Understanding Shield Laws*]; David S. Cohen, Greer Donley & Rachel Rebouché, *Abortion Shield Laws*, 2 NEW ENG. J. MED. EVID. 1 (2023); David S. Cohen, Greer Donley & Rachel Rebouché, *Abortion Shield Laws in Action*, 185 JAMA INTERNAL MED. 911 (2025) [hereinafter Cohen et al., *Abortion Shield Laws in Action*].

<sup>3</sup> See generally DAVID S. COHEN & CAROLE JOFFE, *AFTER DOBBS: HOW THE SUPREME COURT ENDED ROE BUT NOT ABORTION* (2025).

<sup>4</sup> David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 1-2 (2023) [hereinafter Cohen et al., *New Abortion Battleground*].

<sup>5</sup> IDAHO CODE § 18-623 (2025); TENN. CODE ANN. § 39-15-201 (2025).

<sup>6</sup> See, e.g., *Yellowhammer Fund v. Marshall*, 776 F. Supp. 3d 1071 (M.D. Ala. 2025); Petition for Declaratory Judgment and Injunctive Relief, *Missouri v. Planned Parenthood Great Plains No. \_\_\_*, (Feb. 29, 2024) (Missouri AG suing for cross-state abortions), <https://ago.mo.gov/wp->

and a handful of others would ban abortion but for court orders.<sup>7</sup> While most of these laws include exceptions when continuation of the pregnancy puts the pregnant person's life or health in danger, many exceptions are written narrowly and have proven difficult to enforce as a practical matter.<sup>8</sup> Statutes include criminal penalties for performing abortions, some of which impose sentences including life imprisonment on providers.<sup>9</sup> States like Texas also have laws creating civil penalties that allow private individuals to sue abortion providers.<sup>10</sup>

In response to *Dobbs*, even more states have taken steps to protect abortion rights through state laws and constitutional amendments that protect state reproductive rights. Some states, like Delaware, Illinois, Massachusetts, and Minnesota, have repealed longstanding restrictions on abortion care, such as laws that targeted abortion provision with medically unnecessary requirements, and taken steps to increase provider capacity and affordability.<sup>11</sup>

Others have passed new legislation in the wake of *Roe*'s reversal. Twenty-two states and D.C. have adopted shield protections, by statute or executive order, which seek to protect people who provide or receive care within their home (or shield) states.<sup>12</sup> In the spring of 2022, just before the *Dobbs* decision, we helped draft, along with Professor Greer Donley, the first shield law in Connecticut after writing about what shield provisions might encompass.<sup>13</sup> Shield laws, as detailed below, address not just patients traveling to the shield state but also the proliferation of mailed medication abortion.

Medication abortion is a two-drug regimen that ends pregnancy, as approved by the FDA, before ten weeks of pregnancy, though it is often prescribed off-label through the first trimester.<sup>14</sup> The growth of virtual clinics, which offer medication abortion through telehealth, followed a 2020 federal district court decision that temporarily enjoined one of the FDA's restrictions on the first drug in a medication abortion—mifepristone. In December 2021, the FDA announced

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content/uploads/2024-2-29-Missouri-v.-Planned-Parenthood-Petition-for-Injunctive-Relief.pdf; Karen Brooks Harper, *Abortion-Rights Groups Sue Texas AG, Prosecutors to Protect Ability to Help Pregnant Texans Seek Legal Abortions in Other States*, TEX. TRIBUNE (Aug. 23, 2022), <https://www.texastribune.org/2022/08/23/abortion-funds-lawsuit-texas-travel/> [https://perma.cc/5HJS-79T8].

<sup>7</sup> Allison McCann & Amy Schoenfeld Walker, *Tracking Abortion Laws Across the Country*, N.Y. TIMES (July 8, 2025, 11:25 AM), <https://www.nytimes.com/interactive/2024/us/abortion-laws-roe-v-wade.html>.

<sup>8</sup> See generally Greer Donley & Caroline Kelly, *Abortion Disorientation*, 74 DUKE L.J. 1 (2024) (surveying abortion exceptions).

<sup>9</sup> See Yvonne Lindgren & Michelle Oberman, *Recalibrating Risk Under Dobbs*, 94 FORDHAM L. REV. 1 (forthcoming 2025), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=5003888](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5003888).

<sup>10</sup> TEX. HEALTH & SAFETY CODE ANN. § 171.208(a)(1) (West 2025).

<sup>11</sup> Cynthia Soohoo, *State Abortion Laws in the United States*, in ACCESSING ABORTION: GLOBAL AND COMPARATIVE PERSPECTIVES (Rachel Rebouché & Mindy Roseman eds., forthcoming Feb. 2026).

<sup>12</sup> *Shield Laws for Reproductive and Gender-Affirming Health Care: A State Law Guide*, UCLA L. (Oct. 2025), <https://law.ucla.edu/academics/centers/center-reproductive-health-law-and-policy/shield-laws-reproductive-and-gender-affirming-health-care-state-law-guide>.

<sup>13</sup> See Cohen et al., *New Abortion Battleground*, *supra* note 4, at 13 n.64 (describing the authors' roles in originating the concept of a shield law).

<sup>14</sup> See generally David S. Cohen, Greer Donley, & Rachel Rebouché, *Abortion Pills*, 76 STAN. L. REV. 317 (2024) [hereinafter Cohen et al., *Abortion Pills*].

it would lift that rule based on robust evidence that telehealth for medication abortion is safe and effective (which became permanent in 2023).<sup>15</sup>

With the removal of the in-person restriction, mifepristone (along with the second drug, misoprostol) can be mailed to patients as prescribed by a certified provider or dispensed by a certified pharmacy.<sup>16</sup> In the immediate wake of these changes, virtual abortion clinics emerged. At Abortion on Demand, the first large-scale, telehealth abortion service operated by a U.S.-based provider, the entire process, from online counseling to receipt of abortion pills, takes on average 48 hours.<sup>17</sup> In addition, Aid Access is a non-profit group that works with providers to mail medication abortion across the country, including states that prohibit abortion or telehealth for abortion.<sup>18</sup>

Mailed medication abortion has become a vehicle for delivering care no matter where pregnant people live, and shield laws have facilitated the movement of pills across the country, as Part IV describes.

### III. SHIELD LAWS' CONTENT

Although shield laws differ in their language, common protections characterize most of them. Each statute or executive order defines legally-protected reproductive healthcare, including but not limited to pregnancy termination; eighteen states (of the twenty-two with shield protections) and D.C. have definitions or provisions that explicitly cover gender-affirming care.<sup>19</sup>

First, shield laws seek to protect in-state providers' licenses and malpractice insurance rates.<sup>20</sup> If a non-shield state tries to impose criminal or civil liability on a healthcare professional providing an abortion to someone from another state, that prosecution or lawsuit could be reported to the provider's licensing board. Being named as a defendant too many times or being subject to a disciplinary investigation, even if the provider ultimately prevails, could result in licensure suspension, higher malpractice insurance costs, and reputational damage. Shield laws prohibit state medical boards and in-state malpractice insurance companies from taking any adverse action against providers who face out-of-state legal consequences for assisting out-of-state abortion patients.

Second, shield laws prohibit state officials from complying with requests related to interstate investigations of legally-protected reproductive healthcare, both civil and criminal.<sup>21</sup> Shield states have exempted abortion providers from the

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<sup>15</sup> U.S. FOOD & DRUG ADMIN., RISK EVALUATION AND MITIGATION STRATEGY (REMS) SINGLE SHARED SYSTEM FOR MIFEPRISTONE 200 MG (2021).

<sup>16</sup> See *Abortion Pills*, *supra* note 14.

<sup>17</sup> *Frequently Asked Questions*, ABORTION ON DEMAND, <https://abortionondemand.org/faq/> (last visited Jan. 30, 2026).

<sup>18</sup> *Get Abortion and Miscarriage Care, Wherever You Are*, AID ACCESS, <https://aidaccess.org/en/> (last visited Jan. 30, 2026).

<sup>19</sup> See *Shield Laws for Reproductive and Gender-Affirming Health Care: A State Law Guide*, *supra* note 12. Because exact provisions vary, to find what is in a particular state's law requires consulting that statute, not a general list of what shield protections include.

<sup>20</sup> Cohen et al., *Understanding Shield Laws*, *supra* note 2, at 586-87.

<sup>21</sup> *Id.* at 585.

requirements of interstate discovery and witness subpoena laws, which states otherwise enact to incentivize cooperation among state and local law enforcement agencies.<sup>22</sup> These provisions curbing in-state investigations, like all shield provisions, apply only to abortions that are legal in the provider's state. And such an exemption does not protect providers if they travel to the anti-abortion state, where the provider would be subject to that state's laws or a judgment entered in that state's courts. Nevertheless, shield laws try to prevent state actors, such as courts and law enforcement agencies, in the provider's home state from supporting or aiding another state's investigation related to legally-protected reproductive healthcare.

Third, shield policies exempt abortion providers from the state's extradition requirements so long as the individual is not fleeing from justice, covering the provider who never stepped foot in another state.<sup>23</sup> Some states' previously-enacted extradition laws permit or obligate the state to extradite the accused, even if the person has never been in the other state and thus has not fled. As described below, shield laws create exceptions to those provisions.

Fourth, some state shield laws create a cause of action against anyone who interferes with provision of legally-protected reproductive health care.<sup>24</sup> These provisions recognize out-of-state judgments but permit a new state tort claim for interfering with the reproductive health care that was lawful in the state in which it occurred.<sup>25</sup>

Finally, as of the time of publication of this piece, eight shield laws explicitly cover care beyond services delivered in-state, covering both providers providing caring for those traveling to their state as well as providers mailing medication abortion pills out of state, even to states that ban abortion: California, Colorado, Maine, Massachusetts, New York, Rhode Island, Vermont, and Washington.<sup>26</sup> The aforementioned states include language in their shield laws that defines legally-protected reproductive health care (with varying formulations) as care that occurs regardless of patient location. So long as shield-state providers follow their own state's laws, they are covered under the state's shield laws even though non-shield states might view the providers' conduct as violating their own abortion and licensure laws. These shield protections apply to providers who are licensed and located in the shield state at the time of care; they do not apply to actions that fall outside the state's definition of legally-protected reproductive healthcare.

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<sup>22</sup> See Rachel Rebouché, *Shield Laws Are the Fault Line in the Battle over Abortion Access*, NATION (Feb. 20, 2025), <https://www.thenation.com/article/society/shield-laws-fault-line-abortion-access/>.

<sup>23</sup> Cohen et al., *Understanding Shield Laws*, *supra* note 2, at 585.

<sup>24</sup> See, e.g., Public Policy Office, *Shield Laws Related to Sexual and Reproductive Health Care*, GUTTMACHER (Oct. 20, 2025), <https://www.guttmacher.org/state-policy/explore/shield-laws-sexual-and-reproductive-health-care>.

<sup>25</sup> Cohen et al., *Understanding Shield Laws*, *supra* note 2, at 588.

<sup>26</sup> Cohen et al., *Abortion Shield Laws in Action*, *supra* note 2, at 911.

#### IV. SHIELD LAWS' SUCCESSES

Shield laws, particularly the laws in the eight jurisdictions just described, have had a significant impact on the post-*Dobbs* landscape of abortion provision. According to the #WeCount study, which counts abortions since *Roe* was overturned, shield laws facilitated over 12,000 abortions per month in the last few months of 2024.<sup>27</sup> Of those 12,000, patients in states with total abortion bans or bans at six weeks of gestation receive the majority of pills.<sup>28</sup> The remainder, roughly 15% of the total shield abortions, are sent to states where abortion is legal but where state law bans or severely restricts provision of abortion via telehealth.<sup>29</sup>

What this means for individual states is that the average number of abortions taking place after *Roe* was overturned is now higher than the number taking place before. Moreover, #WeCount released state-by-state data for each state with a total abortion ban showing how many residents of that state traveled out of state to get an abortion along with how many received abortion pills via shield providers.<sup>30</sup> In almost all of these states, totaling these two numbers demonstrates an increase in abortions for that state's residents compared to before *Dobbs*.<sup>31</sup> The combination of out-of-state travel and shield provision has blunted anti-abortion attempts to reduce, on the road to eliminating, abortion nationwide.<sup>32</sup>

Although we do not have data on the effects of the non-telehealth parts of the shield laws, there is reason to believe those provisions have had an impact as well. Anecdotally, providers report that the existence of shield laws gives them and their colleagues reassurance when caring for patients traveling to their states. Indeed, travel across state lines to receive an in-person abortion has nearly doubled since *Dobbs*.<sup>33</sup> Shield laws' protection against out of state legal attacks likely reassures providers who might otherwise hesitate to care for patients travelling from a state with an abortion ban.

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<sup>27</sup> See #WeCount Report, *April 2022 to December 2024*, SOC'Y FAM. PLAN. (June 23, 2025), <https://societyfp.org/research/wecount/wecount-december-2024-data/>.

<sup>28</sup> See Abigail R.A. Aiken et al., *Provision of Abortion Medications Using Online Asynchronous Telemedicine Under Shield Laws in the US*, 334 J. AM. MED. ASS'N 1388, 1388-89 (2025).

<sup>29</sup> See *id.*

<sup>30</sup> See generally #WeCount Report, *April 2022 to June 2024*, SOC'Y FAM. PLAN. (Oct. 22, 2024), <https://societyfp.org/wp-content/uploads/2024/10/WeCount-Report-8-June-2024-data.pdf> (providing monthly reports of abortions across the United States).

<sup>31</sup> See generally *id.* at 12-23.

<sup>32</sup> There are, however, caveats to note. For one, mailed medication abortion depends on having an internet connection or a pregnancy for which medication abortion is not contraindicated, to name two limitations. For another, even with remote care, the need for clinical spaces, for abortion past ten or twelve weeks, or when a patient is not a candidate for mailed pills, will not disappear. See generally *Abortion Pills*, *supra* note 14, at 317 ("abortion shield laws that protect cross-border telehealth, efforts to evade abortion bans through missed period pills and advance provision, and pharmacist prescribing of abortion pills.").

<sup>33</sup> See *New Data Show That Interstate Travel for Abortion Care in the United States Has Doubled Since 2020*, GUTTMACHER (Dec. 7, 2023), <https://www.guttmacher.org/news-release/2023/new-data-show-interstate-travel-abortion-care-united-states-has-doubled-2020>.

## V. SHIELD LAWS' CHALLENGES

With shield laws being such an important part of post-*Dobbs* abortion access, it should come as no surprise that they have been a focus of the anti-abortion movement. However, so far, none of the challenges described in this section has succeeded.

Among the attacks on shield laws are the general attempts to restrict abortion during the second Trump Administration. Although not specifically directed at shield provision, they would have a significant effect on shield provision if successfully implemented. The two most prominent attempts to limit abortion during his administration have been to adopt a radical interpretation of the Comstock Act and to urge the U.S. Food & Drug Administration (FDA) to reimpose restrictions on mifepristone.

Regarding the Comstock Act, the anti-abortion movement has been urging the Department of Justice to interpret the 1873 law to ban the mailing of any item that could induce an abortion.<sup>34</sup> This interpretation would apply equally to mailed abortion pills and mailed abortion equipment and instruments. The focus, however, has been on applying the Comstock Act to ban mailing abortion pills, whether within states where abortion remains legal or into states where abortion is illegal. The Trump Administration has given no indication that it will adopt this interpretation, and President Trump dismissed the possibility while on the campaign trail in 2024.<sup>35</sup> Yet this possibility remains a priority of conservative groups like the Heritage Foundation,<sup>36</sup> and if its enforcement were to be approved by the courts, abortion provision pursuant to shield laws could violate federal criminal law.

Likewise, if the FDA were to change how it regulates mifepristone,<sup>37</sup> shield provision would also be altered. Litigation initiated by the anti-abortion non-profit group, Alliance for Hippocratic Medicine, asked federal courts, among other actions, to reimpose the in-person pick-up requirement that previously blocked mailing mifepristone and, more extreme, to rescind the 2000 approval of mifepristone altogether.<sup>38</sup> If either of these changes were to occur, shield providers would no longer be able to mail mifepristone into states with bans, either because mailing mifepristone was no longer permitted or mifepristone was no longer approved.

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<sup>34</sup> Reva B. Siegel & Mary Ziegler, *Comstockery: How Government Censorship Gave Birth to the Law or Sexual and Reproductive Freedom, and May Again Threaten It*, 134 *YALE L.J.* 1068, 1156-62 (2025).

<sup>35</sup> Alice Miranda Ollstein, 'It's Not a Pro-Life Position': Anger After Trump Says No to Comstock, *POLITICO* (Aug. 20, 2024, 4:56 PM), <https://www.politico.com/news/2024/08/20/trump-comstock-enforcement-00175068>.

<sup>36</sup> GENE HAMILTON, *MANDATE FOR LEADERSHIP 2025: THE CONSERVATIVE PROMISE* 562 (2023).

<sup>37</sup> Mifepristone is the first of the two-drug regimen the FDA has approved for medication abortion. See generally *Abortion Pills*, *supra* note 14, at 317 (discussing the strategies used to alter regulation of mifepristone—differing from current FDA regulation).

<sup>38</sup> See, e.g., Letter from Americans United for Life to FDA Commissioner (Jan. 22, 2025), [https://aui.org/wp-content/uploads/2025/01/AUL-FDA-LETTER\\_REMS\\_Final.pdf](https://aui.org/wp-content/uploads/2025/01/AUL-FDA-LETTER_REMS_Final.pdf).

Nevertheless, shield providers might be able to work around these changes if the FDA were to reverse course on mifepristone approval or restrictions. Unlike the effort to use the Comstock Act to punish anyone or any entity mailing any abortion pills, FDA actions would apply only to mifepristone, leaving open the possibility shield providers would continue to mail misoprostol. That drug, approved for ulcer treatment and used off-label both with and without mifepristone for abortion,<sup>39</sup> would not necessarily change. At present, despite pressure from the anti-abortion movement in the first year of the Trump Administration, the FDA has not committed to a process or a timeline for reviewing restrictions on mifepristone.<sup>40</sup>

Also, the ongoing lawsuit against the FDA over mifepristone indirectly and directly implicates shield provision of abortion. In November 2022, an anti-abortion doctors' organization sued the FDA arguing that the agency acted in an arbitrary and capricious manner when it approved mifepristone in 2000 and when it changed restrictions on the drug since that time, including in 2021 when the agency announced it would suspend the in-person pick-up requirement.<sup>41</sup> If successful, this lawsuit would have had the same impact on shield provision as the current political efforts to push the FDA to alter mifepristone's approval or regulation.<sup>42</sup> However, in June 2024, the Supreme Court ruled that the plaintiff doctors' organization did not have standing to bring the case in federal court.<sup>43</sup>

Yet, before the Supreme Court's ruling, the Attorneys General of three states—Kansas, Missouri, and Idaho<sup>44</sup>—intervened in the case. In doing so, the three states directly raised, among other arguments, the issue of shield provision. They claimed that mailing abortion pills into these states under the protection of shield laws threatened the sovereignty of non-shield states.<sup>45</sup> The district court

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<sup>39</sup> See *Abortion Pills*, *supra* note 14, at 325.

<sup>40</sup> See, e.g., Letter from Marin A. Makary, FDA Commissioner, to Josh Hawley, United States Senator (June 2, 2025), <http://media.aclj.org/pdf/Makary-Letter-6.2.25.pdf>.

<sup>41</sup> See Complaint, All. for Hippocratic Med. v. FDA, No. 22-cv-00223, 2022 WL 17091784 (N.D. Tex. Nov. 18, 2022).

<sup>42</sup> See generally discussion *supra* notes 37-40 and accompanying text (explaining the impact FDA changes with respect to mifepristone would have on shield provision).

<sup>43</sup> See *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 396-97 (2024).

<sup>44</sup> The attorney general of Arkansas has taken a different approach. In May 2024, Attorney General Tim Griffin wrote to a brick-and-mortar New York abortion clinic (that, to the best of anyone's knowledge, did not mail pills pursuant to the state shield law) and to the Dutch organization Aid Access demanding they stop mailing pills into Arkansas. See *Attorney General Griffin Issues Cease and Desist Letters to Abortion Pill Companies Advertising in Arkansas*, TIM GRIFFIN: ATT'Y GEN. ARK. (May 21, 2024), <https://arkansasag.gov/news-release/attorney-general-griffin-issues-cease-and-desist-letters-to-abortion-pill-companies-advertising-in-arkansas/>. While the abortion clinic changed some language on its website in response (which the Attorney General hailed as a victory), Aid Access responded that it "provides all support [that patients] need and we will not stop doing that." See also Alex Kienlen, *Arkansas Says New York Woman's Clinic Complying with Cease & Desist Order on Abortion Pill Access*, KARK.COM (June 6, 2024, 6:01 PM), <https://www.kark.com/news/state-news/arkansas-says-new-york-womans-clinic-complying-with-cease-desist-order-on-abortion-pill-access/>.

<sup>45</sup> See Suggestions for Motion to Intervene, All. for Hippocratic Med. v. FDA, No. 2:22-cv-223, 2023 U.S. Dist. Ct. Motions LEXIS 246470 (N.D. Tex. Nov. 3, 2023).

judge agreed, allowing intervention on this basis.<sup>46</sup> The case, now approaching the end of its third year of litigation, sits in a federal court in Missouri which will decide pending procedural motions, including the Trump Administration's motion to dismiss the case.<sup>47</sup>

Finally, at the time of writing, there have been three efforts to hold shield doctors accountable for mailing pills into states with abortion bans, the first two against the same New York physician. The initial action came from the Attorney General of Texas, Ken Paxton. In December 2024, Paxton sued the doctor for mailing abortion pills to a Texas woman.<sup>48</sup> The complaint alleged that the Texas woman received abortion pills from the New York doctor; the woman took the pills and then called "the biological father" asking him to take her to the hospital because she was experiencing bleeding.<sup>49</sup> The complaint further alleges that after the woman was seen at the hospital, the biological father was told that she "'had been' nine weeks pregnant before losing the child."<sup>50</sup> Then, at the woman's residence, the man found the medications.<sup>51</sup> The complaint's allegations from the perspective of the man make it clear that he, not the woman who used the pills, gave this information to Paxton.

Texas's complaint alleges that the New York doctor violated Texas law by "illegally prescribing abortion-inducing drugs to Texas residents and illegally practicing medicine in the State of Texas."<sup>52</sup> Paxton sued the provider, licensed in New York but not Texas, for practicing medicine in Texas without a Texas medical license.<sup>53</sup> The lawsuit also alleged violation of Texas's abortion laws, which prohibit all abortion at all points of pregnancy except in very limited circumstances (that are not applicable in this case) as well mailing abortion-inducing drugs.<sup>54</sup> The complaint sought an injunction against the New York doctor from further violating Texas law and civil penalties of at least \$100,000.<sup>55</sup> New York's shield law prevents New York courts from compelling the doctor-defendant to respond to the complaint or participate in the lawsuit,<sup>56</sup> and the doctor chose not to do so. As a result, in mid-February 2025, the Texas court issued a default judgment against the doctor.<sup>57</sup>

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<sup>46</sup> All. for Hippocratic Med. v. FDA, No. 2:22-cv-00223-Z, 2024 WL 1260639, at \*1, \*7 (N.D. Tex. Jan. 12, 2024).

<sup>47</sup> See Defendants' Reply in Support of Motion to Dismiss Intervenor-States' Amended Complaint, Missouri v. FDA, No. 2:22-cv-223, 2025 U.S. Dist. Ct. Motions LEXIS 94157 (N.D. Tex. May 5, 2025).

<sup>48</sup> Petition & Application for Temporary & Permanent Injunctive Relief at 1, Texas v. Carpenter, No. 471-08943-2024 (471st Dist. Ct. Collin Cnty., Tex. Dec. 12, 2024).

<sup>49</sup> *Id.* at 5-6.

<sup>50</sup> *Id.* at 6.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 5-7.

<sup>53</sup> TEX. HEALTH & SAFETY CODE § 171.003 (LexisNexis 2025); 22 TEX. ADMIN. CODE § 174.8 (West 2024) (repealed 2025).

<sup>54</sup> TEX. HEALTH & SAFETY CODE § 170A.002(a)-(b) (LexisNexis 2025).

<sup>55</sup> Petition, *supra* note 48, at 4.

<sup>56</sup> N.Y. C.P.L.R. § 3119(g)-(h) (CONSOL. 2025).

<sup>57</sup> Order Granting Permanent Injunction, Texas v. Carpenter, No. 471-08943-2024 (471st Dist. Ct. Collin Cnty., Tex. Feb. 13, 2025).

In most civil cases in this posture, if the out-of-state defendant does not satisfy the judgment on her own, Texas would be able ask New York courts to enforce the judgment. However, under New York's shield law, the court clerk where the doctor lives has twice refused docketing the out-of-state judgment, once in March 2025 and again in July 2025.<sup>58</sup> After the clerk refused the second time, New York's governor, Kathy Hochul, issued a statement justifying the clerk's actions based on "New York's shield laws" and the importance of "defending the freedom generations of women fought to secure."<sup>59</sup> She concluded her statement, "Our response to their baseless claim is clear: no way in hell. New York won't be bullied. And I'll never back down from this fight."<sup>60</sup> In late July 2025, in taking a next step to enforce the fines, Paxton petitioned a New York court to force the clerk to file the judgment and a summons against the shield provider.<sup>61</sup>

New York's refusal to enforce the Texas judgment is not only based on statutory ground, but also supported by constitutional precedent. While generally the Full Faith and Credit Clause of the U.S. Constitution requires states to recognize other states' judgments in civil matters, there are two exceptions to that requirement.

First, if the state imposing the judgment had no personal jurisdiction over the defendant, then there is no constitutional imperative to recognize that judgment.<sup>62</sup> Given legal precedent suggests that doctors who provide telehealth services to patients in another state voluntarily avail themselves of the laws of that state and thus subject themselves to that state's personal jurisdiction, it might be difficult for the New York doctor to claim this exception applies.<sup>63</sup>

Second, when the out of state judgment is penal, rather than compensatory, the decision is more like a criminal judgment than a civil one, and criminal judgments are not covered by the Full Faith and Credit Clause.<sup>64</sup> Here, nothing in the Texas lawsuit is about compensating a private individual for injury or loss. The plaintiff is the state of Texas, and there is no claim in the complaint that the state has suffered monetary damages the way an individual would; rather, the complaint is for, as the Supreme Court has described the penal exception in the past, "a breach and violation of public rights and duties, which affect the whole community."<sup>65</sup> Moreover, there is no allegation that the woman who took the pills suffered harm that damages can remedy or that the "biological father" suffered harm that warranted a monetary award. Rather, the complaint revolves around the allegation that the New York doctor violated Texas state law and needs to pay a lump sum

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<sup>58</sup> See Michael Hill, *New York Clerk Again Refuses to Enforce Texas Judgment Against Doctor Who Provided Abortion Pills*, ASSOCIATED PRESS (July 14, 2025, 1:46 PM), <https://apnews.com/article/abortion-pills-lawsuit-texas-new-york-carpenter-2601c059ed475f97e8c8bdd722cce7da>.

<sup>59</sup> Press Release, Office of the Governor of N.Y., Statement from Governor Kathy Hochul (July 14, 2025), <https://www.governor.ny.gov/news/statement-governor-kathy-hochul-93>.

<sup>60</sup> *Id.*

<sup>61</sup> Verified Petition, *Texas v. Bruck*, No. EF2025-2536 (N.Y. Sup. Ct. July 28, 2025).

<sup>62</sup> See, e.g., *Milliken v. Meyer*, 311 U.S. 457, 462 (1940).

<sup>63</sup> See, e.g., *Bullion v. Gillespie*, 895 F.2d 213, 216-17 (5th Cir. 1990).

<sup>64</sup> See *Nelson v. George*, 399 U.S. 224, 229 (1970).

<sup>65</sup> *Huntington v. Attrill*, 146 U.S. 657, 668-69 (1892).

fine as a result, not an amount tied to any particular personal harm. As appears to be the case here, the essence of a penal judgment is its purpose to punish rather than to compensate. Federal courts or the Supreme Court could reverse or narrow precedent in this area; new arguments, of course, will be marshalled on both sides of these constitutional questions.<sup>66</sup>

A month after the Texas civil complaint was filed against the New York doctor, Louisiana officials brought criminal charges against the same physician. In January 2025, a West Baton Rouge grand jury indicted the doctor for sending abortion pills to a Louisiana woman who then gave the pills to her seventeen year old daughter.<sup>67</sup> According to press reports, the daughter took the pills and went to a local hospital after experiencing bleeding.<sup>68</sup> The local prosecutor and the Louisiana Attorney General allege the mother forced her daughter to take the pills, though the grand jury did not indict the mother for coerced abortion. Rather, the grand jury indicted the doctor and the mother for criminal abortion by means of abortion-inducing drugs, a felony that carries with it a one-to-five-year prison sentence.<sup>69</sup>

Like the Texas case against the doctor, the Louisiana case has run head-on into the New York shield law. While the mother who was charged has plead not guilty and has hearings set for later in 2025,<sup>70</sup> the doctor is not in Louisiana and therefore has not been arrested or tried. As a result, in February 2025, the Louisiana governor signed an extradition warrant seeking New York to deliver the doctor to Louisiana to face charges.<sup>71</sup> New York's governor quickly responded, rejecting the extradition request, saying, "I will not be signing an extradition order that came from the governor of Louisiana, not now, not ever."<sup>72</sup> In a second press appearance, she declared she would extradite "over my dead body."<sup>73</sup>

New York's response to the Louisiana indictment is on solid ground. Typically, the U.S. Constitution's Extradition Clause requires states to extradite

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<sup>66</sup> See generally Lea Brilmayer, *Abortion, Full Faith and Credit, and the "Judicial Power" Under Article III: Does Article IV of the U.S. Constitution Require Sister-State Enforcement of Anti-Abortion Damages Awards?*, 44 COLUM. J. GENDER & L. 441 (2024) (enumerating established limits on sister-state judgment enforcement); see also Diego A. Zambrano et al., *The Full Faith and Credit Clause and the Puzzle of Abortion Laws*, 98 N.Y.U. L. REV. ONLINE 382 (2023) (observing that FFC doctrine poses obstacles for abortion shield measures).

<sup>67</sup> Bill of Indictment, *Louisiana v. Carpenter*, No. 250187 (La. Dist. Ct. Jan. 31, 2025).

<sup>68</sup> Pam Belluck & Emily Cochrane, *New York Doctor Indicted in Louisiana for Sending Abortion Pills There*, N.Y. TIMES (Jan. 31, 2025), <https://www.nytimes.com/2025/01/31/health/abortion-louisiana-new-york-prosecution-shield-law.html>.

<sup>69</sup> LA. REV. STAT. § 14:87.9 (2025).

<sup>70</sup> Lorena O'Neil, *Louisiana Mother Pleads Not Guilty Following Abortion Pill Indictment*, LA. ILLUMINATOR (Mar. 11, 2025, 4:59 PM), <https://lailluminator.com/2025/03/11/abortion-pill-10/>.

<sup>71</sup> See Extradition Warrant from Jeff Landry, Governor of Louisiana, to Governor of New York (Feb. 11, 2025), <https://gov.louisiana.gov/assets/2025-Extras/Extradition-warran-Doctor-Margaret-Carpenter.pdf>.

<sup>72</sup> Press Release, Office of the Governor of N.Y., Reproductive Freedom Announcement (Feb. 13, 2025) (transcript available at <https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-governor-hochul-makes-reproductive-freedom-announcement>).

<sup>73</sup> Press Release, Office of the Governor of N.Y., Remarks at the 2025 Caucus Reception (Feb. 16, 2025) (transcript available at <https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-governor-hochul-delivers-remarks-2025-caucus-reception>).

accused individuals to the state making the accusation so the individual can stand trial.<sup>74</sup> This is a mandatory requirement, not an optional one. However, by its language and long-standing precedent, the clause (as well as the federal statute implementing the clause) applies only to fugitives, meaning those who were physically present in the state at the time of the alleged crime and then fled to another state.<sup>75</sup> Importantly, courts have long rejected the idea of virtual presence via mail or other means, meaning someone who was outside the state at the time of the alleged crime is not a fugitive and not covered by the clause's extradition mandate.<sup>76</sup>

This requirement of physical presence creates a gap in the country's extradition framework. Most states have filled this gap by passing their own laws that obligate their governors to extradite even if the accused was not physically present at the time of the alleged crime.<sup>77</sup> However, shield law extradition provisions exempt crimes that meet the definition of lawful reproductive health care from the state extradition requirements.<sup>78</sup>

New York's shield law includes this provision.<sup>79</sup> Because the doctor was not in Louisiana at the time of the crime,<sup>80</sup> the governor followed the shield law and did not extradite. This refusal is consistent with both the Constitution and federal extradition law because the accused doctor was not a fugitive. Louisiana has hinted that it might challenge this rejection in federal court or seek federal assistance in effectuating the warrant,<sup>81</sup> but there is no precedent for federal involvement to force extradition of a non-fugitive. And were this case to go before the Supreme Court, a ruling for Louisiana would go against the plain language of the Constitution and upend precedent in this long-settled area of law.

In the meantime, the New York doctor faces risks if she travels outside of New York. Louisiana officials have said they have warrants out for the doctor's arrest in all fifty states and that she needs to "be careful with her travel plans" because other states might extradite her.<sup>82</sup> This risk is real, even in states with abortion shield laws. If the New York doctor traveled to Massachusetts or California, two of the most abortion-protective states in the country, neither Massachusetts's nor California's shield laws would protect her because she was neither licensed nor present in those states when providing the disputed care, putting her at risk of being extradited if a warrant came to the attention of state or

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<sup>74</sup> U.S. CONST. art. IV, § 2, cl. 2.

<sup>75</sup> Cohen et al., *New Abortion Battleground*, *supra* note 4, at 47.

<sup>76</sup> *Id.*

<sup>77</sup> See, e.g., N.J. STAT. ANN. § 2A:160-14.

<sup>78</sup> Cohen et al., *New Abortion Battleground*, *supra* note 4, at 47-48.

<sup>79</sup> N.Y. CRIM. PROC. LAW § 570.17.

<sup>80</sup> *But see* Extradition Warrant, *supra* note 71 (Oddly, the Louisiana extradition warrant says, "the accused was present in this State at the time of the commission of said crime and fled from the justice of this State." That is plainly incorrect.).

<sup>81</sup> See John Simerman, *DA Tony Clayton Says Evidence Against New York Abortion Provider Too Strong to Ignore*, NOLA.COM (Feb. 14, 2025), [https://www.nola.com/news/courts/louisiana-new-york-abortion-pills-arrest/article\\_de900a40-ca83-11ef-8992-23264ecdc5e6.html](https://www.nola.com/news/courts/louisiana-new-york-abortion-pills-arrest/article_de900a40-ca83-11ef-8992-23264ecdc5e6.html).

<sup>82</sup> Greg LaRose, *New York Governor Rejects Louisiana Extradition Request for Doctor Accused of Mailing Abortion Pills*, LA. ILLUMINATOR (Feb. 13, 2025, 8:11 PM), <https://lailluminator.com/2025/02/13/new-york-extradition/>.

local authorities. So far, only Vermont, in a bill signed into law in mid-2025, has a reciprocity provision in its shield law, protecting doctors from other shield states under Vermont's shield law.<sup>83</sup>

Finally, the developing battle over shield provision has emerged in federal court under a different strategy. In July 2025, a Texas man filed a wrongful death lawsuit against a California shield provider in federal court, alleging that the doctor mailed medication abortion to his pregnant girlfriend, who ended her pregnancy. The lawsuit is novel because the individual sued for civil damages under the tort of wrongful death (which, under the relevant Texas statute, applies to death of the “unborn”) and in federal court via diversity jurisdiction (claiming damages of over \$75,000 between parties from different states).<sup>84</sup> The complaint, which seeks damages and a nationwide injunction “on behalf of a class of all current and future fathers of unborn children” against the defendant doctor, also cites the Comstock Act as the basis for the doctor performing a “wrongful” act.<sup>85</sup>

## VI. CONCLUSION

Shield laws have been in existence now for more than three years, and abortion provision via telehealth into states with abortion bans has been happening pursuant to telehealth shield laws for at least two. Even though the anti-abortion movement has focused much of its attention on stopping abortion pills, particularly as prescribed by shield providers, providers on the ground have not been deterred by lawsuits, political pressure, or the threat of personal liability.<sup>86</sup>

No one knows the future, though. The Trump Administration could change its policy with respect to the Comstock Act or mifepristone. And court challenges could chill shield provision as those cases work their way to the Supreme Court, which could change well-established law. A new set of challenges—unlike those seen so far—could also emerge, potentially creating problems shield providers and shield laws might not withstand.

Until then, shield laws have given providers the confidence to care for patients who travel, and they have given patients who cannot travel the option to get pills even if they live in a state with a strict abortion ban. These novel laws cannot make up for the loss of a national right shared by everyone, but they have done a sizable portion of the work in making the blow of overturning *Roe* not nearly as devastating as many feared.

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<sup>83</sup> VT. STAT. ANN. tit. 1, § 150(b)(4) (2025).

<sup>84</sup> Complaint, *Rodriguez v. Coeytaux*, No. 3:25-cv-00225 (S.D. Tex. July 20, 2025), ECF No. 1.

<sup>85</sup> *Id.* at 7, 10 (“[The Comstock Act] imposes criminal liability on any person who: a. Knowingly uses the mails for the mailing, carriage, or delivery of abortion-inducing drugs . . .”).

<sup>86</sup> See Rosemary Westwood, *After Historic Indictment, Doctors Will Keep Mailing Abortion Pills over State Lines*, NPR (Mar. 19, 2025, 5:00 AM), <https://www.npr.org/sections/shots-health-news/2025/03/19/nx-s1-5312115/margaret-carpenter-indictment-telemedicine-abortion-louisiana-mail-mifepristone-misoprostol>.

# CANARIES IN THE COAL MINE: RURAL WOMEN, MATERNAL HEALTH, AND THE FUTURE OF FEMINIST COALITION BUILDING

Lisa R. Pruitt\*

## I. INTRODUCTION

Given the structure of the U.S. Senate and the Electoral College, scholars and pundits frequently assert and comment on the outsized political power of rural populations.<sup>1</sup> This presumed political power may obscure the fact that rural residents are, in fact, highly vulnerable on various fronts, particularly in terms of socioeconomic well-being and health.<sup>2</sup> Among those living in rural regions, women are more vulnerable still<sup>3</sup>—for many of the same reasons women everywhere are vulnerable, with women of color even more so.<sup>4</sup>

Seeing and *naming* this rural vulnerability is a first step toward strategic coalition building between rural populations and other demographic groups whose vulnerability we frequently discuss, specifically people of color. Naming rural vulnerability seems particularly wise when recent empirical evidence suggests that

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<sup>1</sup> See Kaceylee Klein & Lisa R. Pruitt, *Rural Bashing*, 57 U. RICH. L. REV. 965, 965 (2023) (evaluating the argument that rural people are over-represented in the electoral college and U.S. Senate) (citing, e.g., Emily Badger, *As American as Apple Pie? The Rural Vote's Disproportionate Slice of Power*, N.Y. TIMES (Nov. 20, 2016), <https://www.nytimes.com/2016/11/21/upshot/as-american-as-apple-pie-the-rural-votes-disproportionate-slice-of-power.html>; Katherine J. Florey, *Losing Bargain: Why Winner-Takes-All Vote Assignment is the Electoral College's Least Defensible Feature*, 68 CASE W. RES. L. REV. 317 (2017)).

<sup>2</sup> See *infra* notes 25-37 and accompanying text (detailing rural health deficits).

<sup>3</sup> See Lisa R. Pruitt, *Gender, Geography & Rural Justice*, 23 BERKELEY J. GENDER L. & JUST. 338, 338 (2008); see also Lisa R. Pruitt, *The Women Feminism Forgot: Rural and Working-Class White Women in the Era of Trump*, 49 TOLEDO L. REV. 537, 537 (2018) [hereinafter Pruitt, *Women Feminism Forgot*]; see also Lisa R. Pruitt, *Toward a Feminist Theory of the Rural*, 2007 UTAH L. REV. 421, 421 [hereinafter Pruitt, *Feminist Theory of the Rural*].

<sup>4</sup> See generally Paula A. Braveman et al., *Systemic and Structural Racism: Definitions, Examples, Health Damages, and Approaches to Dismantling*, 41 HEALTH AFFS. 171 (2022) (discussing various forms of structural racism, including residential segregation, biased lending practices, home ownership barriers, intergenerational wealth gaps, and biased policing); Lisa Avalos, *The Under-Policing of Crimes Against Black Women*, 73 CASE W. L. REV. 795, 796-96 (2023) (explaining the systemic under-policing of violent crimes against women of color and specifically Black women); Peter Hepburn, Renee Louis & Matthew Desmond, *Racial and Gender Disparities Among Evicted Americans*, EVICTION LAB (Dec. 16, 2020), <https://evictionlab.org/demographics-of-eviction/> (noting that women of color are disproportionately threatened with eviction and are evicted); Madeline Y. Sutton et al., *Racial and Ethnic Disparities in Reproductive Health Services and Outcomes, 2020*, 137 OBSTETRICS & GYNECOLOGY 225 (2021) (discussing systemic racial injustices in reproductive health disparities).

folks living in the rural United States strongly identify as rural.<sup>5</sup> They also tend to feel they are not getting their fair share of government resources.<sup>6</sup> Acknowledging rural structural deficits, including their human costs, is thus a key to collaborating with rural people.

Complicating the situation from both political and policy standpoints is rural America's association with Donald Trump. This association arose from rural voters' overwhelming support for Trump in 2016, the degree of which has only increased in subsequent elections.<sup>7</sup> Rural America's broad alignment with Trump has caused some progressive elites to turn a cold shoulder to rural populations and their needs.<sup>8</sup> This is an unhelpful response in an era when coalition building is more necessary than ever if progressives are to regain the political power required to implement policies that will mitigate risks for—and better serve—all vulnerable populations.

It is against that fraught and shifting political landscape that I offer a brief and broad survey of some of the ways in which recent actions by the second Trump administration will hurt rural populations. Part II catalogues some hardships likely to land disproportionately on rural women and families. Part III narrows the focus to reproductive health and then zooms in on the issue of maternal mortality to illustrate how this population's vulnerability is likely to be exacerbated by recently enacted conservative laws and policies, primarily at the federal level. The Conclusion discusses how the nation's maternal mortality problem—already at crisis levels among developed nations<sup>9</sup>—provides a ready opportunity for coalition building, not only across race and ethnicity, but also along the rural-urban continuum.

## II. THE IMPACT OF TRUMP'S DOMESTIC POLICY AGENDA ON RURAL WOMEN AND FAMILIES

Rural women are a highly economically disadvantaged group, earning just 64 cents for every dollar earned by all men and just 76 cents for every dollar earned

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<sup>5</sup> See Nicholas Jacobs, *What Liberals Get Wrong About 'White Rural Rage' — Almost Everything*, POLITICO (Apr. 5, 2024), <https://www.politico.com/news/magazine/2024/04/05/white-rural-rage-myth-00150395>.

<sup>6</sup> Lisa R. Pruitt, *Leveraging Rural Identity to Revive Two-Party Politics in Rural America*, in RETHINKING RURAL POLITICS: IDENTITY, IDEOLOGY, AND INTERSECTIONALITY WITHIN RURAL AMERICA (Nicholas F. Jacobs 2025) [hereinafter Pruitt, *Leveraging Rural Identity*].

<sup>7</sup> See, e.g., DANIEL M. SHEA & NICHOLAS F. JACOBS, THE RURAL VOTER: THE POLITICS OF PLACE AND THE DISUNITING OF AMERICA (2023); Lisa R. Pruitt, *Mustering the Political Will to Help Left-Behind Places in a Polarized USA*, 17 CAMBRIDGE J. REGIONS, ECON. & SOC'Y 407, 410 (2024) [hereinafter Pruitt, *Mustering*].

<sup>8</sup> Klein & Pruitt, *supra* note 1; Pruitt, *Mustering*, *supra* note 7; Pruitt, *Women Feminism Forgot*, *supra* note 3.

<sup>9</sup> Munira Z. Gunja et al., *Insights into the U.S. Maternal Mortality Crisis: An International Comparison*, COMMONWEALTH FUND (June 4, 2025), <https://www.commonwealthfund.org/publications/issue-briefs/2024/jun/insights-us-maternal-mortality-crisis-international-comparison> (reporting 22.3 maternal deaths per 100,000 live births in the United States, compared, for example, to 2.8 in The Netherlands and 0 in Norway).

by rural men.<sup>10</sup> While good jobs skew toward men all along the rural-urban continuum, the gender disparity is more pronounced in rural areas, where women make up 48% of the workforce but hold only 37% of good jobs.<sup>11</sup> The lack of good jobs is just one of the challenges facing rural parents. Physical isolation and limited transportation are other obstacles to rural family flourishing—obstacles that are typically greatest for single-parents, who are less likely to have formal education beyond high school and more likely to live in poverty.<sup>12</sup>

All these vulnerabilities are likely to be aggravated by the early actions of the second Trump administration. Probably most consequential for rural America is Trump’s signature domestic policy legislation, the so-called “One Big Beautiful Bill Act,” passed by the U.S. Congress, along party lines, in July 2025.<sup>13</sup> The law will cut funding for SNAP and Medicaid, imposing work requirements for both programs with the goal of reducing eligibility and thus saving money.<sup>14</sup> The former cuts are expected to aggravate food insecurity nationwide, and the latter will hurt all individuals who are unable to clear new bureaucratic hurdles to prove their eligibility.<sup>15</sup> Importantly, the Medicaid cuts will also undermine the viability of rural hospitals for reasons detailed below;<sup>16</sup> they will thus hurt entire rural communities, regardless of individual residents’ Medicaid eligibility.

Also of consequence for rural women and families is the current administration’s threat to cut federal funding to various education sectors. The proposed 2026 budget eliminates \$220 million in funding to individual rural schools and will widen existing education disparities between urban and rural students, including by undermining rural Americans’ access to higher education.<sup>17</sup>

<sup>10</sup> Katherine Gallagher Robbins, Jocelyn Frye, & Annie McGrew, *The Gender Wage Gap Among Rural Workers*, CTR. AM. PROGRESS (Apr. 10, 2018), <https://www.americanprogress.org/article/gender-wage-gap-among-rural-workers/>.

<sup>11</sup> Katherine Hazelrigg, *Working Adults in Rural America Are Almost as Likely (50%) as Working Adults in Urban America (54%) to Have a Job That Pays at Least Middle-Class Wages*, *Georgetown University Report Says*, GEORGETOWN UNIV. CTR. ON EDUC. & WORKFORCE (Feb. 29, 2024), <https://cew.georgetown.edu/wp-content/uploads/GeorgetownCEW-Rural-02.29.24.pdf> (discussing Anthony P. Carnevale, Lulu Kam, & Martin Van Der Werf, *Rural America’s Resilient Workforce*, HIGHER EDUC. TODAY (Apr 1, 2024), <https://www.higheredtoday.org/2024/04/01/rural-americas-resilient-workforce/>).

<sup>12</sup> Tracey Farrigan, *In Rural Areas, Single-Parent Families Have Higher Poverty Rates Than Families Headed by Married Couples*, U.S. DEP’T OF AGRIC. ECON. RSCH. SERV. (Feb. 25, 2019), <https://www.ers.usda.gov/data-products/charts-of-note/chart-detail?chartId=91346>.

<sup>13</sup> One Big Beautiful Bill Act, Pub. L. No. 119-21, 139 Stat. 72 (July 4, 2025).

<sup>14</sup> Madeline Ngo & Margot Sanger-Katz, *Richest Gain Most and Poorest Face Steepest Cuts Under G.O.P. Law, Analysis Finds*, N.Y. TIMES (Aug. 11, 2025), <https://www.nytimes.com/2025/08/11/us/politics/trump-gop-policy-bill-rich-poor.html>.

<sup>15</sup> Jeff Stein, *Senate GOP Tax Bill Includes Largest Cut to U.S. Safety Net in Decades*, WASH. POST (June 29, 2025), <https://www.washingtonpost.com/business/2025/06/29/trump-tax-medicare-snap/>.

<sup>16</sup> See Sarah Jane Tribble, *\$50B Rural Health ‘Slush Fund’ Faces Questions, Skepticism*, KFF HEALTH NEWS (July 21, 2025), <https://kffhealthnews.org/news/article/rural-health-transformation-program-hospitals-medicare-implementation-kansas/>; see also *infra* notes 71-82 and accompanying text.

<sup>17</sup> Mishka Espey, *Rural Students Disproportionately Harmed by Trump’s Attacks on Education*, CTR. AM. PROGRESS (June 25, 2025), <https://www.americanprogress.org/press/release-rural-students-disproportionately-harmed-by-trumps-attacks-on-education/>. In a rare bit of good news for rural

In addition, the administration has cut funding to the HeadStart program, a reduction expected to have disproportionate consequences in rural communities, where childcare deficits are already dramatic,<sup>18</sup> undermining women's ability to work outside the home.

All these cuts, along with others, are likely to hurt rural populations more than urban ones, in part because rural poverty rates have long been higher than urban ones.<sup>19</sup> Further, rural local governments and non-profits tend to be more reliant on federal funding to provide any of a range of services; this is a consequence of generally weaker tax bases and an inability to achieve economies of scale in service delivery.<sup>20</sup> Among threatened services and infrastructure from 2025 cuts are libraries,<sup>21</sup> emergency response,<sup>22</sup> public media,<sup>23</sup> and broadband,<sup>24</sup> to name a few.

Some of the most acute spatial inequalities between rural and urban populations relate to health and health care. As urban populations' health outcomes have improved over time, those of rural residents have deteriorated, heightening

schools, Congress in December 2025 renewed the Secure Rural Schools Act, which partly compensates school districts for revenue they lose due to the presence of federal timber land, which is not taxable. Hailey Branson-Potts, *Congress Approves an Economic Lifeline for Rural Schools in California and Elsewhere*, L.A. TIMES (Dec. 9, 2025), <https://www.latimes.com/california/story/2025-12-09/secure-rural-schools-act-california-schools-funding-forestry> (reporting that schools will also receive back payments that were missed while waiting for the law's renewal).

<sup>18</sup> Jackie Mader, *As Federal Dollars for Head Start Slow, Rural Parents Left Without Other Options*, HECHINGER REP. (Apr. 30, 2025), <https://hechingerreport.org/as-federal-dollars-for-head-start-slow-rural-parents-left-without-other-options/>; see also Tracey Farrigan et al., *Rural America at a Glance: 2024 Edition* (Report No. EIB-282), U.S. DEP'T AGRIC. ECON. RSCH. SERV. 3, 7 (2024), [https://ers.usda.gov/sites/default/files/\\_laserfiche/publications/110351/EIB-282.pdf](https://ers.usda.gov/sites/default/files/_laserfiche/publications/110351/EIB-282.pdf) (reporting that rural populations' labor force participation is limited by childcare-related stressors).

<sup>19</sup> Farrigan, *supra* note 12; *About NRHA: About Rural Health Care*, NAT'L RURAL HEALTH ASS'N (last visited Aug. 14, 2025), <https://www.ruralhealth.us/about-us/about-rural-health-care>; Rebecca Glauber & Andrew Schaefer, *Employment, Poverty, and Public Assistance in the Rural United States*, UNIV. N. H. CARSEY SCH. PUB. POL'Y (2017), <https://carsey.unh.edu/publication/employment-poverty-public-assistance-rural-united-states>.

<sup>20</sup> Lisa R. Pruitt, *How Seeing Rural America as a Commons Can Rebuild Mutual Respect Across the Rural-Urban Divide*, 127 W. VA. L. REV. (forthcoming 2025).

<sup>21</sup> Emily Hays, *Rural Library Funding Threats*, NPR (June 3, 2025), <https://www.npr.org/2025/06/03/nx-s1-5389814-e1/rural-library-funding-threats>.

<sup>22</sup> See *After Disaster Hits, Rural Communities Face Unique Challenges in Recovering*, U.S. GOV'T ACCOUNTABILITY OFF.: BLOG (Jan. 28, 2025), <https://www.gao.gov/blog/after-disaster-hits-rural-communities-face-unique-challenges-recovering> (detailing the unique challenges rural communities face in emergency management and how federal funding can alleviate them).

<sup>23</sup> Catie Edmondson, *Congress Agrees to Claw Back Foreign Aid and Public Broadcast Funds*, N.Y. TIMES (July 17, 2025), <https://www.nytimes.com/2025/07/17/us/politics/senate-vote-trump-bill-pbs-npr-foreign-aid.html>; Frank Langfitt, *Community Radio Stations Are Collateral Damage as Congress Cuts NPR Funding*, NPR (July 20, 2025), <https://www.npr.org/2025/07/20/nx-s1-5469908/trump-npr-public-community-radio-corporation-broadcasting-federal-funding-cuts>.

<sup>24</sup> See Espey, *supra* note 17 (reporting that the Trump administration aims to slash \$550 million from funding to improve rural internet access); Nicol Turner Lee et al., *Why the Federal Government Needs to Step up Efforts to Close the Rural Broadband Divide: Report #1 of the Rural Broadband Equity Project*, BROOKINGS INST. (Oct. 4, 2022), <https://www.brookings.edu/articles/why-the-federal-government-needs-to-step-up-their-efforts-to-close-the-rural-broadband-divide/>.

the disparity between the two.<sup>25</sup> Rural communities have higher risks of obesity, diabetes, heart disease, and cancer; it is thus not surprising that the rural mortality rate is also higher.<sup>26</sup>

One reason for these disparities is a lack of access to health care providers.<sup>27</sup> While one-fifth of Americans live in rural areas, only one-tenth of physicians practice there.<sup>28</sup> Other aspects of diminished rural access are physical distance and practical barriers such as limited public transportation. Rural residents must travel, on average, three to four times as many miles as their urban counterparts to receive hospital-based healthcare services.<sup>29</sup> Rural areas also have a higher percentage of individuals without health insurance.<sup>30</sup> Like uninsured folks everywhere, they often forego preventive services and ultimately seek care at hospital emergency departments as a last resort.<sup>31</sup>

### III. RURAL WOMEN'S REPRODUCTIVE HEALTH

For rural women, healthcare access issues have been particularly acute in relation to reproductive health.<sup>32</sup> The declining number of providers and clinics,<sup>33</sup> along with the concomitant distance to be traveled, impedes all rural women's

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<sup>25</sup> Laura Richman et al., *Addressing Health Inequalities in Diverse, Rural Communities: An Unmet Need*, 7 SSM – POPULATION HEALTH (Apr. 2019), at 1.

<sup>26</sup> *Id.*; TIM SLACK & SHANNON MONNAT, RURAL AND SMALL-TOWN AMERICA 96, 99–101 (2024).

<sup>27</sup> Sally C. Curtin & Merianne Rose Spencer, *Trends in Death Rates in Urban and Rural Areas: United States, 1999–2019*, CTRS. DISEASE CONTROL & PREVENTION NAT'L CTR. HEALTH STAT. (Sept. 2021), <https://www.cdc.gov/nchs/products/databriefs/db417.htm>.

<sup>28</sup> Elizabeth Weeks, *One Child Town: The Health Care Exceptionalism Case Against Agglomeration Economies*, 2021 UTAH L. REV. 319, 341.

<sup>29</sup> Vicki Shabo & Hannah Friedman, *Health, Work and Care in Rural America: Distances to Travel to Hospital-Based Health Care*, NEW AM. (Nov. 17, 2022), <https://www.newamerica.org/better-life-lab/reports/health-work-and-care-rural-america/distances-to-travel-to-hospital-based-health-care>.

<sup>30</sup> Curtin & Spencer, *supra* note 27; Weeks, *supra* note 28, at 339 (noting that Medicaid has long played an essential role in rural maternal health, covering half of all births in rural communities); see Joan Alker & Aubrianna Osorio, *Medicaid Plays a Key Role for Maternal and Infant Health in Rural Communities*, GEO. UNIV. CTR. CHILD. & FAMS. (May 15, 2025), <https://ccf.georgetown.edu/2025/05/15/medicaid-plays-a-key-role-for-maternal-and-infant-health-in-rural-communities/>.

<sup>31</sup> Victoria Udalova et al., *Most Vulnerable More Likely to Depend on Emergency Rooms for Preventable Care*, U.S. CENSUS BUREAU (Jan. 20, 2022), <https://www.census.gov/library/stories/2022/01/who-makes-more-preventable-visits-to-emergency-rooms.html>.

<sup>32</sup> Emma Pliskin, Kate Welti & Jennifer Manlove, *Rural and Urban Women Have Differing Sexual and Reproductive Health Experiences*, CHILD TRENDS (Sept. 15, 2022), <https://www.childtrends.org/publications/rural-and-urban-women-have-differing-sexual-and-reproductive-health-experiences>; Peter T. Merkt et al., *Urban-rural Differences in Pregnancy-Related Deaths, United States, 2011-2016*, 225 AM. J. OBSTETRICS & GYNECOLOGY 183, 183 (2021); Katy Backes Kozhimannil et al., *Rural-Urban Differences in Severe Maternal Morbidity and Mortality in the US, 2007–15*, 38 HEALTH AFFS. 2077 (2019).

<sup>33</sup> See *infra* notes 39-43, 49-51; 57-59 and accompanying text.

access to gynecological care, labor and delivery, and abortion services.<sup>34</sup> The situation tends to be most dire for rural women of color.<sup>35</sup>

I began to write nearly two decades ago about the obstacle of material distance for rural women in relation to abortion access and the “undue burden” standard of *Planned Parenthood of SE Pennsylvania v. Casey*.<sup>36</sup> I continued to write about this issue up through the U.S. Supreme Court’s more distance-sensitive decision in *Whole Woman’s Health v. Hellerstedt* in 2016.<sup>37</sup> But with the exception of my work and that of just a few others,<sup>38</sup> legal scholars have rarely acknowledged, let alone amplified, the burden of distance for rural women seeking abortion care.<sup>39</sup> Certainly, they have rarely used the word “rural.”<sup>40</sup>

Despite the legal academy’s relative neglect of rural women, activists have responded to women’s need to travel for abortion services going back to the pre-

<sup>34</sup> Pruitt, *Women Feminism Forgot*, *supra* note 3, at 539, 545–46; Michele Statz & Lisa R. Pruitt, *To Recognize the Tyranny of Distance: A Spatial Reading of Whole Woman’s Health v. Hellerstedt*, 51 ENV’T & PLAN. A: ECON. & SPACE 1106, 1118–20 (2019).

<sup>35</sup> See *infra* notes 63–64 and accompanying text (detailing the disparities).

<sup>36</sup> See *Planned Parenthood v. Casey*, 505 U.S. 833, 874 (1992); see also Pruitt, *Feminist Theory of the Rural*, *supra* note 3, at 461–62 (discussing cases construing the “undue burden” standard); Lisa R. Pruitt & Marta Vanegas, *Urbanormativity, Spatial Privilege, and Judicial Blind Spots in Abortion Law*, 30 BERKELEY J. GENDER L. & JUST. 76, 81 (2015).

<sup>37</sup> *Whole Woman’s Health v. Hellerstedt*, 579 U.S. 582, 591 (2016).

<sup>38</sup> Most notable among these is Hannah Haksgaard, whose scholarship also focuses on the rural United States. Hannah Haksgaard, *Rural Women and Developments in the Undue Burden Analysis: The Effect of Whole Woman’s Health v. Hellerstedt*, 55 DRAKE L. REV. 663 (2017). Haksgaard has also written about other aspects of rural women’s reproductive lives. Hannah Haksgaard, *Healthcare Education Leaves the Hills: Frontier Nursing University’s Move from Appalachia*, 124 W. VA. L. REV. 687 (2022) [hereinafter Haksgaard, *Health Care Education*]. See also Rachel Rebouché, *Reproducing Rights: The Intersection of Reproductive Justice and Human Rights*, 7 U.C. IRVINE L. REV. 579, 589 (2017) (noting how the burden of travel falls disproportionately on rural women); Pamela S. Karlan, *Undue Burdens and Potential Opportunities in Voting Rights and Abortion Law*, 93 IND. L.J. 139, 153 n.94 (2018) (citing Pruitt’s scholarship on the burden of distance for rural women); Madeline M. Gomez, *More than Mileage: The Preconditions of Travel and the Real Burdens of H.B. 2*, 33 COLUM. J. GENDER & L. 49, 51 (2016) (noting that burden of clinic closures falls heavily on rural women); David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 11, 18 (2023) (noting challenges for women living in abortion deserts and that rural women in particular struggle with abortion access).

<sup>39</sup> See Pruitt, *Women Feminism Forgot*, *supra* note 3, at 545–46 (detailing the oversight).

<sup>40</sup> Hannah Haksgaard makes a similar point in her review of a transnational volume about travel to abortion services. Hannah Haksgaard, *Traveling for Abortion Services and the Rural Women “We Must Not Forget,”* 65 S.D. L. REV. 1, 5 (2020) (reviewing ABORTION ACROSS BORDERS: TRANSNATIONAL TRAVEL AND ACCESS TO ABORTION SERVICES (2019)) (observing that the authors’ focus on travel nevertheless neglects explicit attention to rural women). One early exception to this neglect of rural women is the amicus brief of the NAACP in *Casey*, which may have been the first use of “rural” in Supreme Court litigation about abortion. The Brief commented on how the lack of access to abortion providers has a geographical dimension: “[I]n rural areas, the problem is especially acute. Nine out of ten non-metropolitan counties in the United States have no facility that perform abortions.” Brief for NAACP Legal Def. & Educ. Fund, Inc. et al. as Amici Curiae Supporting *Planned Parenthood of Se. Pennsylvania* at \* 21–22, *Casey*, 505 U.S. 833 (Nos. 91–744, 91–902). The brief also noted that “poor Native American women face some of the largest obstacles, since the Indian Health Services, which may be the only familiar provider of health care and the only health service available for hundreds of miles, is prohibited from performing abortions even if women can find the monetary resources to pay for themselves.” *Id.* at 22.

*Roe v. Wade* era. Feminists have done so by raising and distributing funds to women not living near an abortion provider or who otherwise needed support paying for the procedure.<sup>41</sup> Meanwhile, scholars in other disciplines, such as public health, have long recognized the burden of distance, sometimes even using the word “rural.”<sup>42</sup>

When Texas TRAP laws—targeted regulations of abortion providers—were challenged in *Hellerstedt*, pro-choice legal actors’ attention to distance improved. The plaintiffs, represented by the Center for Reproductive Rights, made fact-intensive arguments about the distances women in the Rio Grande Valley would have to travel for abortion care after TRAP laws closed several clinics near them.<sup>43</sup> The advocacy, however, was rarely expressly framed in relation to rural women.<sup>44</sup>

When the *Hellerstedt* case eventually worked its way through the U.S. Supreme Court, Justice Breyer, writing for the majority, used the word “rural” once. Specifically, he wrote of the burden of clinic closures on “poor, rural, or disadvantaged women”<sup>45</sup> such as those in the Rio Grande Valley, a region that his opinion mentioned twice.<sup>46</sup> Of equal note is that Breyer used the word “miles” nineteen times, mostly tracking the district court’s findings, which in turn had tracked the plaintiff’s arguments regarding distances to be traversed by women seeking abortion care.<sup>47</sup> Thus, when the pro-choice litigators highlighted the burden of distance with detailed data, liberal justices on the Court followed suit.

The focus of pro-choice advocacy shifted again with the 2022 U.S. Supreme Court ruling in *Dobbs v. Jackson Women’s Health Organization*.<sup>48</sup> Once *Dobbs* overturned *Roe v. Wade* and ended constitutional protection for abortion, many states proceeded to ban it altogether.<sup>49</sup> Women in states with such bans are now compelled to travel across state lines—sometimes multiple state lines—to

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<sup>41</sup> See NAT’L NETWORK ABORTION FUNDS, <https://abortionfunds.org/find-a-fund/> (last visited Nov. 7, 2025).

<sup>42</sup> See, e.g., Pliskin et al., *supra* note 32 (examining reproductive health differences between rural and urban women); Jonathan M. Bearak et al., *Disparities and Change over Time in Distance Women Would Need to Travel to Have an Abortion in the USA: A Spatial Analysis*, 2 LANCET PUB. HEALTH 493, 494 (2017) (identifying spatial disparities; noting rural women are likely most impacted by abortion clinic closures).

<sup>43</sup> See Statz & Pruitt, *supra* note 34, at 12-14. See also Lisa Pruitt & Ezer Miller-Walfish, *The Silver Lining for Rural America in the Supreme Court’s Voting Rights Decision*, DAILY YONDER (July 21, 2021), <https://dailyonder.com/analysis-the-silver-lining-for-rural-america-in-the-supreme-courts-voting-rights-decision/2021/07/21/>.

<sup>44</sup> See Statz & Pruitt, *supra* note 34, at 12.

<sup>45</sup> *Whole Women’s Health v. Hellerstedt*, 579 U.S. 582, 594 (2016).

<sup>46</sup> *Id.* at 583, 596 (in fact, the Court took a highly intersectional approach, noting also the socioeconomic disadvantage and ethnicity of women in the Rio Grande Valley).

<sup>47</sup> See Statz & Pruitt, *supra* note 34; see also *Hellerstedt*, 579 U.S. at 594-96.

<sup>48</sup> *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 232 (2022).

<sup>49</sup> See Talia Curhan & Peter Ephross, *State Bans on Abortion Throughout Pregnancy*, GUTTMACHER INST. (July 7, 2025), <https://www.guttmacher.org/state-policy/explore/state-policies-abortion-bans> (noting that “12 states have a total abortion ban” while “29 states have abortion bans based on gestational duration”).

reach an abortion provider.<sup>50</sup> The spatial barriers that long impeded rural women's access to abortion are thus now aggravated, but those barriers are also to some extent shared by millions more women living all along the rural-urban continuum.<sup>51</sup>

Yet spatial barriers to other types of reproductive health care persist for rural women in ways urban and suburban women are far less likely to experience. As already noted, rural people must travel three to four times as many miles as urban individuals to receive hospital-based services of all kinds.<sup>52</sup> Spatial inequality in maternal care is sharper still. Many rural hospitals lack obstetric units,<sup>53</sup> which are particularly costly to maintain,<sup>54</sup> forcing women to travel dozens of miles to get essential care. Rural people live, on average, three times as far from hospitals that offer obstetrics care and five times as far from those offering neonatal care or neonatal intensive care units.<sup>55</sup>

These distances and the lack of specialized services related to labor and delivery and maternal health more broadly are two key reasons why rural maternal mortality rates are significantly higher than urban rates.<sup>56</sup> From 2016 to 2019, the

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<sup>50</sup> See Rebecca E. Zietlow, *Abortion Rights, Fugitives from Slavery, and the Networks That Support Them*, 5 N.C. CIV. RTS. L. REV. 105, 123 (2025). The barriers to that travel are not only material (e.g., the cost of travel, getting time off from work), they may also be legal, as some states have attempted to ban interstate travel for purposes of abortion care. *Id.* at 133. See also Elizabeth Williamson, *A Small City at the Center of a Seismic Shift in Abortion Access*, N.Y. TIMES (Dec. 7, 2025), <https://www.nytimes.com/2025/12/07/us/politics/abortion-carbondale.html?searchResultPosition=1> (describing the long distances many women travel, often across multiple states where abortion is illegal, to Carbondale, Illinois, where several clinics provide abortion services).

<sup>51</sup> See Soumya Karlamangla, *How Many Abortion Seekers Are Traveling to California*, N.Y. TIMES (June 24, 2024), <https://www.nytimes.com/2024/06/24/us/abortion-seekers-california.html>; *Monthly Abortion Provision Study*, GUTTMACHER INST., <https://www.guttmacher.org/monthly-abortion-provision-study#interstate-travel> (last visited Aug. 16, 2025); Molly Cook Escobar et al., *171,000 Traveled for Abortions Last Year. See Where They Went*, N.Y. TIMES (June 13, 2024), <https://www.nytimes.com/interactive/2024/06/13/us/abortion-state-laws-ban-travel.html>; *Latest Data Confirm People Are Traveling Farther Distances to Access Abortion Care Post-Dobbs*, GUTTMACHER INST. (June 13, 2024), <https://www.guttmacher.org/news-release/2024/latest-data-confirm-people-are-traveling-farther-distances-access-abortion-care>; Marielle Kirstein et al., *100 Days Post-Roe: At Least 66 Clinics Across 15 U.S. States Have Stopped Offering Abortion Care*, GUTTMACHER INST. (Oct. 6, 2022), <https://www.guttmacher.org/2022/10/100-days-post-roe-least-66-clinics-across-15-us-states-have-stopped-offering-abortion-care/>.

<sup>52</sup> Shabo & Friedman, *supra* note 29.

<sup>53</sup> Katy B. Kozhimannil et al., *Obstetric Care Access at Rural and Urban Hospitals in the United States*, JAMA RSCH. LETTER (Dec. 4, 2024), <https://jamanetwork.com/journals/jama/fullarticle/2827543> (noted in Sarah Kliff, *Most Rural Hospitals Have Closed Their Maternity Wards, Study Finds*, N.Y. TIMES (Dec. 4, 2024), <https://www.nytimes.com/2024/12/04/health/maternity-wards-closing.html>).

<sup>54</sup> Kliff, *supra* note 53.

<sup>55</sup> Shabo & Friedman, *supra* note 29.

<sup>56</sup> Sarah C. Minion et al., *Association of Driving Distance to Maternity Hospitals and Maternal and Perinatal Outcomes*, 140 OBSTETRICS & GYNECOLOGY 812, 812 (2022) (reporting that longer distances from delivery hospitals are associated with increased risks of adverse maternal health outcomes and neonatal intensive care unit admissions). Large racial disparities in maternal mortality rates also exist. Pregnancy-related mortality rates among American Indian and Alaska Native (AIAN) and Black women are over three times higher than the rate for White women (63.4 and 55.9 vs. 18.1

rural maternal mortality rate was 1.81 times higher than the urban maternal mortality rate.<sup>57</sup> Indeed, one Louisiana-based study concluded that women living in maternity care deserts<sup>58</sup> are three times more likely to die during pregnancy.<sup>59</sup>

Of course, rural women do not experience rurality in isolation. They experience it as Justice Breyer implicitly recognized in *Hellerstedt* when he expressed particular solicitude for “poor, rural or disadvantaged women,” including those living in the Rio Grande Valley: they experience it in intersection with other features of their lives, including class and race. It is thus not surprising that, amidst discouraging maternal mortality data for rural women generally, the data are more devastating still for rural women of color, who are nearly a quarter of all rural women.<sup>60</sup> The rate of maternal death for rural Black women is three to four times higher than for rural White women.<sup>61</sup> For rural Native American women, it is two to three times higher than for rural White women.

One reason rural maternal outcomes have worsened in recent years is hospital closures. Between 2005 and 2024, 193 rural hospitals closed.<sup>62</sup> Among hospitals remaining open, 89 rural hospitals saw their obstetric units close between 2015 and 2019.<sup>63</sup> Since 2020, another 100 rural labor and delivery units have been

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per 100,000). Latoya Hill et al., *Racial Disparities in Maternal and Infant Health: Current Status and Key Issues*, KAISER FAM. FOUND. (Oct. 25, 2024), <https://www.kff.org/racial-equity-and-health-policy/issue-brief/racial-disparities-in-maternal-and-infant-health-current-status-and-efforts-to-address-them/>.

<sup>57</sup> Katherine Harrington et al., *Rural-Urban Disparities in Adverse Maternal Outcomes in the United States, 2016-2019*, 113 AM. J. PUB. HEALTH 224, 224 (2023).

<sup>58</sup> The March of Dimes defines maternity care deserts as (1) counties with no obstetric care facility or providers, or (2) an area more than fifty miles away from critical care obstetric (CCO) services. Megan E. Meredith, Lauren M. Steimle, & Stephanie M. Radke, *The Implications of Using Maternity Care Deserts to Measure Progress in Access to Obstetric Care: A Mixed-integer Optimization Analysis*, 24 BMC HEALTH SERV. RSCH. 682, 682 (May 2024); see also *The Additional Risks and Challenges for Pregnant Women in Rural and Underserved Communities*, U.S. GOV'T ACCOUNTABILITY OFF.: BLOG (May 13, 2021), <https://www.gao.gov/blog/additional-risks-and-challenges-pregnant-women-rural-and-underserved-communities>.

<sup>59</sup> Roni Carin Rabin, *Rural Hospitals Are Shuttering Their Maternity Units*, N.Y. TIMES (Feb. 26, 2023), <https://www.nytimes.com/2023/02/26/health/rural-hospitals-pregnancy-childbirth.html>.

<sup>60</sup> Merkt et al., *supra* note 32; Kozhimannil et al., *supra* note 32. While “rural” is often conflated with “White” in the national imagery, nearly a quarter of rural residents are people of color. Kenneth Johnson & Daniel Lichter, *Growing Racial Diversity in Rural America: Results from the 2020 Census*, 449 UNIV. N. H. CARSEY SCH. OF PUB. POL'Y at 1-2, <https://scholars.unh.edu/carsey/449/> (reporting that the rural non-White population in 2020 was 9.0% Hispanic; 7.7% non-Hispanic Black; 2.5% Native Peoples or “Some Other Race”; 1.0% Asian non-Hispanic; and 3.9% “non-Hispanic Multiracial”).

<sup>61</sup> Merkt et al., *supra* note 32; see also Kozhimannil et al., *supra* note 32 (finding that rural non-Hispanic Black, American Indian/Alaska Native, and Hispanic women have at least 33% higher odds of severe maternal morbidity than rural White women); see also SLACK & MONNAT, *supra* note 26, at 111-12 (collecting studies reporting other reproductive health disparities among rural women based on race/ethnicity).

<sup>62</sup> Zachary Levinson et al., *Key Facts About Hospitals*, KAISER FAM. FOUND. (Feb. 19, 2025), <https://www.kff.org/health-costs/key-facts-about-hospitals/>; Scott Hulver et al., *10 Things to Know About Rural Hospitals*, KAISER FAM. FOUND. (Apr. 16, 2025), <https://www.kff.org/health-costs/10-things-to-know-about-rural-hospitals/>.

<sup>63</sup> These rural hospital closures also exacerbate existing racial and ethnic disparities among women

shuttered.<sup>64</sup> By 2022, half of rural community hospitals were offering no obstetrics care.<sup>65</sup> Meanwhile, 138 hospitals across the country have added obstetric services since 2021,<sup>66</sup> but only 26 of those new units are in rural counties.<sup>67</sup>

Enter the One Big Beautiful Bill Act of 2025. By reducing Medicaid's budget by up to \$880 billion over the next decade, this legislation is likely to devastate rural hospitals, many of which already operate at a deficit.<sup>68</sup> In cases where hospitals do not close entirely, researchers speculate that the units most likely to be cut will be labor and delivery, mental health care, and emergency rooms,<sup>69</sup> all departments that are particularly dependent on Medicaid reimbursements.<sup>70</sup> In short, the law will aggravate the access deficits that rural women already face.<sup>71</sup>

Importantly, the likely adverse consequences for rural hospitals were widely discussed in the run-up to the law's passage.<sup>72</sup> Several Senate Republicans raised the concern, and a compromise was ultimately reached to include \$50 billion

needing maternal healthcare. See *Maternity Ward Closures Exacerbating Health Disparities*, HARV. T.H. CHAN SCH. PUB. HEALTH (Dec. 13, 2023), <https://hsph.harvard.edu/news/maternity-obstetric-closure-health-disparities/>.

<sup>64</sup> CTR. HEALTHCARE QUALITY & PAYMENT REFORM, STOPPING THE LOSS OF RURAL MATERNITY CARE 1 (Apr. 2025), [https://chqpr.org/downloads/Rural\\_Maternity\\_Care\\_Crisis.pdf](https://chqpr.org/downloads/Rural_Maternity_Care_Crisis.pdf); see also Haksgaard, *Healthcare Education*, *supra* note 38.

<sup>65</sup> Kozhimannil et al., *supra* note 53; Katy Kozhimannil et al., "Loss of Hospital-Based Obstetric Services in Rural Counties in the United States, 2010-2022," UNIV. MINN. RURAL HEALTH RSCH. CTR. (July 2024), <https://rhrc.umn.edu/publication/loss-of-hospital-based-obstetric-services-in-rural-counties-in-the-united-states-2010-2022>; Rabin, *supra* note 59.

<sup>66</sup> Liz Carey, *Study: Obstetrics Units in Rural Communities Declining*, DAILY YONDER (Dec. 30, 2024), <https://dailyyonder.com/study-obstetrics-units-in-rural-communities-declining/2024/12/30/>.

<sup>67</sup> *Id.*

<sup>68</sup> Lauren Weber, *Republican Medicaid Cuts Could Shutter Rural Hospitals, Maternity Care*, WASH. POST (Mar. 8, 2025), <https://www.washingtonpost.com/health/2025/03/08/medicaid-cuts-rural-hospitals/>.

<sup>69</sup> TARUN RAMESH & EMILY GEE, CTR. AM. PROGRESS, RURAL HOSPITAL CLOSURES REDUCE ACCESS TO EMERGENCY CARE (Sept. 9, 2019), <https://www.americanprogress.org/wp-content/uploads/sites/2/2019/08/Rural-Hospital-Closures1.pdf>.

<sup>70</sup> *Id.*; see also Jazmin Orozco Rodriguez, "One Big Beautiful Bill" Would Batter Rural Hospital Finances, Researchers Say, KAISER FAM. FOUND. HEALTH NEWS (June 12, 2025), <https://kffhealthnews.org/news/article/rural-hospitals-battered-by-big-beautiful-bill-researchers/>.

<sup>71</sup> The Trump administration has also deprioritized maternal health with various executive actions. Alec MacGillis, *Trump's War on Measurement Means Losing Data on Drug Use, Maternal Mortality, Climate Change, and More*, PROPUBLICA (Apr. 18, 2025), <https://www.propublica.org/article/trump-doge-data-collection-hhs-epa-cdc-maternal-mortality> (detailing cuts within HHS that will undermine maternal well-being). Twenty percent of HHS staff at the Maternal and Child Health Bureau have been terminated since April 2025. See also *Who We Are – Maternal and Child Health*, HEALTH RES. & SERVS. ADMIN. (accessed June 27, 2025), <https://mchb.hrsa.gov/>. HHS has also eliminated many employees at the Division of Reproductive Health of the Center for Disease Control. Julianne McShane, *Inside the 'Vital' Office for Reproductive Health Gutted by Mass HHS Firings*, MOTHER JONES (Apr. 4, 2025), <https://www.motherjones.com/politics/2025/04/hhs-ivf-trump-elon-cuts-reproductive-health-mass-firings-division-of-reproductive-health/>.

<sup>72</sup> Orozco Rodriguez, *supra* note 70; Juana Summers, Kathryn Fink & Christopher Intagliata, *Republicans' Big Bill Could Hit Rural Hospitals Hard*, NPR (June 30, 2025), <https://www.npr.org/2025/06/30/nx-s1-5451401/republicans-big-bill-could-hit-rural-hospitals-hard>.

in the law to bolster the fiscal stability of rural hospitals.<sup>73</sup> Yet rural health officials are skeptical that this so-called rural slush fund will be sufficient, estimating that it is only 43% of what rural hospitals will need to offset the law's sweeping cuts.<sup>74</sup>

The law's funding structure has also raised doubts about whether it can effectively save rural hospitals, or whether the funds will even reach many of them. First, the Director of the Centers for Medicare and Medicaid has discretion over how to distribute half of the funds.<sup>75</sup> Second, states must apply to get access to any of the remaining \$25 billion,<sup>76</sup> with those funds then distributed "equally" among

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<sup>73</sup> Tribble, *supra* note 16; Timothy L. O'Brien et al., *A \$50 Billion Slush Fund Won't Save Rural Hospitals*, BLOOMBERG (Aug. 19, 2025), <https://www.bloomberg.com/opinion/articles/2025-08-19/a-50-billion-slush-fund-won-t-save-rural-hospitals-from-medicaid-cuts> (The fund is only temporary, lasting through 2030, while the bill's wider cuts are permanent); see Zachary Levinson & Tricia Neuman, *A Closer Look at the \$50 Billion Rural Health Fund in the New Reconciliation Law*, KAISER FAM. FOUND. (Aug. 4, 2025), <https://www.kff.org/medicaid/a-closer-look-at-the-50-billion-rural-health-fund-in-the-new-reconciliation-law/>.

<sup>74</sup> Summers et al., *supra* note 72; Tribble, *supra* note 16. Interestingly, when the Centers for Medicare and Medicaid Services announced the awards from the rural fund in December 2025, Dr. Mehmet Oz stated that the fund was not intended to offset reductions or pay bills but rather "to allow us to right-size the system and to deal with the fundamental hindrances of improvement in rural health care." Jessie Hellmann, *Texas Gets Largest Share of Reconciliation Law's Rural Health Fund*, ROLL CALL (Dec. 30, 2025), <https://rollcall.com/2025/12/30/texas-gets-largest-share-of-reconciliation-laws-rural-health-fund/>.

<sup>75</sup> Tribble, *supra* note 16; Summers et al., *supra* note 72. The Centers for Medicare and Medicaid Services are not required to publish information about how the funds are distributed. Levinson & Neuman, *supra* note 73.

<sup>76</sup> In November of 2025, all fifty states applied for a share of the health fund and submitted their plans for how they would use the funding. But receiving funding is highly conditional. How much money a state receives is contingent on compliance with Trump administration policies. States will be rewarded with a larger share of the health fund if they pledge to enact White House-favored laws, so any state that chooses not to fully align with the administration's policy agenda will lose out on federal funding. States also have a narrow window—until the end of 2027—to implement most of the administration's favored policies and would lose funding if they failed to do so in time. The administration's funding review process has also drawn criticism for a lack of promised "radical transparency." Furthermore, if a state has its application rejected or receives less funding than it requested, no appeals process is available. Ganny Belloni, *New Medicaid Office Launched to Oversee Rural Health Funding*, BLOOMBERG L. (Dec. 19, 2025), <https://news.bloomberglaw.com/health-law-and-business/new-medicaid-office-launched-to-oversee-rural-health-funding>; Alice Miranda Ollstein, *The Rural Health 'Hunger Games' Are Underway*, POLITICO (Sept. 15, 2025), <https://www.politico.com/news/2025/09/15/the-rural-health-hunger-games-are-underway-00563763>; Alice Miranda Ollstein, Ruth Reader, & Liz Crampton, *'Sort of Blackmail': Billions in Rural Health Funding Hinge on States Passing Trump-Backed Policies*, POLITICO (Dec. 7, 2025), <https://www.politico.com/news/2025/12/07/sort-of-blackmail-billions-in-rural-health-funding-hinge-on-states-passing-trumps-policies-00679082>; Sarah Jane Tribble & Arielle Zions, *Feds Promised 'Radical Transparency' but Are Withholding Rural Health Fund Applications*, KFF HEALTH NEWS (Dec. 2, 2025), <https://kffhealthnews.org/news/article/rural-health-transformation-program-cms-state-applications-transparency/>. The awards were announced on December 29, 2025. CMS Announces \$50 Billion in Awards to Strengthen Rural Health in All 50 States, CTMS. MEDICARE & MEDICAID SERVS. (Dec. 29, 2025), <https://www.cms.gov/newsroom/press-releases/cms-announces-50-billion-awards-strengthen-rural-health-all-50-states#:~:text=The%20Rural%20Health%20Transformation%20Program's,equally%20among%20a ll%20approved%20states> (reporting that 2026 awards average \$200 million, with Texas receiving the greatest amount, \$281 million).

approved states.<sup>77</sup> The equal distribution stipulation means that a state with three rural hospitals could receive the same amount of funding as a state with ninety rural hospitals.<sup>78</sup> Further, the bill does not limit the use of the funds to rural hospitals; monies can instead be used, for example, to upgrade cybersecurity and robotics at any hospital.<sup>79</sup> States will thus have great latitude in determining which institutions receive a share of the fund,<sup>80</sup> and that will not always serve rural interests within particular states.

#### IV. CONCLUSION: AN OPPORTUNITY TO FIND COMMON GROUND

Childbirth has long been more dangerous for rural women than for their metropolitan counterparts.<sup>81</sup> While it is impossible to know now how dramatically recent changes to federal law and policy will impact rural women, it seems beyond dispute that long-standing spatial inequalities in the availability of maternal care will be aggravated. The aggressive cuts thus foreshadow an even darker future for rural maternal health.

Considering these recent developments, progressive legal scholars—among other progressives—have a decision to make. They can do what some have done recently when rural residents suffer bad outcomes arguably caused or aggravated by conservative policies: ridicule those rural folks for having supported Trump and Republican lawmakers and thus allegedly having brought unfortunate outcomes upon themselves.<sup>82</sup> The pat phrasing is that rural folks “vote against their own interests.”<sup>83</sup>

Alternatively, progressives can consider rural residents a vulnerable population who deserve better from their government. Feminist scholars and activists can choose to see these women as canaries in a coal mine—just as they see women of color as a vulnerable group worthy of solicitude and advocacy. After

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<sup>77</sup> Levinson & Neuman, *supra* note 73.

<sup>78</sup> *Id.*

<sup>79</sup> O’Brien et al., *supra* note 73.

<sup>80</sup> States play other key roles in relation to the robustness of maternal health services, in part because of state discretion over the use of federal Medicaid funds. See *Health Care Litigation Tracker: Planned Parenthood Federation of America, Inc. et al. v. Kennedy et al.*, O’NEILL INST. NAT’L & GLOB. HEALTH L. (updated Aug. 28, 2025), <https://litigationtracker.law.georgetown.edu/litigation/planned-parenthood-federation-of-america-inc-et-al-v-kennedy-et-al/>; Linda Greenhouse, *This Is the Real Impact of the Supreme Court’s Planned Parenthood Decision*, N.Y. TIMES (July 2, 2025), <https://www.nytimes.com/2025/07/02/opinion/planned-parenthood-supreme-court-decision.html>; Kari White et al., *The Risks of Excluding Qualified Family Planning Providers from Medicaid*, JAMA NETWORK (Aug. 13, 2025), at 1, <https://jamanetwork.com/journals/jama/article-abstract/2837601>.

<sup>81</sup> See *supra* notes 59-65 and accompanying text.

<sup>82</sup> See Klein & Pruitt, *supra* note 1. See also Arlie Hochschild, *My Journey Deep in the Heart of Trump Country*, N.Y. TIMES (June 9, 2025), <https://www.nytimes.com/2025/06/09/opinion/trump-supporters-kentucky.html> (arguing that Democrats should be careful not to say “I told you so” if the economy begins to falter under Trump, lest that response drive voters further into Trump’s camp).

<sup>83</sup> See generally THOMAS FRANK, *WHAT’S THE MATTER WITH KANSAS?* (2004) (proffering an argument about the so-called “great derangement” where rural people vote against their own interests).

all, every woman is put at heightened risk by what the Trump administration and wider conservative movements are doling out, and we need a broad coalition to resist that juggernaut.

The response of feminist legal scholars to the abortion regulation landscape, especially pre-*Hellerstedt*, offers a lesson in what *not* to do regarding maternal mortality. What elite progressives in the legal academy failed to acknowledge regarding rural women and spatial inequality in relation to abortion access, they should not again overlook in relation to maternal mortality. It would be unwise to ignore the plight of those whom progressives might instinctively dismiss because they are associated with an opposing political camp.

Further, empirical studies tell us that rural people strongly identify as rural,<sup>84</sup> that “place—via attachments, identities, or attitudes—appears to matter significantly more for rural political psychology than for the political psychologies of urbanites and suburbanites.”<sup>85</sup> This makes it essential for progressives who wish to draw them into the coalition to name them as such. Feminists should thus be intentional about letting rural women know that they and their needs are seen and taken seriously. Further, coalition building around an issue like improved maternal health should be an easy ask. Maternal well-being is not a controversial issue.

Interestingly, Kamala Harris, the Democratic nominee for U.S. President in 2024, illustrated how to be an inclusive advocate for maternal health. Responding to a question about what she would do to ameliorate the U.S. maternal mortality crisis, Harris named three groups for whom maternal mortality rates are particularly high: those who are Black, Native American, and/or rural. She went on to acknowledge the struggles rural hospitals face to remain open amid declining populations and other factors, including Medicaid reimbursement rates.<sup>86</sup>

When Harris said this, she may not have been thinking about coalition building; she may simply have been demonstrating her mastery of data about the issue raised—data showing rural women are the third most vulnerable group in the United States when it comes to maternal mortality, not far behind Native women. But what Harris did in that high-profile setting was link together three groups in heightened need of solutions to the same problem: devastating rates of maternal mortality.<sup>87</sup> In short, Harris acknowledged rural vulnerability and highlighted a shared need among groups who are increasingly seen as unlikely allies—if not outright enemies. What she did in naming rural women’s acute maternal health

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<sup>84</sup> Pruitt, *Leveraging Rural Identity*, *supra* note 6.

<sup>85</sup> B. Kal Munis & Nicole Huffman, *Why Does Place Matter More (Politically) to Rural People? Political Communication, Fomenting Place Resentment and Urban Collective Narcissism*, in *RETHINKING RURAL POLITICS: PLACE-BASED IDENTITY, POLITICAL IDEOLOGY, AND POLICY IN RURAL AMERICA* (Nicholas F. Jacobs, ed. 2025).

<sup>86</sup> Specifically, Harris stated, “Black women are three to four times more likely to die in connection with childbirth; Native women are, like, twice as likely; rural women, one and a half times as likely.” *Transcript of Remarks by Vice President Harris and Liz Cheney at a Campaign Event in Malvern, PA* (Oct. 21, 2024), <https://bidenwhitehouse.archives.gov/briefing-room/speeches-remarks/2024/10/21/remarks-by-vice-president-harris-and-liz-cheney-at-a-campaign-event-malvern-pa/>. Notably, it was Harris’ only use of the word “rural” on the campaign trail after a broad gesture to the sweep of rural and urban at the Democratic Convention. *Id.*

<sup>87</sup> *Id.*

challenges is what feminist legal scholars and other progressives *should* also do if the goal is to build coalitions that can get elected and thus hold out the possibility of delivering greater equity and better reproductive health outcomes for all.

# THE FUTURE OF WORKING FAMILIES IN A RIVEN POLITICAL AND MORAL ECONOMY

Deborah Dinner\*

## I. INTRODUCTION

The United States faces a care crisis.<sup>1</sup> Reports of the high cost, inconsistent quality, and limited availability of childcare are widespread.<sup>2</sup> The lack of adequate long-term care for the elderly is a staggering burden. Total annual expenditures for long-term care services approach half a trillion dollars, and families pay out of pocket for 13.6% of these costs. Family members—most often, wives and daughters—shoulder difficult and sometimes dangerous care for elderly relatives alone, give up jobs to relocate back to childhood homes to care for parents, and drain their retirement savings to qualify for Medicaid. Meanwhile, by 2050, the population of persons sixty-five and older is expected to increase by more than 50%, and the population of persons eighty-five and older is expected to triple.<sup>3</sup> Aging parents who themselves care for adult children with disabilities face unique stressors that negatively affect their own physical and mental health.<sup>4</sup>

Commentary across the political spectrum now focuses on the plight of “working families.” What is often lost in this commentary is that the term “working families” and the experiences it aims to denote have been created through a series of political and legal decisions. The notion of the “working family” and, relatedly, of “work-family conflict,” emerged in the 1980s. These ideas responded to the decline of New Deal liberalism, a constellation of constitutional doctrines, laws, and welfare policies that fostered a settlement in which both management and labor promoted relatively good wages and benefits in unionized industrial jobs, high productivity, and mass consumption. New Deal liberalism emerged from and rested on a specific organization of gender relations that defined the relationships, spaces, and forms of family care. Family laws, employment laws, and social welfare policies all entrenched the idea of the “family-wage”—that husbands and

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<sup>1</sup> See generally MAXINE EICHNER, *THE FREE-MARKET FAMILY: HOW THE MARKET CRUSHED THE AMERICAN DREAM (AND HOW IT CAN BE RESTORED)* (2019) (discussing the contours of the care crisis).

<sup>2</sup> See ECON. POL’Y INST., *CHILD CARE COSTS IN THE UNITED STATES* (2025), <https://www.epi.org/child-care-costs-in-the-united-states/>; EDWARD ZIGLER ET AL., *THE TRAGEDY OF CHILD CARE IN AMERICA 9-12* (2009); DAVID M. BLAU, *THE CHILD CARE PROBLEM: AN ECONOMIC ANALYSIS 10-11* (2001); Meredith J. Harbach, *Childcare Market Failure*, 2015 UTAH L. REV. 659, 669-72.

<sup>3</sup> Reed Abelson & Jordan Rau, *Dying Broke: Facing Financial Ruin as Costs Soar for Elder Care*, N.Y. TIMES (Nov. 14, 2023), <https://web.archive.org/web/20231114132714/https://www.nytimes.com/2023/11/14/health/long-term-care-facilities-costs.html>.

<sup>4</sup> Eun Ha Namkung et al., *Lifelong Parenting of Adults with Developmental Disabilities: Growth Trends over Years in Midlife and Later Life*, 123 AM. J. ON INTELL. & DEVELOPMENTAL DISABILITIES 228, 237-39 (2018).

fathers should earn enough as “breadwinners” to provide for their dependent wives, who were supposed to care for the couple’s children within the home.<sup>5</sup>

By the 1980s, the New Deal liberal consensus had shattered. Between 1964 and 1984, the family wage ideal became illusory for almost all families: Private-sector unionization rates declined dramatically due to global competition, automation, and political assaults on the labor movement. The real value of white men’s wages declined. Inflation and unemployment in the 1970s had upended the economic theories that underpinned New Deal welfare policy.<sup>6</sup> More marriages ended in divorce, and more mothers worked outside the home.<sup>7</sup> In this transformed political economy, labor unions, feminist advocates, liberal think tanks, and social scientists invented the term “working family” as part of their effort to call upon employers and the state to support working caregivers.<sup>8</sup> Ultimately, however, policy fell short of their demands. Instead, “working family” discourse justified policy interventions, from family leave to welfare reform, which reformed the workplace to make it more compatible with care for some families and coerced labor-market participation for other families.

Thus, in the late twentieth century, a neoliberal regime supplanted New Deal liberalism. This new political economy maintains continuity with the earlier one in a key respect: it preserves, indeed intensifies, private responsibility for care. In other respects, the regime departs significantly from New Deal liberalism.

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<sup>5</sup> Several key historical works analyze the Fordist social contract use of gender ideologies to organize work and family. *See generally* ALICE KESSLER-HARRIS, *IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA* (2001) (analyzing how the family-wage ideal shaped Laws respecting employment, unemployment insurance, income tax, and social security); *see generally* IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME* (2013) (analyzing the compromises with Jim Crow made as part of the development of the modern American state); *see generally* NELSON LICHTENSTEIN, *STATE OF THE UNION: A CENTURY OF AMERICAN LABOR* (2002) (locating the apex of labor’s power in the 1930s and 1940s and examining its loss of power in the decades after World War II). This literature shows that the New Deal “settlement” was always a contested one and that the family-wage ideal was never fully realized.

<sup>6</sup> Scholarship analyzes the 1970s challenges to organized labor and the break between the white, male working-class and the Democratic Party. *See generally* JEFFERSON COWIE, *STAYIN’ ALIVE: THE 1970S AND THE LAST DAYS OF THE WORKING CLASS* (2010) (examining the growing rift between a bureaucratized union leadership and rank-and-file workers); *see generally* ROBERT O. SELF, *ALL IN THE FAMILY: THE REALIGNMENT OF AMERICAN DEMOCRACY SINCE THE 1960S* (2012) (arguing that shifting ideas about family life, gender, and sexuality remade politics in the late twentieth century). Revisionist narratives examine labor and workplace organizing among women workers and racial minorities. *See generally* NANCY MCLEAN, *FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE* (2006) (analyzing struggles over equal employment opportunity and the enforcement of Title VII of the Civil Rights Act of 1964); *see generally* KATHERINE TURK, *EQUALITY ON TRIAL: GENDER AND RIGHTS IN THE MODERN AMERICAN WORKPLACE* (2016) (arguing that workplace struggles were central to feminism and analyzing divides within the movement about the meaning of sex equality); *see generally* LANE WINDHAM, *KNOCKING ON LABOR’S DOOR: UNION ORGANIZING IN THE 1970S AND THE ROOTS OF A NEW ECONOMIC DIVIDE* (2019) (arguing that the 1970s saw a proliferation of organizing efforts among women workers and workers of color).

<sup>7</sup> *See* V.J. Schweizer, *Divorce: More Than a Century of Change, 1900-2018*, BOWLING GREEN STATE U. NAT’L CTR. FAM. & MARRIAGE RSCH. (Nov. 22, 2020), <https://doi.org/10.25035/ncfmr/fp-20-22>.

<sup>8</sup> *See* Kirsten Swinth, *Post-Family Wage, Postindustrial Society: Reframing the Gender and Family Order Through Working Mothers in Reagan’s America*, 105 J. AM. HIST. 312, 318-319, 326-333 (2018).

Instead of the family-wage ideal, it affirms formal sex equality under law and social policy that imposes wage-earner norms on women and men alike. In other words, the neoliberal regime replaced the family-wage ideal with a “universal breadwinner” model rather than the “universal caregiver” model advanced by feminists or other models that might have promoted more just distributions of both wage work and care.<sup>9</sup>

Advocates on the political right and left criticize the neoliberal regime and the care crisis it generates. Today’s political discourse reveals the salience of working family discourse and its capacity to be put to new uses. The “national conservative” movement, which emerged in 2019, describes its purpose as advancing a common morality that recognizes the “importance of family, community, and industry to the nation’s liberty and prosperity.”<sup>10</sup> National conservatives use the term “working families” to reference married, heterosexual, often implicitly white, nuclear families. In response to the crisis of care these families face, they advocate for support for male breadwinners and laws and policies that channel women into roles as mothers and full-time caregivers. By contrast, feminists in coalition with labor and civil rights groups offer competing solutions to the care crisis. They fuse demands for enhanced public funding for care with expansive definitions of family, promote laws that accommodate care in workplaces, and support paid caregivers and public care institutions. Ideas about sexuality, gender, and families are thus at the heart of contemporary debates about the economy.

In a riven political and moral economy, the definition and future of working families are not yet determined. This Essay draws on my historical scholarship to outline in Part I the origins of the crisis of care confronting today’s “working families.” Part II offers an overview of the national conservatives’ solution: the restoration of the patriarchal family. Part III analyzes the blueprint for an alternative solution generated by feminist organizing in coalition with labor and civil rights groups in the first quarter of the twenty-first century. I conclude by reflecting on some of the implications of these competing solutions for family care and sex equality.

## II. THE HISTORICAL ORIGINS OF THE CARE CRISIS

In the late 1960s, a growing feminist movement confronted the gender subordination embedded in New Deal liberalism. A deep dive lies beyond the scope of this Essay, but a brief overview illustrates some of the challenges feminists faced. Through the 1960s, family law maintained the imprint of coverture

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<sup>9</sup> See Nancy Fraser, *After the Family Wage: A Postindustrial Thought Experiment*, in *GENDER & JUSTICE* 291-316 (2017); see Nancy Fraser, *After the Family Wage: Gender Equity and the Welfare State*, 22 *POL. THEORY* 591, 592 (1994).

<sup>10</sup> Henry Olsen, *This New Think Tank Wants to Reform Conservatism. Republicans Ignore It at Their Peril*, *WASH. POST* (May 5, 2020), <https://web.archive.org/web/20210126032907/https://www.washingtonpost.com/opinions/2020/05/05/this-new-think-tank-wants-reform-conservatism-republicans-ignore-it-their-peril/> (quoting the American Compass mission statement).

via fault-based divorce, husbands' control over marital property, and sex-differentiated alimony and child custody via standards.<sup>11</sup> The Fair Labor Standards Act of 1938 explicitly excluded agricultural and domestic workers from its protections, and constitutional doctrine limited the FLSA's coverage to interstate commerce. Together, these exclusions meant that an overwhelming majority of women of all races, as well as African American men, remained outside the protection of the FLSA's wage and hour provisions. At the same time, state sex-based labor standards served as a double-edged sword, at once acting as a firewall against exploitation for women workers and limiting their employment opportunities.<sup>12</sup>

The Social Security Act of 1935 ("SSA") made women's social citizenship derivative of their marital status. The keystone entitlement program, simply called "Social Security" (today codified as Title II of the SSA), was dependent on participating in the paid workforce. As a result, individuals (primarily women) who provided full-time family care did not receive benefits directly tied to that care. Instead, they received benefits derivative of their marital status—as the wives, widows, or ex-spouses of male breadwinners. Social Security thus both channeled women toward marriage and created unique economic vulnerabilities for single women and women whose marriages had ended.<sup>13</sup> Another program, called Aid to Dependent Children ("ADC," created by Title IV of the SSA), did provide support for low-income mothers and children, but imposed a series of requirements that resulted in surveillance and stigmatization of recipients, disproportionately women of color and immigrants.<sup>14</sup> Together, Social Security and ADC reinforced marriage as the mechanism for women to achieve economic security.

As I show in my book, *Feminism Lost: Work, Care, and the Law, 1964-1996*,<sup>15</sup> in the last third of the twentieth century, feminists organized, protested, lobbied, and litigated to transform, and in some cases even to reject, New Deal liberalism. They combatted the ways in which New Deal liberalism sustained gender subordination by privatizing dependency and by enforcing sex-differentiated social and economic roles under law. To start, they advanced capacious interpretations of antidiscrimination law to challenge governmental and employer imposition of prescriptive sex-role stereotypes in ways that limited individual freedom. Yet this more familiar story of feminist activism was just the

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<sup>11</sup> JOANNA L. GROSSMAN & LAWRENCE FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 59-61, 178-79, 193-94 (2011).

<sup>12</sup> See generally NANCY WOLOCH, *A CLASS BY HERSELF* (2015) (discussing race and gender ideologies' roles in shaping maternalistic labor standards, pointing to employment law which excluded agricultural and domestic workers, and how African American women disproportionately worked beyond the reach of these laws protections).

<sup>13</sup> See KESSLER-HARRIS, *supra* note 5, at 130-141.

<sup>14</sup> See generally LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE, 189-193* (1994) (critiquing maternalistic social policy).

<sup>15</sup> DEBORAH DINNER, *FEMINIST LOST: WORK, CARE, AND THE LAW, 1964-1996* (Cambridge University Press, forthcoming 2026) (manuscript at 4).

beginning. In addition, and often as a higher priority, feminists fought for a robust welfare state that supported family care.<sup>16</sup>

Consider some illustrative examples. In the late 1960s, labor feminists fought to extend state protective labor standards to men and sectors excluded from coverage, endeavoring to use maternalism as a basis for heightened protection of all workers. Radical and socialist feminists articulated a right to universal public childcare, believing it would free middle-class women from the isolation of full-time childrearing, empower communities of color, and instill liberationist values in children. In the early 1970s, middle-class feminists advocated Social Security credits that reward the caregiving labor of “homemakers.” Later that decade, activists with ties in both the feminist and welfare-rights movements, led by women of color, fought for the expansion of government entitlement programs to benefit families caring outside of heterosexual marriage.

Had they come to fruition, these feminist campaigns would have avoided or at least substantially mitigated the care crisis of today. Yet, as my book details, from the mid-1960s through the end of the twentieth century, business opposition, judicial conservatism, and the rise of the New Right defeated feminists’ most ambitious campaigns to win public support for care. The trend across family law, employment law, and welfare policy was toward liberalization—equal treatment of men and women under law—coupled with intensified private responsibility for dependency. Together, these dual trends intensified the experience of conflict between work and family, maintained economic inequality between the sexes notwithstanding formal rights to equal treatment, and deepened class-based inequities.<sup>17</sup>

Family law opened access both to divorce and to marriage yet also exacerbated economic inequalities along sex and class lines. In the 1970s, a no-fault divorce revolution swept across the states, fueled by men’s rights as much as women’s rights advocacy. At the same time, feminists lost parallel battles to win heightened protection both for women’s control over marital property and for entitlements at divorce that rewarded caregiving labor.<sup>18</sup> In the decades that followed, college-educated people increasingly married each other at high rates, while marriage rates declined among those without a four-year college degree.<sup>19</sup> These differentials, given the fact that social policy ties a myriad of welfare benefits to marriage, deepened economic inequality among families.<sup>20</sup> Even as it

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<sup>16</sup> My book builds on scholarship analyzing feminists’ expansive definitions of equality and advocacy for family supports, from the 1960s through the 1990s. See TURK, *supra* note 6; KIRSTEN SWINTH, *FEMINISM’S FORGOTTEN FIGHT: THE UNFINISHED STRUGGLE FOR WORK AND FAMILY* (2018).

<sup>17</sup> See generally MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2005) (explaining that the life cycle involves both biological dependency and the derivative dependency that arises from the labor and resources required to perform care and arguing that society owes a debt to caregivers).

<sup>18</sup> See SUZANNE KAHN, *DIVORCE, AMERICAN STYLE* 1–19 (2021); ALISON LEFKOVITZ, *STRANGE BEDFELLOWS: MARRIAGE IN THE AGE OF WOMEN’S LIBERATION* 9–38 (2018).

<sup>19</sup> See NAOMI CAHN & JUNE CARBONE, *MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY* 19–20 (2014).

<sup>20</sup> See SERENA MAYERI, *MARITAL PRIVILEGE: MARRIAGE, INEQUALITY, AND THE TRANSFORMATION OF AMERICAN LAW* 1–11 (2025).

destabilized heterosexual supremacy, the Supreme Court's 2015 ruling in *Obergefell v. Hodges* reinforced marriage as the primary site of familial care.<sup>21</sup>

The labor-market participation of mothers with children under the age of six increased from 30% in 1970 to 69% in 2025.<sup>22</sup> Workplace structures did not change, however, to meet the needs of working caregivers (whether mothers, fathers, or other kin or guardians). Until the passage of the Pregnant Workers Fairness Act in 2023, the Pregnancy Discrimination Act (“PDA”) of 1978 exemplified the inadequacy of sex discrimination law to force these changes. The PDA guarantees equal treatment for pregnant and temporarily disabled employees. It prohibits an employer, for example, from refusing to promote a pregnant employee who is capable of performing the job or from denying her the leave time extended to other employees. The capacity for this comparative right to realize job and income security for childbearing workers, however, depends on the employers’ voluntary provision of temporary disability benefits in the first instance.<sup>23</sup>

Even as families’ need for support grew, social welfare policy failed to socialize either the labor of care itself or its costs. In the 1970s, Ruth Bader Ginsburg and the staff of the ACLU Women’s Rights Project, along with many other pioneering feminist attorneys, advanced an anti-stereotyping principle in equal protection doctrine. They succeeded in ending explicit sex-role stereotyping within government benefit programs. For example, female service members gained access to the same non-means-tested benefits for their spouses as male service members did. Fathers who lost their spouses and needed to care for their minor children on their own gained access to “mother’s benefits.” These feminist victories could not achieve substantive sex equality because they did not fundamentally expand welfare supports for care. Feminist proposals for social insurance programs responsive to women’s biological and social roles in reproduction—for example, the expansion of state temporary disability insurance programs that would provide income security to sick and injured as well as pregnant workers and Social Security credits for family caregiving—met defeat.

By the mid-1990s, both the Democratic and Republican parties alike embraced new norms related to gender, work, and family. These norms supplanted the family-wage ideal of New Deal liberalism, but not with the care-supportive policies advanced by feminists. Instead, the norms that were consolidated by the

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<sup>21</sup> See Laura A. Rosenbury, *Federal Visions of Private Family Support*, 67 VAND. L. REV. 1835, 1860 (2014).

<sup>22</sup> See Wendy Wang & Jenet Erikson, *More Married Mothers of Young Children Are Working Full Time*, INST. FAM. STUD. (Nov. 2025), <https://ifstudies.org/report-brief/more-married-mothers-of-young-children-are-working-full-time>. The reasons for this are manifold, including the rising costs of living, declines in private-sector unionization, and the real value of men’s wages. Formal sex equality in divorce law, as well as growing economic inequality, also act as incentives for women’s labor-market participations.

<sup>23</sup> See Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 485-89 (2011) (relating that the courts were also nearly uniformly hostile to disparate-impact liability claims under the PDA) [hereinafter Dinner, *Costs of Reproduction*].

end of the twentieth century prioritized labor-market participation and self-sufficiency for women and men alike.

The Family and Medical Leave Act of 1993 (“FMLA”) partially mitigated what the media, by then, labelled “work-family conflict,” though, again, it did not transform workplace structures. The FMLA created an entitlement for covered workers to take leave from their jobs to care for their families following the birth or adoption of a new child or during a “serious illness” of the employee, his or her spouse, parent, or child. Although the FMLA makes care during such extraordinary moments in the life cycle more compatible with employment, the statute still treats the need for care-related accommodations as exceptional rather than routine. Eligibility requirements, furthermore, exclude about 40% of the country’s workforce from FMLA protection,<sup>24</sup> and the unpaid character of the leave entitlement means many working-class families cannot afford to utilize it.<sup>25</sup> The FMLA further entrenched a cultural preference for individualized familial care, privileged benefits for marital families, and linked benefits to wage work.

Consistent with these hierarchies, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRWORA”) set time limits on lifetime receipt of public assistance to single parents and their children.<sup>26</sup> PRWORA thus coerced many poor mothers to work who would have preferred to care for their children full time and/or who were skeptical of workplace exploitation into low-wage jobs. Together, the FMLA and PRWORA outlined the contours of a new political and moral economy: sex neutrality under law, privatized care, the “feminization” of the workforce, and the reconciliation of paid work with family care in the absence of fundamental transformation of either.

In sum, throughout the late twentieth century, feminist activists fought against both the traditional gender ideologies that shaped New Deal liberalism and against ascendant market libertarianism. They advocated both capacious interpretations of antidiscrimination law and robust welfare-state support for care. As a result of anti-feminist opposition, however, law and policy instituted thin, formalist interpretations of sex discrimination law. Rather than implementing social insurance, welfare entitlements, and labor protections that would have spread the costs of care across society, changes in the welfare regime intensified private responsibility for care.

The COVID-19 pandemic amplified the gender and racial inequality generated by the care crisis and, at the same time, presented a political

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<sup>24</sup> Sarah Nadeau, *Guaranteeing Comprehensive, Inclusive Paid Family and Medical Leave and Sick Time*, *CTR. AM. PROGRESS* (Mar. 14, 2024), <https://www.americanprogress.org/article/playbook-for-the-advancement-of-women-in-the-economy/guaranteeing-comprehensive-inclusive-paid-family-and-medical-leave-and-sick-time/> (“[D]ue to restrictive eligibility criteria, nearly half of all employees in the United States, 44 percent, are not covered by the law, including 46 percent of women employees.”).

<sup>25</sup> CATHERINE R. ALBISTON, *INSTITUTIONAL INEQUALITY AND THE MOBILIZATION OF THE FAMILY AND MEDICAL LEAVE ACT: RIGHTS ON LEAVE* 10 (2010).

<sup>26</sup> Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

opportunity.<sup>27</sup> In March 2020, the Families First Coronavirus Response Act, for the first time in the nation's history, enacted a federal mandate for paid leave, amending the FMLA to mandate that an employer provide COVID-related leave.<sup>28</sup> In 2021, however, opponents gutted the care-related provisions of President Joe Biden's infrastructure bill that would have significantly increased federal funding for childcare, expanded community and home-based elder care via Medicaid, and improved the job conditions of paid care workers. Ultimately, Congress treated the pandemic as a time of exception rather than a dire signal of the need to support care in "ordinary" times. The ruptures generated by the pandemic, however, also opened a space for new political formations that utilize "working family" rhetoric and ideologies.

### III. THE NATIONAL CONSERVATIVE SOLUTION: RESTORE THE PATRIARCHAL FAMILY

National conservatism is one movement that has moved into this space. Like the feminist activists of the late twentieth century, national conservatives also oppose the neoliberal political economy: what they call "*WSJ*-style economic policy."<sup>29</sup> Yet they pose a dramatically different solution than do feminists: restoration of the patriarchal family. Oren Cass, Republican Party operative and founder of American Compass, a research and advocacy group at the vanguard of national conservatism, argues that social policy should satisfy two principles: "family is good," and "supporting family means supporting working families."<sup>30</sup> National conservatives have a particular vision of which working families they want to support, how those families should be organized, and what forms support should take.<sup>31</sup>

National conservatives, with supportive rhetoric from the current Trump administration, have proposed a two-part agenda respecting working families. To start, national conservatives endorse industrial policy and employment laws that

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<sup>27</sup> See NAT'L WOMEN'S L. CTR., A YEAR OF STRENGTH & LOSS: THE PANDEMIC, THE ECONOMY, & THE VALUE OF WOMEN'S WORK 3 (Mar. 2021), [https://nwlc.org/wp-content/uploads/2021/03/Final\\_NWLC\\_Press\\_CovidStats.pdf](https://nwlc.org/wp-content/uploads/2021/03/Final_NWLC_Press_CovidStats.pdf) (reporting that more than 2.3 million women, compared to 1.8 million men, dropped out of the labor force between February 2020 and February 2021); Catherine Powell, *Color of Covid: The Racial Justice Paradox of Our New Stay-at-Home Economy*, CNN (Apr. 18, 2020, at 9:13 AM), <https://www.cnn.com/2020/04/10/opinions/covid-19-people-of-color-labor-market-disparities-powell/index.html> (reporting Black and Latina women were both more likely to labor in high-risk jobs considered essential and more likely to hold jobs that were eliminated).

<sup>28</sup> Families First Coronavirus Response Act, Pub. L. No. 116-127, §§ 3101–3106, 134 Stat. 178, 189–92 (2020) (providing paid family leave); §§ 5101–5111, 134 Stat. at 195–201 (providing paid sick leave); The American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9641, 135 Stat. 4, 161–71 (2021) (subsequently extending tax credits for employers providing COVID-19-related paid sick and family leave from April 1 to September 30, 2021).

<sup>29</sup> Oren Cass, *Passing a Test on Family Policy*, AM. COMPASS (Jan. 31, 2024), <https://americancompass.org/passing-a-test-on-family-policy/> (emphasis added).

<sup>30</sup> *Id.*

<sup>31</sup> See Deborah Dinner, *Putting (Some Kind of) Families First*, 27 HEDGEHOG REV., Spring 2025, <https://hedgehogreview.com/issues/after-neoliberalism/articles/putting-some-kind-of-families-first>.

will restore male breadwinners' earning power as well as their cultural primacy. The imposition of tariffs with the stated purpose of reinvigorating American industries such as coal and steel implicitly and, often explicitly, codes work and workers as white, male, and heterosexual.<sup>32</sup> When it comes to antidiscrimination law, national conservatives see a zero-sum game: some workers' gain must come at the expense of others' losses. Project 2025 promised to pressure the Equal Employment Opportunity Commission to "disclaim its regulatory pretensions."<sup>33</sup>

The flip side of policies that empower breadwinners are those that coerce women into motherhood. National conservatives promote this goal with both soft power—such as tax credits and other economic incentives—and hard power, including the criminal law.<sup>34</sup> The assault on reproductive rights is core to national conservative family policy. After the Supreme Court's 2022 decision in *Dobbs v. Jackson Women's Health Organization*, so-called "trigger bans" went into effect in eleven states, and two more states relied on nineteenth-century laws to establish total or near-total bans on abortion.<sup>35</sup> After the Supreme Court put an end to litigation that challenged the Food and Drug Administration's regulations on mifepristone, national conservatives now plan to pressure the FDA itself to withdraw approval of the drug,<sup>36</sup> the most common mechanism of abortion in the United States. National conservatives have succeeded in defunding Planned Parenthood and plan to interpret federal employment discrimination and pension laws in ways that limit employer-sponsored abortion benefits.<sup>37</sup> The conservative campaign against abortion should be seen as a piece of a larger socio-legal agenda respecting gender, work, and care; its purpose and effect is to push women into roles as mothers.

In addition to cutting back on the enforcement of employment discrimination law, conservatives oppose the social welfare entitlements that would help parents combine care with workforce participation. In 2021, J.D. Vance, then considering a run for the U.S. Senate, responded to proposals for

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<sup>32</sup> See Proclamation No. 10947, 90 Fed. Reg. 24199 (June 3, 2025); Exec. Order No. 14241, 90 Fed. Reg. 15517 (Apr. 8, 2025); Proclamation No. 9705, 83 Fed. Reg. 11625 (Mar. 8, 2018); Thomas Blake Earle, *No White Man Left Behind*, WASH. POST (Oct. 27, 2017), <https://www.washingtonpost.com/news/made-by-history/wp/2017/10/27/no-white-man-left-behind/>.

<sup>33</sup> JONATHAN BERRY, MANDATE FOR LEADERSHIP 2025: THE CONSERVATIVE PROMISE 581-86 (2023).

<sup>34</sup> See Caroline Kitchener, *White House Assesses Ways to Persuade Women to Have More Children*, N.Y. TIMES (Apr. 21, 2025), <https://www.nytimes.com/2025/04/21/us/politics/trump-birthrate-proposals.html>.

<sup>35</sup> See Victoria Bekiempis, *Republican-run US States Move to Immediately Ban Abortion After Court Overturns Roe v. Wade*, GUARDIAN (June 24, 2022), <https://www.theguardian.com/law/2022/jun/24/what-states-have-abortion-trigger-laws> (The eleven states with trigger bans were Alabama, Arkansas, Idaho, Kentucky, Louisiana, Missouri, Oklahoma, South Dakota, Tennessee, and Texas. The additional two states that relied on nineteenth century laws were West Virginia and Wisconsin).

<sup>36</sup> See Rachel Cohen Booth, *The Right's New Playbook to Restrict Access to Abortion Pills*, VOX (May 14, 2025, at 4:46 PM), <https://www.vox.com/policy/412327/abortion-mifepristone-reproductive-rights-trump-rolling-thunder-ectopic-pregnancy-medication-fda>.

<sup>37</sup> See Kevin D. Roberts, *Foreword* to MANDATE FOR LEADERSHIP 2025: THE CONSERVATIVE PROMISE 1, 6 (2023); Roger Severino, *Department of Health and Human Services*, in MANDATE FOR LEADERSHIP 2025: THE CONSERVATIVE PROMISE 449, 471-72 (2023); BERRY, *supra* note 33, at 585.

universal daycare that had resurfaced in debates over Biden's infrastructure bill. On the social media platform X (formerly Twitter), he posted: "'Universal day care' is class war against normal people." Vance reposted a chart by American Compass, purportedly showing that parents with four-year college degrees were twice as likely to support full-time paid childcare as those with less than a college education.<sup>38</sup> Such class rhetoric is far from gender neutral. Given extant sex disparities in both wages and primary responsibility for childrearing, the paucity in public childcare forces women disproportionately to stagnate within or drop out of the workforce, or simply to juggle intense work and care in ways detrimental to their own health.

National conservatives want to support working families through the tax code rather than via welfare entitlements; as always, the devil is in the details of policy design. Senators Marco Rubio and Mike Lee have advocated tax credits to help cover the cost of commercial daycare, while Senator Josh Hawley has proposed legislation to create a "parent tax credit:" a fully refundable credit that would pay parents to care for children under age thirteen, offering married couples double the credit awarded to single parents.<sup>39</sup> Even though this leave is formally sex neutral, past experience suggests that mothers will be more likely to perform the care.<sup>40</sup> In addition, tax credits will exacerbate economic inequality among families, as they are only likely to benefit those who earn enough to pay taxes.

#### IV. THE FEMINIST SOLUTION: WELFARE PROTECTIONS FOR WORKING CAREGIVERS

In the twenty-first century, feminist activism in coalition with labor and civil rights groups has laid the foundation for a different solution to the neoliberal care crisis. The political architecture of this solution is intersectional; it centers a class-sensitive approach to sex equality and diverse forms of family-making that are inclusive along lines of race and ethnicity as well as sexual orientation and gender identity. This Essay concludes with a sketch of the blueprint for the feminist solution, which advocates welfare-state protections for working caregivers. These protections entail legal recognition within state-sponsored and employment benefits for pluralism in family relationships, for the accommodation of care at

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<sup>38</sup> Hayes Brown, *J.D. Vance Says Universal Child Care Is an Attack on the Working Poor. That's Ridiculous*, MSNBC (Apr. 30, 2021, at 4:53 AM), <https://www.msnbc.com/opinion/j-d-vance-says-universal-child-care-attack-working-poor-n1265911>.

<sup>39</sup> Caroline Downey, *Hawley to Introduce \$12K Tax Credit Bill*, NAT'L REV. (Apr. 26, 2021, at 9:31 AM), <https://www.nationalreview.com/news/hawley-to-introduce-12k-child-tax-credit-bill/>; Joseph Zeballos-Roig, *Sen. Josh Hawley Wants to Send \$1,000 Monthly Checks to Families with Kids Under 13 but Provide Less to Single Parents*, BUS. INSIDER (Apr. 26, 2021, at 12:03 PM), <https://www.businessinsider.com/josh-hawley-child-tax-credit-monthly-checks-families-kids-2021-4>.

<sup>40</sup> I base this conclusion on sex disparities in leave utilization under the FMLA and in exit rates from the workforce, during the Covid pandemic (in significant part due to childcare responsibilities). See *supra* notes 27-28 and accompanying text.

work, and for support for public forms of care, including the economic security of paid caregivers.

The first element of the feminist blueprint is state-paid family leave laws. These have remedied some of the limitations of the FMLA, promoting greater class equity in access to leave and expanding the family relationships defined as meritorious of care. California enacted the first paid leave law in the nation in 2002, on the heels of an advocacy campaign led by a powerful labor movement in coalition with advocates representing working women, the elderly, minority and immigrant communities, and disabled people.<sup>41</sup> To date, thirteen states and the District of Columbia have enacted paid family leave laws that match or exceed the FMLA in the duration of leave and the size of the employer covered.<sup>42</sup> These laws guarantee job-protected leave for covered employees to bond with a new child, care for a family member, care for their own disabilities and, in some jurisdictions, to handle an exigency related to a family member's active military service duty, an employee or family member's experience of domestic violence or sexual harassment or assault, or a school closure due to a public health emergency.<sup>43</sup>

State laws differ from both the FMLA and many other countries' paid leave laws in their expansive definition of family, a principle strongly held by key advocacy groups such as the National Partnership for Women and Families.<sup>44</sup> A dozen laws allow for leave to care for a "domestic partner" or the functional equivalent, in addition to parent, child, and spouse; laws vary and also include in the definition of family grandparents, grandchildren, legal guardian or ward, and in-laws or parents or spouses of a domestic partner.<sup>45</sup> Such capacious definitions of family broaden these laws' utility for more people and, certainly, contribute to their political appeal. They also connect the feminist work-family agenda to the LGBTQ movement's effort to win legal benefits for plural family forms. By expanding benefits beyond marital families, state-paid family leave laws are more inclusive of diverse families.<sup>46</sup>

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<sup>41</sup> Eileen Appelbaum & Ruth Milkman, *Paid Family Leave in California: New Research Findings*, 18 STATE OF CAL. LAB. 45, 51 (2004).

<sup>42</sup> See *State Paid Family & Medical Leave Insurance Laws*, NAT'L P'SHIP WOMEN & FAMILIES, 8-9, 17-18 (July 2024), <https://nationalpartnership.org/wp-content/uploads/2023/02/state-paid-family-leave-laws.pdf>. Of the fourteen jurisdictions, twelve provide twelve weeks for at least some category of child bonding or family care (thus matching the duration of unpaid leave under the FMLA). *Id.* One state provides eight weeks leave, and another six weeks. The laws also cover more employers than does the FMLA. Most cover *all* employers in the state, whereas the FMLA only covers employers with fifty or more employees. *Id.*

<sup>43</sup> *Id.* at 3-5.

<sup>44</sup> Claire Cain Miller, *The World 'Has Found a Way to Do This': The U.S. Lags on Paid Leave*, N.Y. TIMES (June 22, 2023), <https://web.archive.org/web/20211103230252/https://www.nytimes.com/2021/10/25/upshot/paid-leave-democrats.html>

<sup>45</sup> *State Paid Family & Medical Leave Insurance Laws*, *supra* note 42, at 6-7.

<sup>46</sup> The inclusion of domestic partners extends coverage to Queer and other couples who choose not to marry. Because marriage rates differ across racial and ethnic communities, plural definitions of family also have positive effects on the leave laws' racial inclusivity. See Juliana Menasce Horowitz, Nikki Graf & Gretchen Livingston, *The Landscape of Marriage and Cohabitation in the U.S.*, PEW RSCH. CTR. (Nov. 6, 2019), <https://www.pewresearch.org/social-trends/2019/11/06/the-landscape-of-marriage-and-cohabitation-in-the-u-s/> (analyzing marriage rates across demographic groups).

Challenges in implementing state-paid leave laws limit their capacity to promote gender and class equality. Some workers do not know about the leave guaranteed to them under the law.<sup>47</sup> Employers do still retaliate against workers who take the leave to which they are legally entitled, and some workers preemptively decline to take leave as a result.<sup>48</sup> Men remain less likely than women to take even paid family leave, in part due to the cultural sanctions they face when they defy extant breadwinner norms.<sup>49</sup> Nonetheless, these state laws vindicate a longstanding feminist effort to combine welfare state supports for families with the liberalization of both gender roles within families and the definition of family itself.

A second pillar of feminist “working families” architecture is the recognition that the workplace is constitutive of and appropriately responsive to biological and social reproduction. An important building block is the federal Pregnant Workers Fairness Act (“PWFA”) and analogous state laws. Beginning in 2012, two advocacy organizations—A Better Balance and the National Women’s Law Center—spearheaded campaigns for workplace accommodations laws related to pregnancy. In less than a decade, twenty-five states and the District of Columbia passed PWFA laws. Both “red” and “blue” state legislatures responded positively to the construction of such laws as pro-family, and important not only to women’s economic equality, but also to coalitions that won business support.<sup>50</sup>

These laws remedy the perception that the workplace and family care are separate institutional spaces—an ideological construct that emerged in the industrial period and shaped both New Deal and neoliberal social policy, albeit in different ways. According to this earlier construct, sex discrimination law did not need to remedy employment structures that were incompatible with the physical demands of pregnancy or with those related to family care.<sup>51</sup> Such accommodations were understood as “irrational” and an illegitimate redistribution of the costs of reproduction onto employers.<sup>52</sup>

The PWFA inverts this logic by exposing the discriminatory impact of workplace models of the “ideal” male breadwinner on pregnant persons. It mitigates the limitations of disparate-treatment liability under the PDA, as well as courts’ hostility to disparate-impact claims.<sup>53</sup> The PWFA and most of the analog state laws borrow from disability law principles to create an affirmative entitlement to leave, mandating that employers provide “reasonable accommodations” for

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<sup>47</sup> EILEEN APPLEBAUM & RUTH MILKMAN, LEAVES THAT PAY: EMPLOYEE AND WORKER EXPERIENCES WITH PAID FAMILY LEAVE IN CALIFORNIA 4 (2011).

<sup>48</sup> Catherine Albiston & Lindsey Trimble O’Connor, *Just Leave*, 39 HARV. J. L. & GENDER 1, 6 (2016).

<sup>49</sup> *Id.* at 43.

<sup>50</sup> Deborah Widiss, *Pregnant Workers Fairness Acts: Advancing a Progressive Policy in Both Red and Blue America*, 22 NEV. L. J. 1131, 1149 (2023).

<sup>51</sup> See generally JOAN C. WILLIAMS, UNBENDING GENDER: WHY WORK AND FAMILY CONFLICT AND WHAT TO DO ABOUT IT (2000) (leading the critique of the “ideal worker” norm, that is, a male breadwinner who had a wife at home to care for his children and support him, too).

<sup>52</sup> See Dinner, *Costs of Reproduction*, *supra* note 23, at 420.

<sup>53</sup> See Widiss, *supra* note 50, at 1137-38.

pregnant, childbirth, or related medical conditions, unless doing so would pose an “undue hardship” on the employer.<sup>54</sup>

The third pillar of a feminist working-family agenda is state support for public, rather than private, forms of care. Although they represent a progressive effort to allocate some of the *costs* of reproduction to the broader society, including employers, paid family leave and the PWFA still affirm privatized family care. By contrast, a more expansive care agenda centers on institutions that provide collective care, from public childcare centers to community living centers for people with disabilities. A signature legislative proposal of this agenda is the Child Care for Working Families Act, reintroduced in both houses of Congress in July 2025.<sup>55</sup> The Act would provide funds for states to provide child care and early learning programs for low-to-moderate income families; cap child care costs at 7% of family income, expand eligibility, and make services free for families earning less than 85% of their states’ median income; implement incentives and regulation to raise child care workers’ wages; and preserve grants for Head Start.<sup>56</sup>

An essential component of just public care is economic security and improved work conditions for paid care workers. In the 1970s and 1980s, the Service Employees International Union and the American Federation of State, County, and Municipal Employees began organizing home health care workers. They framed this work not as a form of private domestic service but as a form of public work funded by government programs, and they fought to establish government authorities as employers, with whom care workers might collectively bargain to secure higher pay and better working conditions.<sup>57</sup>

In the last quarter-century, care workers have made strides in organizing outside of unions and federal labor law. Worker centers that provide legal and social services to low-wage workers have grown more numerous and more powerful. They bring increasing ranks of women, immigrants, and people of color into the labor movement, promoting leadership development and collective action to improve work conditions. Although they did not initially pose deep challenges to labor-market structures, in recent years, worker centers have led sectoral organizing efforts that reach beyond the limitations of single-employer-based union organizing. Many of these efforts focus on the care workforce, including domestic workers who are most often non-unionized.<sup>58</sup>

These victories for care workers are precarious. Efforts by the Trump administration to deport and drive underground undocumented migrants threaten the care workforce, in particular. Anti-immigrant crackdowns discourage paid caregivers from engaging in labor organizing, even when it does not result in their

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<sup>54</sup> *Id.* at 1144; 42 U.S.C. § 2000gg (2022).

<sup>55</sup> Child Care for Working Families Act, H.R. 4418, 119th Cong. (2025) (noting as of the writing of this article the bill had been introduced to the House with no further activity).

<sup>56</sup> *Fact Sheet: What to Know About the Child Care for Working Families Act*, CTR. AM. PROGRESS (July 16, 2025), <https://www.americanprogress.org/article/fact-sheet-what-to-know-about-the-child-care-for-working-families-act/>.

<sup>57</sup> See EILEEN BORIS & JENNIFER KLEIN, *CARING FOR AMERICA: HOME HEALTH WORKERS IN THE SHADOW OF THE WELFARE STATE* 222 (2012).

<sup>58</sup> See Kate Andrias, *The New Labor Law*, 126 *YALE L.J.* 2, 42-43, 68-69 (2016).

imprisonment or removal.<sup>59</sup> Medicaid cuts in 2025, to be implemented over ten years, will not only hurt care clients but also harm caregivers. For example, most childcare providers are small employers who cannot afford to purchase health insurance for their workers, and, as a consequence, less than a quarter of early childhood educators (outside the public schools) have employer-sponsored coverage.<sup>60</sup> Many utilize Medicaid for needed healthcare security.<sup>61</sup> In states without Medicaid expansion, the number of uninsured childcare workers is four times the number in states with Medicaid expansion.<sup>62</sup> This data portends a crisis in health care for care workers themselves in the coming decade.

The crescendo in political critiques of the neoliberal regime that consolidated in the last decades of the twentieth century presents an opportunity to remake the politics of work and care. Initiatives to expand the family relationships eligible for benefits, to win workplace accommodations for care, and to value the workers who sustain public care institutions hold promise for a more just future. This future will enable greater freedom in gender roles and enable the care at the heart of U.S. families and society to flourish.

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<sup>59</sup> See Rachel M. Werner & Amanda R. Kreider, *Two Looming Crises Threaten to Collapse U.S. Long-Term Care*, PENN LEONARD DAVIS INST. HEALTH ECON. (May 30, 2025), <https://ldi.upenn.edu/our-work/research-updates/two-looming-crises-threaten-to-collapse-u-s-long-term-care/>.

<sup>60</sup> See *Medicaid Is a Critical Support for the Early Childhood Education Workforce*, GEO. UNIV. MCCOURT SCH. PUB. POL'Y, CTR. CHILD. & FAM. (2025), <https://ccf.georgetown.edu/2025/04/21/medicaid-is-a-critical-support-for-the-early-childhood-education-workforce/>.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

# WOMEN, KNOWLEDGE INSTITUTIONS, AND CONSTITUTIONAL LAW

Vicki C. Jackson\*

## I. INTRODUCTION

This Essay argues that knowledge institutions are crucial to the ability of historically disadvantaged groups—including women—to correct the injustices they have suffered. In Part II, the Essay begins by defining knowledge institutions and explaining why they need legal recognition and protection in a constitutional democracy. Part III then argues that knowledge institutions are a resource for challenging conventional understandings and assumptions that may produce injustices not readily remedied through political processes. Knowledge institutions have served this role in several important constitutional battles in the United States—over racial equality, gender equality, and discrimination against same-sex couples. The claim is not that knowledge institutions will always produce correct understandings of the world, but that the likelihood of their doing so, and of correcting their own prior errors in ways that enable improvement in the human condition, is greater than that of most other secular institutions.

## II. KNOWLEDGE INSTITUTIONS AS INFRASTRUCTURE

Knowledge institutions are a vital but insufficiently acknowledged part of the necessary infrastructure of constitutional democracy. They include the truth-oriented press, universities, and government offices responsible for data collection and reporting. They also include scientific associations or institutes, libraries, museums, and some other NGOs. More formally, knowledge institutions can be defined as (1) ongoing entities, (2) with a central purpose of creating, disseminating, or preserving knowledge, (3) that use appropriate disciplinary methods to determine what counts as knowledge, and (4) that apply those disciplinary methods independently of the views of funders, governments, or of popular opinion. Some knowledge institutions are private, and some are public; under U.S. constitutional law, public institutions may be subject to different constraints than private institutions. Whether public or private, being a genuine knowledge institution requires a commitment to pursuing truth (or better understandings) that entails a disciplined approach to identifying knowledge, and the capacity and will to do so independently; knowledge institutions also must have capacities for error correction.<sup>1</sup>

Some knowledge institutions are explicitly protected in constitutional texts. In the United States, the First Amendment protects “freedom . . . of the

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<sup>1</sup> For earlier writing, see, e.g., Vicki C. Jackson, *Knowledge Institutions in Constitutional Democracies: Preliminary Reflections*, 7 CAN J. COMP. & CONTEMP. L. 156 (2021); Vicki C. Jackson, *Knowledge Institutions in Constitutional Democracy: Reflections on ‘the Press,’* 14 J. MEDIA L. 275

press,” though scholars and jurists disagree on whether this refers to the press as a private industry or as a technology for circulating expression.<sup>2</sup> Unlike many other countries’ constitutions, the U.S. Constitution is not explicit in protecting universities. It was only after World War II that the Supreme Court began to recognize “academic freedom” as a “special concern” of the First Amendment’s free speech provisions.<sup>3</sup> The Court’s attentiveness to this value may have declined in recent years.<sup>4</sup> The Court’s recent case law, moreover, poses real risks to maintaining the non-partisan independence of government knowledge offices. The Court has expanded the scope of federal offices that, it says, must be subject to the President’s unrestrained will in firing employees;<sup>5</sup> and the Court has also held that government employees have no First Amendment protection for their speech, when they are acting within the scope of their duties, even if they are speaking in order to better advance (or avoid mistakes in) the performance of their office’s mission.<sup>6</sup> Moreover, the Court has treated the “press” clause of the First Amendment as largely insignificant, holding that distinctions between press companies and other speakers are impermissible under the free speech clause of that Amendment.<sup>7</sup>

Knowledge institutions play a role beyond that of individual rights protection provisions. Institutions enable some kinds of investigative, analytical, and scholarly projects that individuals, acting without organizational support, are unlikely to achieve. Institutions may provide focal points for the protection of related individual rights.<sup>8</sup> Institutions can help protect their members from liability or government persecution. Perhaps most importantly, institutions help develop,

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(2022); Vicki C. Jackson, *Knowledge Institutions and Resisting ‘Truth Decay,’* in DISINFORMATION, MISINFORMATION AND DEMOCRACY (Ronald J. Krotoszynski, Jr., András Koltay & Charlotte Garden eds., 2025) [hereinafter *Truth Decay*]; Vicki C. Jackson, *Journalism and Academia: Knowledge Institutions Buttressing Constitutional Democracy*, KNIGHT FIRST AMENDMENT INST. BLOG (July 1, 2024), <https://knightcolumbia.org/blog/journalism-and-academia-a-free-press-and-independent-universities-as-knowledge-institutions-buttressing-constitutional-democracy>.

<sup>2</sup> Compare Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1975) (“the Free Press guarantee is, in essence, a structural provision of the Constitution . . . [that] extends protection to an institution[,] [t]he publishing business . . . the only organized private business that is given explicit constitutional protection”), with *Citizens United v. Federal Election Commission*, 558 U.S. 310, 352-54 (2010) (statute cannot distinguish between “press” companies and other private companies in campaign regulation). Compare MARTHA MINOW, *SAVING THE NEWS: WHY THE CONSTITUTION CALLS FOR GOVERNMENT ACTION TO PRESERVE FREEDOM OF SPEECH* (Oxford Univ. Press 2021) (protecting press as private industry), with Eugene Volokh, *Freedom for Press as an Industry or for Press as a Technology? From Framing to Today*, 160 U. PA. L. REV. 469 (2012) (protecting press as protecting access to technological means of distribution).

<sup>3</sup> See *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967); see also *Sweezy v. New Hampshire*, 354 U.S. 234, 250-51 (1957).

<sup>4</sup> See Jackson, *Truth Decay*, *supra* note 1 (discussing *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181 (2023)).

<sup>5</sup> See, e.g., *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 215-20, 238 (2020).

<sup>6</sup> See *Garcetti v. Ceballos*, 547 U.S. 410, 421-22 (2006).

<sup>7</sup> See *Citizens United*, 558 U.S. at 352.

<sup>8</sup> See generally ADAM CHILTON & MILA VERSTEEG, *HOW CONSTITUTIONAL RIGHTS MATTER* (Oxford Univ. Press 2020).

maintain, and update the very standards by which knowledge can be identified, a task beyond the capacity of any individual.

Of course, individuals have produced important advances in human knowledge;<sup>9</sup> individual rights of research, writing, inquiry, and free expression remain absolutely critical. But today, institutions are homes to most forms of knowledge production. It is institutions that pass on disciplinary standards for knowledge-seeking to new generations. It is institutions that provide the funds and the locus to bring together minds pursuing related subjects in ways that enhance the search for truth. Private business corporations are institutions that may engage in research, but they are motivated primarily by profit, not by a search for truth or knowledge. In contrast, universities, the truth-seeking press, and government offices charged with collecting and disseminating data are entities whose *primary* purposes (whether in a for-profit or non-profit mode) include the creation, preservation, and dissemination of knowledge; they act for somewhat more disinterested reasons to develop better understandings of the world. It is my claim that constitutional law must protect both individual and institutional forms of knowledge seeking.

Knowledge institutions are key aspects of the epistemic infrastructure of constitutional democracies. Such governments, like any other, need reliable knowledge to craft public policy responsive to the needs of their populations. But when democratic governments fail to do so, faith in democracy may be shaken, opening the door to charismatic populist leaders who claim that there is no need to follow proper procedures or engage in evidence-based decision-making—that their solution to the problem will be the fix. Constitutional democracies, moreover, require more of their citizenry and officials than do other forms of government. They require citizens who are knowledgeable enough about issues and candidates to cast wise votes and who can engage in informed discussion and public opinion formation between elections, often on difficult subjects. They also require citizens and public officials who are aware of the law generally and, specifically, are aware of the people’s rights. For all these reasons, knowledge institutions are especially essential to constitutional democracies.

### III. KNOWLEDGE INSTITUTIONS AND GENDER EQUALITY

Women’s inequalities were long sustained in both law and society. They were maintained by the fragility of women’s lives in pregnancy and the demands of child rearing. They were reinforced by myths about their abilities and rules that, based on those myths, locked them out of educational and economic opportunity. They were sustained by laws that erased their very identities as separate persons,

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<sup>9</sup> *Cf.*, e.g., REMI ADEKOYA ET AL., ACADEMIC FREEDOM IN THE UK: PROTECTING VIEWPOINT DIVERSITY 21 (Policy Exchange 2020) (“[M]ost of [John Locke’s] important work was done under private patronage,” because the “Test Acts” required a degree of intellectual conformity within Oxford and Cambridge at the time, before traditions of academic freedom were well established.)

placing them under the control of male husbands. This hierarchy resulted in economic oppression and physical abuse.

Advances in medical knowledge have made pregnancy and childbirth less dangerous and have given women means of controlling their reproductive lives. Advances in knowledge have rebutted claims made to support many sex-based discriminatory laws, resulting in repeal or invalidation of those laws, which in turn has allowed women entry into economically remunerative spaces. Legal barriers to women's equality, both within the family and in the market, have over the last century been largely removed in the United States. These developments depended, in part, on advances in knowledge, which could both help motivate and be used by social movements and in courts and legislatures. Knowledge institutions have contributed to the social movement for gender equality, even if they did not necessarily play a central role. Changes in women's lives have been made possible by medical advances and evolving social awareness—including of women's own consciousness. Research has helped to undermine sex-based assumptions that underlay many unfair exclusions; and research has played an important role in enabling the medical and technological conditions for change and in providing part of the impetus for change.

Thus, it is not surprising that advocates for sex equality, including Ruth Bader Ginsburg, filled their briefs with empirical and normative findings and arguments derived from scholarly literature, government data, and news reports. Nor is it surprising that Ginsburg's opinions about issues of gender equality, as a judge, were filled with references to research designed to overcome irrational or unfounded stereotypes and prejudices about women.<sup>10</sup>

Consider *Reed v. Reed*,<sup>11</sup> where the issue was the constitutionality of an Idaho intestacy statute that provided that ““(o)f several persons claiming and equally entitled (under § 15-312) to administer, males must be preferred to females . . . .”<sup>12</sup>—that is, the law provided an automatic preference for a male to act as executor among persons of otherwise equal familial relationship to the deceased. As is well known, this was the first case in which the Court held a gender classification unconstitutional; it was part of a broader change in thinking, reflected by Idaho's repeal of this provision while the case was pending.<sup>12</sup> Ginsburg's brief cited numerous academic sources, including books, law review articles, news reports (such as *The New York Times*), and government reports. Her brief's argument for applying strict scrutiny to sex classifications, like race classifications, included extensive excerpts from the *Harvard Law Review*'s recent Note, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*,<sup>13</sup> and from Pauli Murray's *The Negro Woman's Stake in the Equal*

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<sup>10</sup> In order to illustrate the reliance by courts and legal advocates on sources provided by knowledge institutions, more citations are included in the quotations in the text that follow than is customary; these are original to the advocates' briefs or judicial opinions being quoted.

<sup>11</sup> *Reed v. Reed*, 404 U.S. 71, 73 (1971).

<sup>12</sup> *See id.* at 74-75, n.4 (noting also that the repeal was not effective until 1972).

<sup>13</sup> Brief for Appellant at 15, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 430) (citing Note, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, 84 HARV. L. REV. 1499 (1971)).

*Rights Amendment*.<sup>14</sup> Ginsburg's brief also relied on scholarly and government sources for a critique of the legal status of married women, arguing:

Neither slaves nor married women had the legal capacity to hold property or to serve as guardians of their own children. Neither blacks nor women could hold office, serve on juries, or bring suit in their own names. Men controlled the behavior of both their slaves and their wives and had legally enforceable rights to their services without compensation. See [earlier pages in the brief that provided extensive support for the characterization of family law]. See also L. Kanowitz, *Women and the Law: The Unfinished Revolution* 5-6 (1969). As Gunnar Myrdal remarked, the parallel was not accidental, for the legal status of women and children served as the model for the legal status assigned to black slaves . . . [citing his book, *An American Dilemma* (2d ed. 1962)].<sup>15</sup>

Ginsburg also cited then-recent leading works by feminist historians, including groundbreaking works like *Up from the Pedestal* (1968) by Aileen Kraditor, who taught at Rhode Island College and later at Boston University;<sup>16</sup> *Century of Struggle* (1959) by independent scholar Eleanor Flexner, published by Harvard University Press;<sup>17</sup> *Women and the Law* (1969) by Leo Kanowitz, a UC Hastings law professor, whose work one contemporary reviewer described as “offer[ing] sufficient data and analysis to shame a male dominated legal order”;<sup>18</sup> and *Everyone Was Brave: The Rise and Fall of Feminism in America* (1969) by William L. O'Neill, a history professor at Rutgers University.<sup>19</sup> She cited other scholarly work, including Pauli Murray and Mary Eastwood's prescient 1965 article, *Jane Crow and the Law: Sex Discrimination and Title VII*,<sup>20</sup> university reports, including the Report of the Committee on the Status of Women in the Faculty of Arts and Sciences (Harvard University 1971), and data provided by government offices, including the Civil Service Commission and the Labor Department's Bureau of Labor Statistics.<sup>21</sup> The myth-busting, knowledge-based character of her argumentation was summed up in her Reply Brief, where she

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<sup>14</sup> *Id.* at 17 (citing Pauli Murray, *The Negro Woman's Stake in the Equal Rights Amendment*, 9 HARV. C.R.-C.L. L. REV. 253 (1971)).

<sup>15</sup> *Id.* at 28-29 (citing GUNNAR MYRDAL, *AN AMERICAN DILEMMA* 1073 (2d ed. 1962)).

<sup>16</sup> *Id.* at 27, 29 (citing AILEEN S. KRADITOR, *UP FROM THE PEDESTAL: SELECTED WRITINGS IN THE HISTORY OF AMERICAN FEMINISM* (Quadrangle Books 1968)).

<sup>17</sup> *Id.* at 27, 28, 31, 41 (citing ELEANOR FLEXNER, *CENTURY OF STRUGGLE: THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES* (Harvard Univ. Press 1959)).

<sup>18</sup> Henry H. Foster Jr., *Women and the Law*. By Leo Kanowitz., 19 BUFF. L. REV. 451, 451 (1970); see Brief for Appellant, *supra* note 13, at 10, 29, 31, 33, 34, 35 (citing KANOWITZ).

<sup>19</sup> Brief for Appellant, *supra* note 13, at 31 (citing WILLIAM L. O'NEILL, *EVERYONE WAS BRAVE: THE RISE AND FALL OF FEMINISM IN AMERICA* (Quadrangle Books 1969)).

<sup>20</sup> *Id.* at 15, 19 (citing Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232 (1965)).

<sup>21</sup> *Id.* at 11, 39, 63, 64 (citing, *inter alia*, COMMITTEE ON THE STATUS OF WOMEN, REPORT OF THE COMMITTEE ON THE STATUS OF WOMEN IN THE FACULTY OF ARTS AND SCIENCES (Harvard Univ. 1971)).

wrote that “[t]he myth that women are inherently disqualified for full participation in public life as independent persons is no longer acceptable.”<sup>22</sup>

Phineas Indritz, a prominent civil rights lawyer of the mid-twentieth century<sup>23</sup> appeared on behalf of the American Veterans Committee as the first attorney on a “Joint Brief Amici Curiae” in *Reed v. Reed*. This joint brief, like Ginsburg’s brief, also relied extensively on scholarly work and is even more explicit on the connection between knowledge production and the dismantling of sex-based discrimination in law:

Lack of systematic study of sex-based discriminations is perhaps the principal reason why the courts have been less vigorous in recognizing that irrational governmentally-imposed discrimination is as great an evil, and as unconstitutional, when it is sex-based as when it is race-based. It is only since the mid-sixties that the nation has begun to examine the extent of sex discrimination in our laws and practices and its grievous impact upon the rights and welfare of people (principally women, and in some instances men).<sup>24</sup>

This joint amicus brief also relied on legislative hearings and on Census Bureau data to show that “women in this country (and in Idaho) are not as inferior in ability as the Idaho statute assumes.”<sup>25</sup> The data showed that over 40% of women were already employed; that women had completed on average the same (or slightly more) years of schooling than men, and, the amicus brief further observed:

In April, 1970, 4,431,000 women worked in professional and technical jobs and 1,301,000 as managers, officials and proprietors (T. 334, p. 225). In 1969, there were 39,506 women on active military duty, of whom 13,183 held officer rank (T. 386, p. 257). In 1968, there were 27,833 women scientists on the National Register of Scientific and Technical Personnel (T. 808, p. 525).<sup>26</sup>

Still another amicus brief, by Lee Rankin for the City of New York, likewise invoked a number of scholarly authorities and government sources of data in its argument.<sup>27</sup>

The Court’s unanimous opinion in *Reed* was brief and unrevealing about why the Court had shifted its stance so markedly from its most recent prior sex discrimination case, *Hoyt v. Florida*.<sup>28</sup> One possibility is change in personnel. Of

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<sup>22</sup> Reply Brief for Appellant at 2-3, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4), 1971 WL 133598.

<sup>23</sup> See VETERAN FEMINISTS OF AM., *The VFA Pioneer Histories Project: Phineas Indritz*, <https://veteranfeministsofamerica.org/vfa-pioneer-histories-project-phineas-indritz/> (last visited Aug. 22, 2025). His daughter, my Yale Law School classmate Tova Indritz, was I believe the first woman to head up a federal Public Defender’s Office—in New Mexico, 1982-1995.

<sup>24</sup> Joint Brief of Amici Curiae, at 13, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4), 1971 WL 133600.

<sup>25</sup> *Id.* at 26.

<sup>26</sup> *Id.*

<sup>27</sup> See Brief for the City of New York as Amicus Curiae, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4), 1971 WL 133599.

<sup>28</sup> *Hoyt v. Florida*, 368 U.S. 57 (1961).

the justices on the Court at the time of *Hoyt*, only Justices Douglas, Brennan, and Stewart were still sitting when *Reed* was decided by a unanimous seven-justice bench; none of them expressed any disagreement with the *Reed* decision but all of them had agreed with *Hoyt*, which had upheld a statute that excused women from jury service over the Sixth Amendment objections of a female defendant.<sup>29</sup> Changes in personnel thus cannot fully account for the shift, which may be attributed in important part to the remarkable change in social awareness about the justifiability of legally imposed disabilities based on gender that had occurred in the 1960s—a shift in awareness to which knowledge institutions contributed.

Next, consider *Frontiero v. Richardson*,<sup>30</sup> where the Court struck down a sex-based statute that assumed, for purposes of certain benefits for military members, that female spouses were dependent on their military husbands, but required male spouses to prove their financial dependency on their military wives' salaries in order to qualify for spousal benefits. Four members of the Court would have adopted strict scrutiny for gender classifications, as advocate Ginsburg again argued. Justice Brennan, writing for this group, cited from the scholarly literature presented in Ginsburg's *Reed v. Reed* brief<sup>31</sup> in writing that "There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."<sup>32</sup> Ginsburg submitted an amicus brief arguing for strict scrutiny,<sup>33</sup> although that amicus brief was not available on Westlaw at the time of this writing. The brief of Morris Dees for appellants is available on Westlaw and reflects citations to many scholarly works,<sup>34</sup> as well as news reports and government published

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<sup>29</sup> See *id.* Of the three overlapping justices, Justice Douglas had joined a separate concurring opinion with Chief Justice Warren and Justice Black in *Hoyt* that agreed that the sex discriminatory law should be upheld. *Id.* at 57, 69 (Warren, C.J., concurring joined by Black and Douglas, JJ.). Justices Brennan and Stewart had evidently agreed with Justice Harlan's opinion for the Court. On the bench for *Reed* were Chief Justice Burger, and Justices Blackmun, Brennan, Marshall, Douglas, Stewart, and White. See *Reed*, 404 U.S. 71.

<sup>30</sup> *Frontiero v. Richardson*, 411 U.S. 677 (1973).

<sup>31</sup> See Allison Anna Tait, *A Tale of Three Families: Historical Households, Earned Belonging, and Natural Connections*, 63 HASTINGS L.J. 1345, 1359 (2012).

<sup>32</sup> *Frontiero*, 411 U.S. at 685.

<sup>33</sup> See RUTH BADER GINSBURG, MY OWN WORDS 131-32 (with Mary Hartnett & Wendy W. Williams) (2016). Ginsburg, along with the ACLU and Morris Dees, submitted a joint reply brief, also not available on Westlaw at the time of this writing. In the portions of that joint reply brief excerpted in GINSBURG, *supra*, at 133-37, it is clear that Ginsburg was continuing the scholarly, knowledge-based assault on sex discrimination that she began in her brief in *Reed v. Reed*.

<sup>34</sup> See Brief for Appellants, *Frontiero v. Richardson*, 411 U.S. 677 (1973) (No. 71-1694) 1971 WL 134340. These works included Barbara K. Cavanaugh, *A Little Dearer than His Horse: Legal Stereotypes and the Feminine Personality*, 6 HARV. C.R.-C.L. L. REV. 260 (1971); *Equal Rights for Women: A Symposium*, 6 HARV. C.R.-C.L. L. REV. 215 (1971); Paul A. Freund, *The Equal Rights Amendment Is Not the Way*, 6 HARV. C.R.-C.L. L. REV. 234, 235-236 (1971); Thomas E. Murphy, *Female Wage Discrimination: A Study of the Equal Pay Act 1963-1970*, 39 U. CIN. L. REV. 615 (1970); William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968). See also *supra* note 33.

data.<sup>35</sup> Similarly, in *Mississippi University for Women v. Hogan*,<sup>36</sup> an amicus brief cited scholarly works on nursing, and on men and women as nurses, as well as scholarly works on sex discrimination and the harm from “job segregation” and stereotypes of nursing as women’s work.<sup>37</sup> These themes played an important role in the Court’s decision striking down a ban on admission of men to a state university nursing school.<sup>38</sup>

In *United States v. Virginia*,<sup>39</sup> now-Justice Ginsburg continued to appeal to sources from knowledge institutions in rejecting Virginia’s arguments that its sex-segregated military academy and women’s leadership institute were constitutionally permissible. She cited scholarly literature on the history of women’s exclusion from higher education,<sup>40</sup> and medical scholarship from the nineteenth century purporting to show that “the physiological effects of hard study and academic competition with boys would interfere with the development of girls’ reproductive organs.”<sup>41</sup> In rejecting Virginia’s proffered reasons for maintaining Virginia Military Academy (VMI) as an all-male institution, she drew on legal history and scholarly works to explain why the course of past events undermined the plausibility of the reasons given:

The notion that admission of women would downgrade VMI’s stature, destroy the adversative system and, with it, even the school, is a judgment hardly proved, a prediction hardly different from other “self-fulfilling prophec[ies],” see *Mississippi Univ. for Women*, 458 U.S., at 730, once routinely used to deny rights or opportunities. When women first sought admission to the bar and access to legal education, concerns of the same order were expressed. For example, in 1876, . . . [one state court] explained why women were thought ineligible for the practice of law [writing that because women care for the young, they cannot “bestow that time (early and late) and labor, so essential in attaining to the eminence to which the true lawyer should ever aspire”] and that their

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<sup>35</sup> Brief for Appellants at 13-14, *Frontiero v. Richardson*, 411 U.S. 677 (1973) (No. 71-1694) 1971 WL 134340 (citing U.S. Department of Labor data to show that “at some family income levels almost one-half the wives are full-time members of the work force”).

<sup>36</sup> *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

<sup>37</sup> See Brief Amici Curiae of National Women’s Law Center et al., *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982), 1982 WL 608477. Another amicus brief, arguing that the school should remain exclusively for women, cited only cases. Amicus Brief for Mississippi University for Women Alumnae Ass’n, *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982), 1981 WL 389657.

<sup>38</sup> See *Mississippi Univ. for Women*, 458 U.S. at 729-33.

<sup>39</sup> *United States v. Virginia*, 518 U.S. 515 (1996).

<sup>40</sup> *Id.* at 536-39.

<sup>41</sup> *Id.* at 536, n.9 (citing several nineteenth century works).

exclusion thus reflects not “old fogyism” but rather “a desire to *grade up* the profession.”<sup>42</sup> . . .

A like fear, according to a 1925 report, accounted for Columbia Law School’s resistance to women’s admission, although

“[t]he faculty . . . never maintained that women could not master legal learning. . . . No, its argument has been . . . more practical. If women were admitted to the Columbia Law School, [the faculty] said, then the choicer, more manly and red-blooded graduates of our great universities would go to the Harvard Law School!” *The Nation*, Feb. 18, 1925, at p. 173.

Medical faculties similarly resisted men and women as partners in the study of medicine. See R. Morantz-Sanchez, *Sympathy and Science: Women Physicians in American Medicine* 51–54, 250 (1985); see also M. Walsh, “Doctors Wanted: No Women Need Apply” 121–122 (1977) (quoting E. Clarke, *Medical Education of Women*, 4 *Boston Med. & Surg. J.* 345, 346 (1869) (“‘God forbid that I should ever see men and women aiding each other to display with the scalpel the secrets of the reproductive system . . . .’”)); . . . . More recently, women seeking careers in policing encountered resistance based on fears that their presence would “undermine male solidarity,” see F. Heidensohn, *Women in Control?* 201 (1992); deprive male partners of adequate assistance, see *id.*, at 184–185; and lead to sexual misconduct, see C. Milton et al., *Women in Policing* 32–33 (1974). Field studies did not confirm these fears. See Heidensohn, *supra*, at 92–93; P. Bloch & D. Anderson, *Policewomen on Patrol: Final Report* (1974).

Women’s successful entry into the federal military academies, and their participation in the Nation’s military forces, indicate that Virginia’s fears for the future of VMI may not be solidly grounded. The Commonwealth’s justification for excluding all women from “citizen-soldier” training for which some are qualified, in any event, cannot rank as “exceedingly persuasive,” as we have explained and applied that standard.<sup>43</sup>

Note that Justice Ginsburg relied on scholarly works, and news reports, as well as legal cases. Note further that Justice Ginsburg’s extensive references to nineteenth-century medical texts illustrate an important caution: Knowledge institutions and their members can be wrong; faculty, journalists, government statisticians may err.<sup>44</sup> But knowledge institutions are committed to epistemic

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<sup>42</sup> Here Justice Ginsburg’s opinion in *Virginia*, at 543, cited to *In re Application of Martha Angle Dorsett to Be Admitted to Practice as Attorney and Counselor at Law* (Minn. C.P. Hennepin Cnty., 1876), in *THE SYLLABI*, Oct. 21, 1876, at 5, 6 (emphasis added).

<sup>43</sup> *Virginia*, 518 U.S. at 542–45 (footnotes omitted).

<sup>44</sup> Consider here the debates over footnote 11 in *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954),

openness—meaning, that they are open to challenges to orthodoxies, and in this way, can function over the long term as self-correcting bodies. In their commitment to epistemic openness, they differ from other more authority-oriented sources of knowledge and have repeatedly shown over time their flexibility in adapting to new evidence and new understandings.

#### IV. KNOWLEDGE INSTITUTIONS AND LGBTQ EQUALITY ISSUES

More briefly, let us note the role of knowledge institution and, in particular, scholarship, in the great legal change that occurred regarding LGBTQ rights. In 1960, according to *Bowers v. Hardwick*, almost all states prohibited sodomy,<sup>45</sup> which came to be associated with same-sex sexuality. In 1986 the Supreme Court in *Bowers* characterized as “facetious” a claim that punishing two gay men for their sexual conduct violated their fundamental constitutional rights.<sup>46</sup> Yet in 2015—less than three decades later—the Supreme Court held that same-sex couples had a constitutional right to marry.<sup>47</sup> The impact of the political and social movement for LGBTQ rights was enormous, including more people “coming out” to their family, friends and neighbors. That movement was aided by scholarly work that debunked mistaken beliefs about history, thereby reconstructing the meaning of past laws, and corrected mistaken impressions about other nations’ laws.

Soon after the 1986 *Bowers* decision rejecting constitutional attacks on a criminal sodomy law,<sup>48</sup> William Eskridge and other scholars began publishing

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referring to findings from social science experiments that black children preferred playing with white dolls and attributing that to race segregation. There are at least three significant debates about this footnote. First, the methodology and soundness of the conclusions drawn have been challenged, critics noting that black children in the North had even stronger preferences for white dolls than black children in the South, in tension with the idea that it was segregation itself that created the effect. See William J. Rich, *Betrayal of the Children with Dolls*, 90 CORNELL L. REV. 419, 420 & n. 6, 7 (2005). Second, there is debate over how significant this finding was to the Court’s judgment, see, e.g., Sanjay Mody, *Brown Footnote Eleven in Historical Context: Social Science and the Supreme Court’s Quest for Legitimacy*, 54 STAN. L. REV. 793 (2002); Mario L. Barnes & Erwin Chemerinsky, *What Can Brown Do for You?: Addressing McClesky v. Kemp as a Flawed Standard for Measuring the Constitutionally Significant Risk of Race Bias*, 112 NW. U. L. REV. 1293, 1321-26 (2018). Third, on how significant such findings should be to the constitutional issue, compare Barnes & Chemerinsky, *supra*, at 1321, 1333-36 (favoring consideration of well-researched racial impact data) with *Grutter v. Bollinger*, 539 U.S. 306, 364-66 (2003) (Thomas, J., concurring in part and dissenting in part) (disagreeing with majority’s reliance on social science data to support affirmative action for minorities and suggesting that it might support using other research to justify historically black colleges in excluding white applicants, both of which results, he argues, are barred by a correct understanding of the Constitution).

<sup>45</sup> *Bowers v. Hardwick*, 478 U.S. 186, 193 (1986).

<sup>46</sup> *Id.* at 194. See also *id.* at 196 (Burger, C.J., concurring) (implying, incorrectly, that homosexuality was generally condemned in Western civilization, in apparent disregard of a then-recent European decision striking down a sodomy law, *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981) & ¶ 52, which was cited by the Court in *Lawrence v. Texas*, 539 U.S. 558, 573 (2003)).

<sup>47</sup> *Obergefell v. Hodges*, 576 U.S. 644 (2015).

<sup>48</sup> The majority in *Bowers* briefly alluded to scholarly works to establish that prohibitions on sodomy were widespread and longstanding, see *Bowers*, 478 U.S. at 192-94 (noting that at the time of the decision 24 states and the District of Columbia still had sodomy laws). On the other hand, Justice

work challenging the legal and historical bases for statutory discrimination against gay people.<sup>49</sup> The petitioner's brief in *Lawrence v. Texas*<sup>50</sup> cited many academic sources, including works by Eskridge, Bill Rubenstein, Richard Posner, Anne Goldstein, Jonathan N. Katz, Nan Hunter, and Kenneth Karst.<sup>51</sup> Justice Kennedy's opinion for the Court in *Lawrence* cites Eskridge, *Hardwick and Historiography*<sup>52</sup> and refers to the "academic writings, and . . . scholarly amicus briefs filed to assist the Court in this case, [making] fundamental criticisms of the historical premises relied upon by the majority and concurring opinions in *Bowers*."<sup>53</sup> The Court corrects the legal history errors of *Bowers*, drawing on scholarship to explain that, rather than homosexual sex being a long-standing distinctive category in law,

the concept of the homosexual as a distinct category of person did not emerge until the late 19th century. See, e.g., J. Katz, *The Invention of Heterosexuality* 10 (1995); J. D'Emilio & E. Freedman, *Intimate Matters: A History of Sexuality in America* 121 (2d ed. 1997) ("The modern terms homosexuality and heterosexuality do not apply to an era that had not yet articulated these distinctions"). . . . It was not until the 1970's that any State singled out same-sex relations for criminal prosecution, and only nine States have done so. . . . In summary, the historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated.<sup>54</sup>

Not only does the Court rely on scholarship to correct the historical record, but it also notes the scholarly critique of *Bowers*, which is described as "substantial and continuing, disapproving of its reasoning in all respects, not just as to its historical assumptions. See, e.g., C. Fried, *Order and Law: Arguing the Reagan Revolution—A Firsthand Account* 81–84 (1991); R. Posner, *Sex and Reason* 341–350 (1992)."<sup>55</sup> These historical misunderstandings and scholarly critiques, the Court said, weakened *Bowers*' stare decisis force.<sup>56</sup>

The role of historical scholarship seemed quite central—but in a different way—to the 2015 decision in *Obergefell v. Hodges*,<sup>57</sup> holding that denial of the

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Blackmun's dissent cited recent scholarship about the normative implications of privacy rights recognized in other cases, *Bowers*, 478 U.S. at 205, and discussed the religious origins of sodomy prohibitions, *id.* at 211–12 (Blackmun, J., dissenting).

<sup>49</sup> See WILLIAM N. ESKRIDGE JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (Harvard Univ. Press 1999) (elaborating arguments presented in his earlier article, *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993)).

<sup>50</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>51</sup> See Brief for Petitioners at xvi–xx, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) 2003 WL 152352 (listing sources in Table of Authorities).

<sup>52</sup> *Lawrence*, 539 U.S. at 571 (citing William N. Eskridge, Jr., *History and Historiography*, 1999 U. ILL. L. REV. 631, 656)).

<sup>53</sup> *Id.* at 567–568.

<sup>54</sup> *Id.* at 568, 570–571.

<sup>55</sup> *Id.* at 576.

<sup>56</sup> *Id.* at 572–73, 576–78.

<sup>57</sup> See *Obergefell v. Hodges*, 576 U.S. 644, 656 (2015).

right to marry to same-sex couples violated the Constitution. In 1972, in *Baker v. Nelson*,<sup>58</sup> the Court had dismissed a similar claim as failing to present a substantial federal question. But in *Obergefell*, the narrowly divided Court emphasized, drawing on scholarship, how marriage had changed over the years:

For example, marriage was once viewed as an arrangement by the couple's parents based on political, religious, and financial concerns; but by the time of the Nation's founding, it was understood to be a voluntary contract between a man and a woman. See N. Cott, *Public Vows: A History of Marriage and the Nation* 9–17 (2000); S. Coontz, *Marriage, A History* 15–16 (2005). As the role and status of women changed, the institution further evolved. Under the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity. See 1 W. Blackstone, *Commentaries on the Laws of England* 430 (1765). As women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity, the law of coverture was abandoned. See Brief for Historians of Marriage et al. as Amici Curiae 16–19. These and other developments in the institution of marriage over the past centuries were not mere superficial changes. Rather, they worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential. See generally N. Cott, *Public Vows*; S. Coontz, *Marriage*; H. Hartog, *Man & Wife in America: A History* (2000).<sup>59</sup>

The majority also documented the changing views of the medical profession on whether homosexuality was a mental disorder, noting that “in more recent years . . . psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable,” citing an amicus brief from a leading scientific association of psychologists.<sup>60</sup>

Reason and evidence will not always make a difference, but they can be important tools for advancing equality and justice. Moreover, expert findings are not sacrosanct; they can and should be tested against standards of reliability. Yet it is troubling to see Justice Thomas using the *Skrmetti* case, which involved the constitutionality of a state law banning hormone therapy for minors with gender dysphoria, as an occasion for what might colloquially be called “expert bashing.”<sup>61</sup>

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<sup>58</sup> *Baker v. Nelson*, 409 U.S. 810 (1972).

<sup>59</sup> *Obergefell*, 576 U.S. at 659–660.

<sup>60</sup> *Id.* at 661 (citing Brief for American Psychological Association et al. as Amici Curiae Supporting Petitioners, *Obergefell v. Hodges*, 576 U.S. 644 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1004713 at 7–17). Chief Justice Roberts' dissent also drew on scholarship and news reports to raise concerns that the holding might lead to similar rights for “polyamorous” relationships. *Id.* at 704–05 (Roberts, C.J., dissenting).

<sup>61</sup> *Compare* *United States v. Skrmetti*, 605 U.S. 495, 530 (2025) (Thomas, J. concurring) (criticizing reliance on “so-called experts”); *with id.* at 607–08 (Kagan, J., dissenting) (arguing that the Supreme Court should have remanded for the lower court to evaluate the “extensive, complex, and disputed” evidence under the appropriate standard of review).

It is also troubling to see the Court's occasional reluctance to question deeply flawed legislative reliance on unscientific evidence about medical matters.<sup>62</sup>

All involved in trying to sustain constitutional democracies have a shared interest in protecting the independence of, and respect for, our knowledge institutions—even if they do not always “get it right” on the first go round. Justice Harlan once said, “decisions on questions of equal protection and due process are not based on abstract logic, but on empirical conditions,”<sup>63</sup> an observation that serves to emphasize the role that the knowledge institutions of society play in providing a foundation for sound constitutional decisions.

Without universities to provide safe space for scholarly work, independent news media to encourage reporting on people's changing lives, and government offices that reliably keep data about what people are actually doing, litigating claims on behalf of historically disadvantaged groups would be that much harder.

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<sup>62</sup> See *Gonzales v. Carhart*, 550 U.S. 124 (2007); for a sharp critique of the empirical bases for that law, see *id.* at 174-180 (Ginsburg, J., dissenting).

<sup>63</sup> *Katzenbach v. Morgan*, 384 U.S. 641, 659, 668 (1966) (Harlan, J., dissenting).



# ENGENDERING AUTHORITY: SOCIAL MOVEMENTS, LEGITIMACY, AND GENDER

Judith Resnik\*

## I. VITRIOL ABOUT ENGENDERED INNOVATIONS

Efforts are underway to undermine the safety of and respect for a host of people with a myriad of identities. Federal executive initiatives in 2025 included orders to stop domestic and international programs providing food, health care, and jobs; to cut funds to universities; to dismantle federal agencies; to ban law firms from access to government facilities; to deport individuals; to end gender-affirming care; to target trans people; to prevent support for diversity and inclusion; and to dispatch federal armed forces to U.S. cities. Divisions about these actions have sparked a barrage of lawsuits arguing the illegality of many federal actions. Objections to federal pronouncements come from government officials at federal, state, and local levels, university leaders, learned societies, and various organizations and individuals who have been targeted.

While the 2025 federal actions are startling in their intensity and rapidity, they reflect longstanding conflicts about equality and status. The United States is one of many places where an “anti-gender movement” posits gender as an “ideology” that undermines social orders.<sup>1</sup> What “gender ideology” means is rarely specified but the underlying hostility comes in part from the understanding that the word “gender” is deployed to denote first, that everyone has “gender”; second, rather than an essential and fixed divide, social constructions and institutions generate meaning for the words “women” and “men”; and third, that positing two

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\* Arthur Liman Professor of Law, Yale Law School. All rights reserved © 2026. My thanks to my co-editors, Nancy Levit and Laura Rothstein, to Stéphanie Hennette Vauchez for inviting me to write an essay for *Intersections*, and to colleagues—including Dennis Curtis, Mahzarin Banaji, Emily Bazelon, Nancy Gertner, Brenda Hale, Deborah Hensler, Vicki Jackson, Margaret McKeown, Brenda Murray, Melissa Murray, Reva Siegel, Julie Suk, and Holly Thomas—for many discussions and joint ventures related to equalities and inequalities, in and out of courts and the academy, and to my everable research assistants Margaret Baughman, Jessica Boutchie, Swathi Kella, and Zoë Mermelstein, whose engagement in my work is a special pleasure. This essay is related to a longer discussion that I provided in *Femmes, genre et (re)définition des obligations juridiques—passées et présentes (Women, Gender, and the (Re)Definition of Legal Obligations—Past and Present)*, INTERSECTIONS REVUE SEMESTRIELLE GENRE & DROIT, June 2025, <https://revue-intersections.parisnanterre.fr/index.php/accueil/article/view/1373>. *Intersections* is a French journal on gender and legal studies, published by the Université Paris Nanterre. Both that essay and this comment borrow from and build on prior of my articles including *Representing What? Gender, Race, Class, and the Struggle for the Identity and the Legitimacy of Courts*, 15 L. & ETHICS OF HUM. RTS. 1 (2021); *A Collective Collage: Women, the Structure of American Legal Education, and Histories Yet to Be Written*, 80 UMKC L. REV. 737 (2012); and *Class in Courts: Incomplete Equality's Challenges for the Legitimacy of Procedural Systems*, in A GUIDE TO CIVIL PROCEDURE: INTEGRATING CRITICAL LEGAL PERSPECTIVES (Brooke Coleman, Suzette Malveaux, Portia Pedro & Elizabeth Porter eds., 2022).

<sup>1</sup> See shine choi, Natália Maria Félix de Souza, Amy Lind, Swati Parashar, Elisabeth Prügl, & Marysia Zalewski, *The Damages Done by the “Anti-Gender Movement,”* 26 INT'L FEMINIST J. POL. 1, 1 (2024).

binary boxes in which to categorize people misses the breadth of human experience.<sup>2</sup>

To understand the vitriol requires appreciation for what social movements have built, as they made visible the harms of gender-based inequalities that take tolls on individuals and the body politic. I focus here on the transformations within judiciaries, the legal profession, the legal academy, other institutions, and on aspects of rights and obligations that have gained traction and will, I believe, be resilient.

To sketch these changes requires a reminder that courts were built into governments at the United States' founding. The United States Constitution created its own judiciary and protections for judicial independence. Several state constitutions provided that all courts would be "open" and that "every person" had rights to remedies. While such pronouncements were (and are) heartening, "every person" did not mean all people. As is familiar, statutes and practices in many states prevented married women from owning property and from enforcing contracts. Enslavement put Black men and women outside the circle of rights, and, throughout much of the twentieth century, prisoners were "civilly dead" and without legal status to challenge gruesome forms of oppression.<sup>3</sup>

Equality movements revised those many exclusions, which meant that entitlements to government services, including "courts," expanded to embrace all persons. Thus, while judiciaries, like the governments of which they are a part, were once exclusionary institutions enforcing hierarchies of authority and subordination, courts in polities today calling themselves democracies are expected to be available to anyone alleging cognizable claims.<sup>4</sup> Moreover, all aspects and echelons of the judiciary are now expected—as part of courts' legitimacy—to include the array of people who were once excluded because of aspects of their identity.

Women and men of all colors contributed to this new reality as they pushed for entry into law and remade some of its practices. In this brief institutional account, I sketch feminist theoretical debates about sameness and difference, the growing consciousness of intersectionality and leanness about binary delineations, and the backlash that has resulted from struggles over equality. I write as a

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<sup>2</sup> Judith Resnik, *Femmes, genre et (re)définition des obligations juridiques—passées et présentes (Women, Gender, and the (Re)Definition of Legal Obligations—Past and Present)*, INTERSECTIONS REVUE SEMESTRIELLE GENRE & DROIT, June 2025, at 2, <https://revue-intersections.parisnanterre.fr/index.php/accueil/article/view/1373>; see generally JOAN WALLACH SCOTT, GENDER AND THE POLITICS OF HISTORY (1988).

<sup>3</sup> See generally JUDITH RESNIK, IMPERMISSIBLE PUNISHMENTS: HOW PRISON BECAME A PROBLEM FOR DEMOCRACY (University of Chicago Press, 2025).

<sup>4</sup> That political equality entails obligations to recognize the equal standing of all persons is explored by many theorists. See, e.g., JAMES LINDLEY WILSON, DEMOCRATIC EQUALITY (2019); RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 1-10 (2000). Dennis Curtis and I, along with others, argue that courts are one venue for democratic values to be enacted, as judges and litigants—across class, gender, race, and more—are now obliged to be in respectful and dignified, public-facing exchanges and provide accounts of arguments and decisions. See JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY STATES AND DEMOCRATIC COURTROOMS 18 (2011), reissued 2022 e-book, <http://hdl.handle.net/20.500.13051/18178>.

“participant-observer.” My analysis is shaped by my work within law schools and universities, as an occasional lawyer (I argued the case before the U.S. Supreme Court for women’s admission to the Rotary Club), as a researcher on bias in the courts, and as a member of national and international organizations aiming to improve access to and the fairness of institutions.<sup>5</sup>

## II. ORGANIZING LEGAL PROFESSIONALS: VECTORS OF IDENTITY AND AFFILIATION

Return to the nineteenth century, when a group of white men in 1878 launched the first national organization of lawyers, the American Bar Association (ABA). In 1899, several women founded their own organization, the National Association of Women Lawyers (NAWL). Two other major legal entities that also continue today stem from the early twentieth century. Thirty-two law schools came together in 1900 to form the American Association of Law Schools (AALS), which in the twenty-first century has more than 180 member law schools. In 1923, the American Law Institute (ALI) began and later became famous for its “Restatements” of legal doctrine.

Two white women gained admission to the ABA in 1918; its membership remained all-white until the 1950s. In 1943, the ABA adopted a resolution that admission was “not dependent upon race, creed, or color,” and in 1950, the ABA recorded its first Black member. In 1971, the ABA welcomed as an “affiliated” organization the National Bar Association, a group of Black lawyers begun in 1925—in part to respond to exclusion from the ABA.

An upsurge in women-based legal organizations began in the 1970s, as the number of women entering law school helped to propel classes, research, and faculty hiring. Linda Kerber proffered an analysis in “Writing Our Own Rare Books” of the pioneering class materials and casebooks that addressed a then-new topic: women and the law.<sup>6</sup> In 1971, Carnegie Corporation sponsored a meeting it called “Women and the Law” at Yale Law School, which provided a “34-page mimeographed packet” of reading lists from courses taught.<sup>7</sup> Two major casebooks emerged thereafter—the 1974 *Text, Cases, and Materials on Sex-Based Discrimination*, by Kenneth Davidson, Ruth Bader Ginsburg, and Herma Hill Kay, and the 1975 *Sex Discrimination and the Law: Cases and Remedies*, written by

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<sup>5</sup> See, e.g., *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 537 (1987); JOHN C. COUGHENOUR, PROCTOR HUG, JR., MARILYN H. PATEL, TERRY BIRD, HENRY SHIELDS, JR., MARGERET MCKEOWN, DEBORAH HENSLER, & JUDITH RESNIK, THE EFFECTS OF GENDER IN THE FEDERAL COURTS: THE FINAL REPORT OF THE NINTH CIRCUIT GENDER BIAS TASK FORCE (July 1993), reprinted in 67 S. CAL. L. REV. 745, 745 (1994) [hereinafter Ninth Circuit Gender Bias Task Force Report]; see also Dorothy W. Nelson, *Introduction to the Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force*, 67 S. CAL. L. REV. 731, 731 (1994); Judith M. Billings & Brenda Murray, *Introduction to the Ninth Circuit Gender Bias Task Force Report: The Effects of Gender*, 67 S. CAL. L. REV. 739, 739 (1994).

<sup>6</sup> Linda K. Kerber, *Writing Our Own Rare Books*, 14 YALE J. L. & FEMINISM 429, 429 (2002). The essay was part of a Symposium, *Women, Justice & Authority*. See Cori Van Noy, *Symposium: Women, Justice, and Authority, Introduction*, 14 YALE J. L. & FEMINISM 217 (2002).

<sup>7</sup> Kerber, *supra* note 6.

Barbara Allen Babcock, Ann E. Freedman, Eleanor Holmes Norton, and Susan Deller Ross.

The AALS section, Women in Legal Education (WLE), begun in 1970, represented another innovation, in that it departed from the AALS's template for subsections organized around subject matters such as contracts, constitutional law, and property. Comparable efforts in other academic disciplines were underway: during the late 1960s and early 1970s, women's "committees," "task forces," and "caucuses" began, as did the "Committee on the Status of Women in the Profession" of the American Association of University Professors.<sup>8</sup> These collectives pressed their host organizations to attend to discrimination against women and to the challenges of understanding bodies of knowledge in which issues of gender had been sidelined.

A shared theme was that the absence of women in the professoriate was a problem for the quality of education and the research produced. In 1970, students created an annual event called the National Conference on Women & Law, which continued for decades thereafter. Then-Professor Ruth Bader Ginsburg was instrumental in founding the Women's Rights Law Reporter at Rutgers Law School and the Women's Rights Project of the American Civil Liberties Union (ACLU). Law students elsewhere launched publications, some of which were short-lived while others continued, at times with names changed to reflect the shift from the category of "women's" rights to terms "gender," "feminism," "sexuality," and "intersectionality."

Gender was thus one among many categories of analysis and action. The National Association for the Advancement of Colored People (NAACP) began in the 1940s, and its template of a Legal Defense Fund (LDF) provided a model for the Mexican American Legal Defense and Education Fund (MALDEF), Lambda Legal Defense and Education Fund (Lambda Legal, promoting respect for LGBTQ+ rights), the Puerto Rican Legal Defense and Education Fund (PRLDEF, later called LatinoJustice/PRLDEF), the Asian American Legal Defense and Education Fund (AALDEF), the National Organization for Women's Legal Defense and Education Fund (NOW LDEF, later called Legal Momentum), and the Disability Rights Education and Defense Fund.

In 1971, some 130 Black judges formed a Judicial Council within the National Bar Association to work towards the "eradication of racial and class bias from every aspect of the judicial and law enforcement processes." Women judges created a parallel organization, the National Association of Women Judges (NAWJ), which began in 1979. In that year, the United Nations General Assembly approved the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)—which is one of many international conventions that the United States has not ratified.<sup>9</sup> In 1991, the NAWJ helped to create the International Association of Women Judges (IAWJ), which worked with national-

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<sup>8</sup> See Ruth M. Oltman, *Women in the Professional Caucuses*, 15 AM. BEHAV. SCI. 281 app. I (1971).

<sup>9</sup> CEDAW entered into force on September 3, 1981. *Convention on the Elimination of All Forms of Discrimination Against Women*, G.A. Res. 34/180 (Dec. 18, 1979). See generally Judith Resnik, *Comparative (In)equalities: CEDAW, the Jurisdiction of Gender, and the Heterogeneity of Transnational Law Production*, 10 INT'L J. CONST. L. 531 (2012).

level chapters in many countries. In 1988, the National Consortium on Racial and Ethnic Bias in the Courts began; supported by the National Center for State Courts, that effort was in 2002 renamed the National Consortium on Racial and Ethnic Fairness in the Courts.

By then, the ABA had established its own Commission on Women in the Profession, of which Hillary Clinton was the first chair, and thereafter, its Commission on Racial and Ethnic Diversity in the Profession. The ABA's commitments to this transformed legal workplace have made it the subject of attacks. Nevertheless, the ABA continues to be a vocal proponent of the independence of the bar and of the contributions that diversification of the profession makes.

Many legal issue/identity organizations have other agendas. Some are framed by subspecialties mapping onto roles taken in law. An example is the American Corporate Counsel Association (begun in 1982 and renamed the Association of Corporate Counsel to reflect its global presence), which aimed to enhance the status of in-house lawyers and influence policies. In 1997, a related group—the Minority Corporate Counsel Association—pressed for demographic diversity within that segment of the legal profession. In the 1980s, the “law and economics” movement—funded by several foundations—bloomed inside law schools, and the Federalist Society formed to “provide a counterweight” to a “liberal” agenda.<sup>10</sup> Joined by other organizations, they argued that insufficient attention was paid to freedom and liberty.

One goal of some of these organizations has been to end affirmative action. Another target is access to courts. The U.S. Chamber of Commerce became active in promoting an anti-regulatory regime to circumscribe the role of courts and agencies in overseeing commercial transactions and in responding to claims by employees and consumers. The American Tort Reform Foundation, founded in 1986, issues annual reports on “judicial hellholes,” referring to individual judges or jurisdictions perceived as favorable to plaintiffs.<sup>11</sup>

The growth in and debate among lawyer–judge organizations are aspects of a more general conflict over the “rights revolution” of the twentieth century and the role of government and its courts. The NAWJ, the Judicial Council of the National Bar Association, LDF, Lambda Legal, MALDEF, and others sought to expand the meanings of equality's mandates and relied on courts as one vector to reconfigure rights. Those efforts took shape through legislation and litigation that produced remedies such as affirmative action in admissions or employment, injunctions against household violence and funding programs to lessen its occurrence, expanding access to marriage, and requiring financing of lawyers for economically strapped civil litigants. Thus, governments were enlisted to interrupt patterns of inequality and subordination.

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<sup>10</sup> STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 139 (2008). One analysis of the mobilization of anti-regulatory and libertarian proponents comes from Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008).

<sup>11</sup> See *Tort Hellholes*, AM. TORT REFORM FOUND., <https://judicialhellholes.org/> (last visited Feb. 17, 2026).

The capacity to engage in collective action through class-action lawsuits came by virtue of other legal innovations. In the 1960s, rule makers for the federal courts reframed procedures to enable aggregate litigation so that individuals who would not be able to pursue claims individually—because of a lack of knowledge about the harms or a lack of resources—could do so together. Some cases resulted in court orders mandating structural remedies, calling for equal treatment for schoolchildren, better conditions for prisoners, and less discrimination in employment.<sup>12</sup>

### III. MAKING CLAIMS ABOUT GENDER IN LAW: THE NATIONAL ASSOCIATION OF WOMEN JUDGES

Collective efforts of persuasion have been another approach. The projects of the NAWJ included supporting affirmative action to get women on the bench, studies to lessen gender bias in courts and in law, and efforts to articulate new rights and protection for victims of violence and for women prisoners. The arc of NAWJ's efforts provides a window into the preoccupations of U.S. feminism over several decades.

When about a hundred women gathered to found the organization in 1979, they described themselves as part of the “crest of Second Wave Feminism.”<sup>13</sup> The NAWJ's call for more women judges was grounded in familiar arguments about sameness and difference. One claim was that as a matter of democracy and “fairness,” gender ought not be the basis for excluding women from the bench; I call that claim *descriptive discrimination*. This approach implicitly relied on forms of *equivalence* between women and men—that because women and men were each other's equals as professionals, women's exclusion from judgeships was attributable to discrimination based on their sex. At the same time, NAWJ leadership asserted that women would be *different* from male judges. A judiciary “made up of . . . varied groups should result in the application of a more representative, realistic, and cosmopolitan set of attitudes to the all-important process of interpreting and applying the law of the land.”<sup>14</sup> Co-founder Vaino Spencer explained, women judges, as “direct victims of discrimination . . . [were] bound to be more concerned and conscious of the need to relate to all people.”<sup>15</sup>

With these two sets of claims, women who became judges simultaneously could be posited to represent a nondiscriminatory selection (and thereby legitimate courts as egalitarian institutions), as well as to provide a distinctive vantage point that could alter the outcomes (and thereby legitimate courts as incorporating diverse, and potentially competing, ideas about the obligations of justice). The

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<sup>12</sup> See Judith Resnik, “Vital” *State Interests: From Representative Actions for Fair Labor Standards to Pooled Trusts, Class Actions, and MDLs in the Federal Courts*, 165 U. PA. L. REV. 1765 (2017); Judith Resnik, *From “Cases” to “Litigation,”* 54 LAW & CONTEMP. PROBS. 5 (1991).

<sup>13</sup> NAT'L ASS'N OF WOMEN JUDGES, KEEPING THE PROMISE OF JUSTICE: CELEBRATING 25 YEARS OF THE NATIONAL ASSOCIATION OF WOMEN JUDGES 8 (2003).

<sup>14</sup> Joan Dempsey Klein, *Women Judges Join Together*, 67 WOMEN'S L.F. 11, 13 (1981).

<sup>15</sup> Lynn C. Rossman, *Women Judges Unite: A Report from the Founding Convention of the National Association of Women Judges*, 10 GOLDEN GATE U. L. REV. 1237, 1244 (1980).

egalitarian strand is a form of liberal discourse, and the meaning of “equal” has sparked divides about whether liberalism requires formal or substantive equality and, if the goal is substantive, how to measure its achievements. The emphasis on difference has been controversial, as a critical literature worries about essentializing and homogenizing women by assuming that women share the same “different experiences” that yield epistemological insights divergent from those of men.<sup>16</sup>

In 1980, the NAWJ joined NOW LDEF in seeking to persuade judiciaries to undertake research on the effects of gender in their courts by co-sponsoring the National Judicial Program to Promote Equality for Women and Men in the Courts. Part of the motivation for this project came from experiences of women litigants. When women argued the illegality of barriers to pregnant women teaching school or of requirements for weight and height to be “stewardesses” (now called “flight attendants”), they often encountered judges who, like the defending institutions, assumed that work opportunities should be limited on the basis of sex, pregnancy, and physical characteristics. The Program’s co-founders, Norma Wikler and Lynn Hecht Schafran, recounted that, if they provided examples from outside a state about discriminatory treatment of women, judges agreed that bias existed but insisted it did not in *their* jurisdiction.<sup>17</sup>

To respond, these educators shaped empirical projects, jurisdiction by jurisdiction, so that studies of problems in specific jurisdictions could be used for the jurists within those venues. Task force topics ranged from inquiries into biases against women as litigants, lawyers, and judges to the challenges faced by women witnesses, sometimes belittled when detailing the violence that they had encountered or ignored when pressing their economic needs. Methods included quantitative surveys of lawyers and judges, focus groups, hearings, and a review of case law and statutes.

New Jersey took the lead in the early 1980s when its Chief Justice, Robert Wilentz, was the first to commission a “Task Force” on “gender bias in the courts.”<sup>18</sup> In 1988, the Conference of Chief Justices of the State Courts adopted a resolution calling for the study of gender, racial, and ethnic bias.<sup>19</sup> In 1993, the Conference issued another resolution, supporting the implementation of the proposals made by such task forces. By the close of the twentieth century, more than twenty-five jurisdictions had launched studies of gender and race through formally constituted task forces.<sup>20</sup>

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<sup>16</sup> See, e.g., HAS LIBERALISM FAILED WOMEN? 1-15 (Jyette Klausen & Charles S. Maier eds., 2001).

<sup>17</sup> See Lynn Hecht Schafran, *Documenting Gender Bias in the Courts: The Task Force Approach*, 70 JUDICATURE 280 (1987); Norma Juliet Wikler, *On the Judicial Agenda for the 80s: Equal Treatment for Men and Women in the Courts*, 64 JUDICATURE 202 (1980).

<sup>18</sup> *The First Year Report of the New Jersey Supreme Court Task Force on Women in the Courts—June 1984*, 9 WOMEN’S RTS. L. REP. 129 (1986). New Jersey was also first to charter a task force focused on bias based on sexual orientation. *Final Report of the Task Force on Sexual Orientation Issues*, N.J. JUDICIARY (2001), <http://www.judiciary.state.nj.us/pressrel/2001/taskforce.htm>.

<sup>19</sup> Conference of Chief Justices, *Resolution XVIII: Task Force on Gender Bias and Minority Concerns*, 26 CT. REV. 5 (Fall 1989); see also Lynn Hecht Schafran, *Gender Bias in the Courts: An Emerging Focus for Judicial Reform*, 21 ARIZ. ST. L.J. 237 (1989).

<sup>20</sup> Judith Resnik, *Asking About Gender in Courts*, 21 SIGNS 952 (Summer 1996).

The federal courts came later to the project; about half the circuits commissioned reports after the Judicial Conference of the United States called in 1992 for studies of gender bias.<sup>21</sup> By 2006, some sixty jurisdictions—state and federal—had produced official reports and, in 2019, the State of Washington launched a new project, focused on the intersections of gender, class, and race. That work—with a 2021 report—aimed to underscore that economic insecurity was central to people seeking to use courts and disproportionately affected women of all colors.<sup>22</sup>

The findings of many jurisdictions overlapped. Accounts from California, Georgia, Kentucky, Maryland, and Minnesota described that, when women sought redress for violence termed “domestic,” they were often blamed for provoking attacks, or their experiences were disbelieved and trivialized.<sup>23</sup> New Jersey’s mid-1980s report is illustrative: “stereotyped myths, beliefs, and biases were found to sometimes affect judicial decision-making in . . . domestic violence, juvenile justice, matrimonial law, and sentencing.”<sup>24</sup> That task force concluded that “strong evidence” existed of differential treatment of women and men in courts and chambers.

In addition, the National Consortium of Task Forces and Commissions on Racial and Ethnic Bias in the Courts supported studies targeted at those issues; in some places, efforts on gender and race/ethnicity overlapped, with a focus on their intersections. At times, conflicts emerged as participants worried that attention to gender or race would eclipse the other. Moreover, accounting for intersections was difficult because of a paucity of data; relatively few persons of color were then judges and lawyers, and reports strove for anonymous accounts to avoid personalization and attacks.

Nonetheless, these efforts challenged the meta-narrative of courts as intrinsically even-handed. Research in psychology enabled acknowledgment that that, while intentional bias may not have been at work, “implicit” bias can frame the receipt of information and shape conclusions about individuals’ veracity.<sup>25</sup> The

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<sup>21</sup> REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 64 (Sept. 22, 1992); Judith M. Billings & Brenda Murray, *Introduction to the Ninth Circuit Gender Bias Task Force Report: The Effects of Gender*, 67 S. CAL. L. REV. 739, 740-41 (1993); see also Judith Resnik, “Naturally” Without Gender: Women, Jurisdiction, and the Federal Courts, 66 N.Y.U. L. REV. 1682, 1685-89 (1991).

<sup>22</sup> See WASH. STATE SUP. CT. GENDER & JUST. COMM’N, 2021 GENDER JUSTICE STUDY 1-10 (2021), [https://www.courts.wa.gov/subsite/gjc/documents/2021\\_Gender\\_Justice\\_Study\\_Report.pdf](https://www.courts.wa.gov/subsite/gjc/documents/2021_Gender_Justice_Study_Report.pdf).

<sup>23</sup> Ninth Circuit Gender Bias Task Force Report, *supra* note 5, at 881-82, 888-89, 930; see, e.g., JUD. COUNCIL OF CAL., ADVISORY COMM. ON GENDER BIAS IN THE CTS., ACHIEVING EQUAL JUSTICE FOR WOMEN AND MEN IN THE CALIFORNIA COURTS: FINAL REPORT 205-16 (Gay Danforth & Bobbie L. Welling eds., July 1996); A REPORT TO THE SUPREME COURT OF GEORGIA BY THE COMMISSION ON GENDER BIAS IN THE JUDICIAL SYSTEM (1991), *reprinted in* 8 GA. ST. U. L. REV. 539, 551-53 (1992); MINN. SUP. CT. TASK FORCE FOR GENDER FAIRNESS IN THE CTS., GENDER FAIRNESS REPORT (1989), *reprinted in* 15 WM. MITCHELL L. REV. 825, 871-82 (1989); MD. SPECIAL JOINT COMM., REPORT OF THE SPECIAL JOINT COMMITTEE ON GENDER BIAS IN THE COURTS 1-11 (1989).

<sup>24</sup> *First Year Report of the New Jersey Supreme Court Task Force on Women in the Courts—June 1984*, 9 WOMEN’S RTS. L. REP. 129, 136 (1986).

<sup>25</sup> See Kirsten N. Morehouse & Mahzarin R. Banaji, *The Science of Implicit Race Bias: Evidence from the Implicit Association Test*, 153 DAEDALUS 21 (2024).

accumulated task force reports showed that gender, race, and other biases were systemic problems. When held against the baseline ideology that courts were disinterested venues, the bias task forces were remarkable endeavors that judiciaries launched to interrogate their own work and then, if problems were identified, to recommit to “fairness” by revising rules and practices.

Assessing the impact of these initiatives is complex. Many projects were officially commissioned by judiciaries and therefore had guaranteed audiences of lawyers and judges. Law journals published the studies that, as Deborah Hensler put it, were a wise mix of “stories and statistics.”<sup>26</sup> Yet when contrasted with the number of people serving as judges, many did not become involved with the work. Moreover, the NAWJ and the Racial and Ethnic Bias Consortium did not have substantial resources or large memberships. Further, decades later, those efforts are not in the mainstream of professional and academic discussions.

On another metric, however, the idea that a lack of diversity was problematic for judiciaries took hold. Deliberate efforts—in some places called “positive discrimination” and in the United States termed “affirmative action”—were undertaken to alter the composition of the bar and bench, along with the legal academy.<sup>27</sup> The task forces, with thousands of pages documenting courtroom interactions, legal rules, and survey responses, garnered endorsements from the ABA, the Conference of Chief Justices of the State Courts, the affiliated Conference of State Court Administrators, and the Judicial Conference of the United States. New ethics and disciplinary rules advised judges not to belong to clubs that excluded people on the basis of gender and race. Courts and bar associations developed how-to manuals, programs, and conferences. The footprints of this work can also be found in an occasional decision, such as the 1995 California court reversal of a verdict based on the gender-biased behavior of the judge toward the plaintiff, a young woman seeking damages for sexual harassment by her employer.<sup>28</sup> In 2018, a federal judge in Mississippi cited gender bias studies when creating a process to appoint a receiver in a lawsuit involving a major fraud on hundreds of investors; the “lack of diversity” prompted him to call for a range of “deeply qualified” applicants.<sup>29</sup>

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<sup>26</sup> Deborah R. Hensler, *Studying Gender Bias in the Courts: Stories and Statistics*, 45 STAN. L. REV. 2187, 2188 (1993); see Judith Resnik, *Gender Bias: From Classes to Courts*, 45 STAN. L. REV. 2195 (1993).

<sup>27</sup> The United Nations Gender Quota Portal maps countries that have set-asides or other means for diversifying elected officials. UNITED NATIONS GENDER QUOTA PORTAL, <https://genderquota.org/quota-analysis> (last visited Oct. 30, 2025).

<sup>28</sup> *Catchpole v. Brannon*, 42 Cal. Rptr. 2d 440 (Cal. Ct. App. 1995); see LYNN HECHT SCHAFFRAN & NORMA J. WIKLER, NAT’L JUD. EDUC. PROGRAM, GENDER FAIRNESS IN THE COURTS: ACTION IN THE NEW MILLENNIUM 39 (2001).

<sup>29</sup> *SEC v. Adams*, No. 18-CV-252, 2018 WL 2465763, at \*2, \*4 (S.D. Miss. June 1, 2018).

#### IV. CONTESTING THE LAWFULNESS OF REMEDIAL EFFORTS: VIOLENCE AGAINST WOMEN AND AFFIRMATIVE ACTION

A related project of the NAWJ was its support of the Violence Against Women Act (VAWA),<sup>30</sup> enacted by Congress in 1994. VAWA was a multi-pronged statute aspiring to shift the behavior of police, prosecutors, judges, and others across many settings—courts, households, the streets, workplaces, college campuses, and Indian reservations. VAWA included encouragement and funding for gender bias studies and directed funds to the Office on Violence Against Women in the U.S. Department of Justice to distribute for state-based programs. Funding for a largely punitive approach to violence generated a coalition of support, as well as criticism from some who were concerned that the brunt of the sanctions would be imposed on men of color.

A particularly contentious aspect of VAWA was called a new “civil rights remedy,” providing victims of gendered violence with a cause of action for damages in federal or state courts against individuals who had inflicted the harm. The statute did not provide for lawsuits against states for inaction.<sup>31</sup> While supported by dozens of state attorneys general, opposition came from others, including the Chief Justice of Maine, who testified on behalf of the Chief Justices of the State Courts that women in divorces might include allegations of violence as leverage by shifting the venue from state to federal court.<sup>32</sup> Another outspoken critic was U.S. Supreme Court Chief Justice William Rehnquist.<sup>33</sup> As chair of the Judicial Conference of the United States, he appointed an ad-hoc committee that initially opposed VAWA’s civil rights remedy.

NAWJ members worked on reworking the civil rights remedy to narrow its reach to victims who could demonstrate that animus towards them on the basis of gender motivated violence. Thereafter, the Judicial Conference shifted to taking no position on the new civil rights remedy and supported other provisions. Yet, after enactment, opponents of this provision prevailed in court; in 2000, Chief

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<sup>30</sup> Violence Against Women Act of 1994 (VAWA), Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended in scattered sections of 18 U.S.C. and 42 U.S.C.). The Act was first proposed in 1991, enacted in 1994, and reauthorized by the 113th Congress and President Obama in 2013. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (codified as amended in scattered sections of 8 U.S.C., 18 U.S.C., 22 U.S.C., 42 U.S.C., and 47 U.S.C.). The Act, as amended in 2013, modified the Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 25 U.S.C. §§ 1301–1304), to provide tribal courts, if they complied with specified procedures, expanded and concurrent criminal jurisdiction over non-Indians committing acts of domestic violence against Indians on tribal reservations.

<sup>31</sup> See 42 U.S.C. § 13981 (1994) (current version at 42 U.S.C. § 12361). In *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court held Congress lacked the power to enact that civil rights remedy.

<sup>32</sup> *Violence Against Women: Victims of the System: Hearing on S. 15 Before the S. Comm. on the Jud.*, 102d Congress 314–17 (1991) (statement by the Hon. Vincent L. McKusick, President, Conf. of Chief Justices); see *A Symposium Celebrating the Fifteenth Anniversary of the Violence Against Women Act and Honoring Its Champion, Vice President Joe Biden*, 11 GEO. J. GENDER & L. 511, 521 (2010).

<sup>33</sup> See Judith Resnik, *The Programmatic Judiciary: Lobbying, Judging, and Invalidating the Violence Against Women Act*, 74 S. CAL. L. REV. 269, 269–70, 271, 276 (2000).

Justice Rehnquist, writing for a five-person majority in *United States v. Morrison*, held that Congress lacked the power under either the Commerce Clause or the Fourteenth Amendment to enact that remedy.<sup>34</sup> While Congress repeatedly thereafter supported funding and expansion of some provisions of VAWA, in 2025, federal funding was put into jeopardy—in part because applicants for grants were told they had to comply with an executive order barring promotion of “gender ideology” and the framing of “domestic violence” as part of “systemic social justice issues.”<sup>35</sup>

The United States is not, as noted, a signatory to many international conventions, including CEDAW. Although CEDAW had not included violence in its original account of discrimination, the Committee provided a later directive that identified the subordination imposed by gender-based violence. In the decades thereafter, legal instruments and judicial bodies around the world have recognized that gender-based violence is a mode of discrimination. The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (the “Istanbul Convention”) went into force in 2014, and dozens of decisions of the European Court of Human Rights address the issue and call for affirmative measures to respond to victims.<sup>36</sup> The Inter-American Court of Human Rights has likewise recognized violence’s discriminatory impact; one example comes from a lawsuit in which the U.S. Supreme Court rejected the claim that a city’s failure to enforce a protective order after which a man killed his three children violated the U.S. Constitution.<sup>37</sup>

As discussed, in 1991, NAWJ members had helped to found the IAWJ, which aimed to “pioneer judicial education programs to advance human rights, uproot gender bias from judicial systems, and promote women’s access to courts” through developing “a global network of women judges” that fosters “judicial leadership and . . . judicial independence.”<sup>38</sup> As of 2025, IAWJ counted about 5000 members in dozens of jurisdictions. The IAWJ hosted regional and transnational conferences and—until recently—received U.S. government grants to run seminars, such as “Towards a Jurisprudence of Equality or JEP.”

Direct attacks on these generative efforts to alter law’s relationship to inequality started in the mid-1990s and were interrelated with efforts to end

<sup>34</sup> See *Morrison*, 529 U.S. 598. For an analysis of why the majority erred in conceptualizing the issues as about family and tort and hence for exclusive state law governance, see Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619 (2001).

<sup>35</sup> Rachel Louise Snyder, ‘It Sounds Really Dire Because It Is Really Dire’, N.Y. TIMES (June 2, 2025), <https://www.nytimes.com/2025/06/02/opinion/domestic-violence-funding.html>.

<sup>36</sup> See, e.g., Anna Gwiazda & Liana Minkova, *Gendered Advocacy Coalitions and the Istanbul Convention: A Comparative Analysis of Bulgaria and Poland*, 26 INT’L FEMINIST J. POL. 31 (2024); *Factsheet: Violence Against Women*, EUROPEAN COURT OF HUMAN RIGHTS (Oct. 2024), [https://www.echr.coe.int/documents/d/echr/fs\\_violence\\_woman\\_eng](https://www.echr.coe.int/documents/d/echr/fs_violence_woman_eng).

<sup>37</sup> See *Castle Rock v. Gonzales*, 545 U.S. 748, 768-69 (2005); *Jessica Lenahan (Gonzales) v. U.S.*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11 (2011); Caroline Bettinger-López, *Introduction: Jessica Lenahan (Gonzales) v. United States: Implementation, Litigation, and Mobilization Strategies*, 21 J. GENDER, SOC. POL’Y & L. 207, 214 (2012).

<sup>38</sup> *Who We Are*, INT’L ASS’N OF WOMEN JUDGES, [https://iawj.clubexpress.com/content.aspx?page\\_id=22&club\\_id=882224&module\\_id=475491](https://iawj.clubexpress.com/content.aspx?page_id=22&club_id=882224&module_id=475491) (last visited Feb. 17, 2026).

affirmative action. One judge derided the Federal Court of Appeals for the District of Columbia for its Task Force on Gender, Race, and Ethnic Bias. He argued that:

We were to be influenced—perhaps bludgeoned is more correct—to accept a profound change in outlook that would ultimately be expected to affect our substantive decisions. . . . [I]t is nothing less than frightening that a powerful ideological movement with hard political overtones could have come so close in its efforts to intimidate the federal judiciary. . . . This misconceived effort should never have been launched in any circuit. It should be opposed everywhere.<sup>39</sup>

This judge was correct that bias task forces were part of a form of affirmative action; they probed the ways in which gender and race organized workplaces and law, and how to intervene when appropriate.<sup>40</sup> That judge was not, however, correct that judicially chartered initiatives were aberrational. Since the 1920s, when the federal judiciary gained a collective organization, it has launched research and made recommendations about jurisdiction, funding, workloads, aggregate litigation, and criminalization of acts by younger people. Moreover, from the 1960s through close to the century's end, affirmative action was seen as a desirable and, in some contexts, a relatively ordinary response to histories of subordination. In high-profile decisions of the 1960s and 1970s, the Supreme Court had explained the propriety of using a range of remedies to root out prior discrimination. Indeed, when questions were raised in the 1970s about the federal courts discriminating in employment of staff such as secretarial support, the Judicial Conference of the United States responded in 1979 by creating its own "affirmative action plan." That effort's changing names—in 1986 to an "Equal Opportunity Plan," and then to an "Employment Fairness Plan"—reflected a move away from affirmative action.

During the last decades, litigants and judges opposed to affirmative action succeeded in undermining its legality. One way to track the shift in U.S. equal protection law is through *Mallory v. Harkness*,<sup>41</sup> a lawsuit stemming from another artifact of bias task forces. Because of Florida's work in the 1980s on bias, the Florida legislature revised its selection process for judges. Florida had nine people serve on its judicial nominating commission, with three members selected by the Florida Bar and three by the court; those six were then to pick three more commissioners. The statute required that in each set of three, one "must be a

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<sup>39</sup> Laurence H. Silberman, *The D.C. Circuit Task Force on Gender, Race and Ethnic Bias: Political Correctness Rebuffed, Speech at the Federalist Society Conference for Group Rights, Victim Status, and the Law* (Sept. 23, 1995), reprinted in 19 HARV. J. L. & PUB. POL'Y 759, 765-66 (1996).

<sup>40</sup> SPECIAL COMM. ON GENDER, REPORT OF THE SPECIAL COMMITTEE ON GENDER TO THE D.C. CIRCUIT TASK FORCE ON GENDER, RACE, AND ETHNIC BIAS (1995), reprinted in 84 GEO. L.J. 1657 (1996); SPECIAL COMM. ON RACE & ETHNICITY, REPORT ON RACE AND ETHNICITY (1995), reprinted in 64 GEO. WASH. L. REV. 189 (Jan. 1996); Vicki C. Jackson, *What Judges Can Learn from Gender Bias Task Force Studies*, 81 JUDICATURE 15, 16 (1997).

<sup>41</sup> 895 F. Supp. 1556 (S.D. Fla. 1995).

member of a racial or ethnic minority or a woman.”<sup>42</sup> Drafters of this statute had not, evidently, focused on what feminist theory and practice considers central: intersectionality. To use the phrase “minority or a woman” is to ignore the many women who are both. Yet during the statute’s brief tenure, it appeared that panels so composed did nominate more women and men of all colors. Whatever the long-range impact might have been, in 1995, a federal district judge struck down the statute as violating the equal protection rights of a white man who had sought to be chosen by the Florida Bar to sit on a Judicial Nominating Commission.<sup>43</sup>

That 1990s ruling forecast the doctrine to come. Although the U.S. Supreme Court had, in earlier decisions, accepted the utilities of affirmative action in higher education, in its 2013 decision in *Fisher v. University of Texas*, the Court signaled a retreat.<sup>44</sup> The issue returned to the Supreme Court. In 2022, in *Students for Fair Admissions (SFFA) v. Harvard*, the Court closed the door on the use of race as a factor in admissions.<sup>45</sup> Many universities then made changes in their policies. Moreover, although *SFFA* had not categorically ruled out all uses in all venues (including the military academies), in 2025, the federal government provided an expansive interpretation in “guidance” aiming to exclude all initiatives welcoming “diversity” and to chill public and private sector efforts.<sup>46</sup>

## V. APPRECIATING THE GENERATIVITY AND FACING THE CONFLICTS

As I noted at the outset, while enabled by the election of 2025, the “anti-gender movement” has been gathering steam for many years and has been supported by political movements aiming to alter practices of inclusion in education, employment, and other facets of life.<sup>47</sup> One marker of this shift in the United States was the Supreme Court’s 2022 rejection of a federal constitutional right of pregnant individuals to control their decisions on reproduction and to obtain abortions.<sup>48</sup> More generally, the goals of some critics are to dislodge

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<sup>42</sup> See FLA. SUP. CT. RACIAL & ETHNIC BIAS STUDY COMM’N, “WHERE THE INJURED FLY FOR JUSTICE”: REFORMING PRACTICES WHICH IMPEDE THE DISPENSATION OF JUSTICE TO MINORITIES IN FLORIDA (Deborah Hardin Wagner ed., 1990); FLA. STAT. § 43.29 (amended Oct. 1, 1991).

<sup>43</sup> *Mallory*, 895 F. Supp. at 1558 (S.D. Fla. 1995). The district court subsequently awarded fees to the plaintiffs under 42 U.S.C. § 1988. See *Mallory v. Harkness*, 923 F. Supp. 1546 (S.D. Fla. 1996), *aff’d*, 109 F.3d 771 (Table) (11th Cir. 1997).

<sup>44</sup> *Fisher v. Univ. of Texas at Austin (Fisher II)*, 579 U.S. 365, 387-89 (2016).

<sup>45</sup> *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 230-31 (2023).

<sup>46</sup> U.S. Off. of Pers. Mgmt., *Memorandum on Initial Guidance Regarding DEIA Executive Orders* (Jan. 21, 2025), <https://www.opm.gov/media/e1zj1p0m/opm-memo-re-initial-guidance-regarding-deia-executive-orders-1-21-2025-final.pdf>.

<sup>47</sup> See Choi, Félix de Souza, Lind, Parashar, Prügel & Zalewski, *supra* note 1.

<sup>48</sup> See *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 330 (2022); Melissa Murray & Katherine Shaw, *Dobbs and Democracy*, 137 HARV. L. REV. 728, 729 (2024); Reva B. Siegel, *Memory Games: Dobbs’s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127 (2023); Reva B. Siegel, *The Politics of Constitutional Memory*, 20 GEO. J.L. & PUB. POL’Y 19, 56 (2022).

institutional integrity, academic freedom, professional judgments, and scientific research.

Yet to focus only on these attacks is to miss both the contributions of identity-based groups as well as their contemporary struggles about how to attract membership, secure financial support, and formulate agendas. As the legal profession diversified, questions came to the fore about the *need* to affiliate by identity—as well as the *time* to do so. Moreover, debates within feminism have resulted in fissures about the categories of analyses, the topics to be addressed, and the modes of action. Scholars committed to advancing equality have worried about the design of diversity programs, and researchers have sought to measure their impact.<sup>49</sup> Disagreements about remedies abound; within the legal academy, efforts to define and regulate sexual misconduct have generated deep divides.<sup>50</sup> The listserv for the WLE has been a site of conflict about what public stances individuals and the academy should take, given violence in the United States and around the world. Intersectionality has come to be appreciated, yet disagreement has been intense about which facets gain attention and whether harms go unacknowledged. Further, critics from within and without see various reforms as rigid, performative, intolerant, and unwise. In sum, much more needs to be written about the complexity of using categories of race, gender, class, nationality, religion, and ethnicity, as well as about the utilities, content, and difficulties of remedies, including affirmative action.

Likewise, glorification of the academy and the legal profession needs to be tempered by an appreciation of these institutions' limits. Universities have not been able to generate sufficient political support to interrupt and end the attacks. More generally, the commitment to rights-to-remedies with which I began has not, in practice, opened paths to protecting everyone's rights; the reasons are a mix of political will and resources. The prices of legal education and the fees charged by lawyers are part of that problem. Demand outstrips supply, and logistical and economic barriers abound for people hoping that law will help.<sup>51</sup>

In another time, this essay could therefore have been about the nuances needed when undertaking identity-based inquiries, the need for altering approaches that emerged in prior decades, and the factors preventing materialization of rights and remedies. But I write in the shadow of the pummeling of higher education to deplete its resources and control its practices; attacks on individual judges and on courts; the seizures of individuals and the demands for records of NGOs and universities; and disregard for the authority in this democratic federation of state

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<sup>49</sup> See, e.g., FRANK DOBBIN & ALEXANDRA KALEV, *GETTING TO DIVERSITY: WHAT WORKS AND WHAT DOESN'T* (2022).

<sup>50</sup> See, e.g., JANET HALLEY, *SPLIT DECISION: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 3-5 (2006); *DIRECTIONS IN SEXUAL HARASSMENT LAW* 8-9 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004).

<sup>51</sup> MATTHEW MENENDEZ, MICHAEL F. CROWLEY, LAUREN-BROOKE EISEN, & NOAH ATCHISON, BRENNAN CTR. FOR JUSTICE, *THE STEEP COSTS OF CRIMINAL JUSTICE FEES AND FINES: A FISCAL ANALYSIS OF THREE STATES AND TEN COUNTIES*, 1, 5 (Nov. 21, 2019), [https://www.brennancenter.org/media/5290/download/2019\\_10\\_Fees%26Fines\\_Final.pdf](https://www.brennancenter.org/media/5290/download/2019_10_Fees%26Fines_Final.pdf); see Judith Resnik, *The Capital of and the Investments in Courts, State and Federal*, 99 *N.Y.U. L. REV.* 1958 (2024).

and local officials. I have summarized some of the many sites of activity and innovations, as well as the challenges of not essentializing people, institutions, or jurisdictions. I have sketched how collective, interdependent, intersectional analyses and action shaped different ideas, practices, and expectations if institutions. Aspirations to engender flourishing have required struggles over gender's implications, governments' obligations, and equality's frontiers. Hence, the questions now are about how to reconfigure and what to build.



# SEX, GENDER, AND THE BLOGOSPHERE: LOOKING BACK AT THE FEMINIST LAW PROFESSORS BLOG, 2006-2024

Bridget J. Crawford\*

## I. INTRODUCTION

The *Feminist Law Professors* blog began in 2006 as a modest effort to make feminist legal scholars more visible to one another and to the broader world. What emerged from this effort was a dynamic, collectively imagined space that bore witness to generational shifts in feminist legal thought, the rise and fall of blogging culture, and the enduring challenges of feminist community-building. This Essay reflects on the origins, evolution, and legacies of the *Feminist Law Professors* blog, situating it within its legal, cultural, and technological moments. It also offers my reflections—as one of two blog editors—on the risks and rewards of writing publicly as a feminist legal scholar, as well as on the blog’s closure in 2024.

The Essay proceeds in four parts. Part II traces the blog’s origins and early goals, emphasizing blog founder Ann Bartow’s community-building vision and the blogroll’s distinctive inclusivity. Part III examines content, contributors, and style, highlighting the blog’s blend of commentary and curation across topics ranging from judicial nominations to popular culture. Part IV explores the internal and external pressures that shaped the blog’s trajectory, including online harassment, resource demands, and shifting digital habits. Part V considers whether and how blogging has been recognized as scholarly labor, with a focus on citation, archiving, and institutional valuation. The Essay concludes by reflecting on the blog’s legacy and the ongoing need for open, collective feminist spaces in legal academia.

## II. BEGINNINGS: A BLOG AND A COMMUNITY

In September 2006, Professor Ann Bartow launched *Feminist Law Professors* with a deceptively simple goal: “to build a stronger feminist law prof community across scholarly subject areas.”<sup>1</sup> The blog had no editorial board, no formal submission requirements, no posting or comment policy, and no ideological litmus test.<sup>2</sup> Instead, the blog welcomed a wide range of voices, united by a commitment—sometimes diffuse, sometimes contested—to feminist engagement

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<sup>1</sup> Ann Bartow, *Welcome to the “Feminist Law Professors” Blog*, FEMINIST L. PROFESSORS (Jan. 20, 2006), <https://www.feministlawprofessors.com/2006/01/welcome-to-the-feminist-law-professors-blog/>.

<sup>2</sup> See *About This Blog*, FEMINIST L. PROFESSORS, <https://www.feministlawprofessors.com/2006/01/welcome-to-the-feminist-law-professors-blog/> (welcoming “self-identified feminist” law professors to join the blogroll and explaining that “[e]very feminist law professor is a unique individual, and nothing about her life, views or work should be presumed from her presence in the blogroll, other than that she considers herself a feminist”).

with the law. Joining the blogroll meant simply a willingness to have one's name included in a public list of feminist law professors, with each person free to define the term "feminist" for themselves and to contribute content or not, as they saw fit.<sup>3</sup>

At the launch of *Feminist Law Professors*, legal blogging was on the rise.<sup>4</sup> Blogs like *Brian Leiter's Law School Reports*, *Concurring Opinions*, *PrawfsBlawg*, and *TaxProf Blog* had recently emerged and were shaping online scholarly communities and discourse.<sup>5</sup> But unlike those four platforms, *Feminist Law Professors* built its community not only through published posts and comments, but through the blogroll itself. That published sidebar list, open to "any self-identified feminist law professor" who asked to be listed, became a vital instrument of recognition.<sup>6</sup> It thus conveyed not only the names of faculty members but also their identities as feminists. "The blog came into existence," Bartow has explained, "because I thought it might be useful to try to make feminist law professors a little more visible to each other and to the world."<sup>7</sup> Blogroll members were unrestricted in what they could post, free from editorial intervention or limitation.<sup>8</sup>

I became a blog contributor and editor a few months after its founding—not because I had asked, but because I continued to send Bartow articles, links, and commentary to post.<sup>9</sup> To that point, I had known Bartow only by reputation. About a decade earlier, she had co-authored an essential study of women in legal education.<sup>10</sup> We had attended the same law school, too, but did not overlap. So, after sending her the fifth or sixth missive, I was a bit surprised when Bartow

<sup>3</sup> See *id.*

<sup>4</sup> See, e.g., Orin S. Kerr, *Blogs and the Legal Academy*, 84 WASH. U. L. REV. 1127, 1127-28 (2006) (noting that "that blogs provide a promising platform for law professors interested in being public intellectuals. Law professor blogs allow professors to participate in and influence broader debates on law-related topics").

<sup>5</sup> See, e.g., Paul L. Caron, *Are Scholars Better Bloggers? Bloggership: How Blogs Are Transforming Legal Scholarship*, 84 WASH. U. L. REV. 1025, 1026 (2006) (providing Apr. 15, 2004 as the launch date for the *TaxProf* blog); Molly McDonough & Sarah Randag, *ABA Journal Blawg 100*, ABA J. (Dec. 1, 2007, 5:21 PM CST), [https://www.abajournal.com/magazine/article/aba\\_journal\\_blawg\\_100](https://www.abajournal.com/magazine/article/aba_journal_blawg_100) (listing *Brian Leiter's Law School Reports*, *Concurring Opinions* and *PrawfsBlawg* in the "Ivory Tower" category). One contemporary source reported that, as of mid-2005, there were 182 law professor bloggers; only 41 of those were women. See also Ann Bartow, *On Blogging*, FEMINIST L. PROFESSORS (Feb. 27, 2006), <https://www.feministlawprofessors.com/2006/02/on-blogging/>.

<sup>6</sup> See *supra* text accompanying note 2.

<sup>7</sup> Email from Ann Bartow to Bridget Crawford (Aug. 21, 2025, 10:47 AM) (on file with the author). I later wrote that the blogroll was "a visible way of signaling to students, colleagues, and the outside world that there is a vibrant intellectual community of legal scholars who consider gender an important issue, regardless of what each person's teaching or scholarship focus may be." Bridget Crawford, *Bloggng Do's and Don'ts*, FEMINIST L. PROFESSORS (June 22, 2011), <https://www.feministlawprofessors.com/2011/06/bloggng-dos-donts/>.

<sup>8</sup> See *About This Blog*, *supra* note 2 ("If you're a member of the blogroll and would like to see something posted, go right ahead (or email the blog administrators, if more convenient).").

<sup>9</sup> See, e.g., Ann Bartow, *Bridget Crawford's Report from Yale's "Sex for Sale" Symposium*, FEMINIST L. PROFESSORS (Feb. 6, 2006), <https://www.feministlawprofessors.com/2006/02/bridget-crawfords-report-from-sex-for-sale-symposium/>.

<sup>10</sup> See Lani Guinier et al., *Becoming Gentlemen: Women's Experience at One Ivy League Law School*, 143 U. PA. L. REV. 1 (1994).

replied (with a nicer version of): “Why don’t you just post them yourself?” So, I did. And I kept doing so for more than eighteen years.

When I began blogging in my fourth year of full-time teaching, I had not yet considered the risks associated with doing so before tenure—although I should have. Speaking one’s mind or writing publicly about gender-related issues carries multiple risks: being perceived as strident or oversensitive; being associated with an area of law deemed marginal or “not doctrinal”; and surfacing disagreements among feminists that some colleagues saw as evidence of disarray rather than critical engagement.<sup>11</sup> To do so in a relatively “new” format such as a blog compounded some of those risks. Indeed, blogging—not just drafting content but also responding to others on- and off-line, monitoring comments, filtering spam, and other site administration—takes time. In hindsight, I now understand that the risks and downsides of blogging are both professional and socio-personal, with consequences for mentorship, promotion, one’s sense of belonging in the legal academy, and limitations on available time for other professional and personal pursuits.<sup>12</sup> Consistently, Bartow offered encouragement while giving me full autonomy. Repeatedly, she told me to write and post about whatever I wanted. There were no rules or formatting requirements—just an open field that invited innovation but also surfaced my uncertainties.

In the blog’s early years, Bartow and I were its main contributors, with other faculty colleagues making occasional additional posts.<sup>13</sup> Contributors wrote about conferences, new publications, research resources, court decisions, law school campus activities, personal reflections, and feminist frustrations.<sup>14</sup> We

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<sup>11</sup> See, e.g., Lucille A. Jewel, *Silencing Discipline in Legal Education*, 49 U. TOL. L. REV. 657, 657 (2018) (“In the 1990s, tenured or tenure-track outsider scholars were criticized based on their purported intellectual deficits. There was the idea that outsider scholarship, on topics of race, feminism, and LGBTQ issues, was not rigorous enough to pass muster within the academy and was not appropriate for the award of tenure.”); Martha Albertson Fineman, *Introduction* to *AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY* xv (Martha Albertson Fineman & Nancy Sweet Thomadsen eds., 1991) (on the scholarly disagreement as a form of critical engagement). See also Judith Resnik, *Visible on “Women’s Issues,”* 77 IOWA L. REV. 41, 41 (1991) (reporting that when she started teaching large law school classes in the 1970s, she received what a colleague “took to be very kind advice. He said: ‘Be careful. Don’t teach in any areas associated with women’s issues. Don’t teach family law, don’t teach sex discrimination. Don’t teach trusts and estates. Teach the real stuff, the hard stuff: contracts, torts, procedure, property—and don’t be too visible on women’s issues.’”); Linda K. Kerber, *Writing Our Own Rare Books*, 14 YALE J. L. & FEMINISM 429, 433 (2002) (describing the authors of one of the earliest casebooks on gender discrimination as writing “[a]gainst an intellectual context that decried identity politics, against an academy that decried identity-driven research subjects and held that the woman who wished to succeed ought to keep her distance from women’s subjects”).

<sup>12</sup> See generally B. Jessie Hill, *The Associate Dean for Research in the Age of the Internet*, 31 TOURO L. REV. 33, 37 (2014) (discussing some benefits and burdens associated with law faculty blogging).

<sup>13</sup> Over the lifespan of the blog, I made more than 3,300 posts; Bartow made more than 4,600. See *Blog Dashboard*, FEMINIST L. PROFESSORS (screenshots on file with the author). Each of Christine C. Corcos, David S. Cohen, and Anthony C. Infanti contributed more than 100 posts, too. *Id.* Over forty additional colleagues posted using their own login credentials; from time to time, we, as blog editors, logged on to make posts for blogroll members who asked us to post material for them. *Id.*

<sup>14</sup> See, e.g., Christine Coros, *Names Are Important: Sexual Orientation, Gender Identities and the Law: A Research Bibliography*, FEMINIST L. PROFESSORS (Mar. 30, 2021),

quoted from others liberally and linked habitually.<sup>15</sup> Our audience was a mix of scholars, activists, and curious individuals. Readers (presumably) came not only for the content, but also for the contributors' perspectives and ideas, and for the implicit reassurance that feminist legal thought was not a marginal corner of the academy, but a robust, polyphonic conversation.

For the very idea and audacity of the *Feminist Law Professors* blog, Bartow's vision and thought-leadership merit particular mention. Although I did not fully appreciate it at the time, I now see that she did something remarkable: She built a professional "house" and handed out keys. Any blogroll member could post without editorial intervention. The blog was not *hers*, Bartow consistently reminded us. It belonged to the blogroll members.<sup>16</sup> Under Bartow's leadership, the *Feminist Law Professors* blog became a platform where writers could transcend institutional hierarchies, doctrinal silos, and methodological and tonal differences. Through the shared experience of blogging, Bartow became a dear friend.<sup>17</sup>

Despite (or perhaps because of) the extensive blogroll, there was no attempt to present a unified message or perspective. I regularly promoted others' work and linked to their good professional news, even when their focus or methods differed from mine. That practice reflected a core tenet of my version of—and vision for—feminism: To support others who are doing meaningful, thoughtful equality work and take a broad view of what counts as relevant.<sup>18</sup> What happens in law, politics, culture, and society is all connected. Feminists need not speak with one voice, either; a diversity of approaches strengthens the field and deepens our collective understanding.<sup>19</sup> That being said, disagreeing with other feminists publicly always felt fraught. But the blog made space for critical engagement, not

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<https://www.feministlawprofessors.com/2021/03/names-are-important-sexual-orientation-gender-identities-and-the-law-a-research-bibliography/>; David S. Cohen, *A Banner Year for Gay Rights Litigation*, FEMINIST L. PROFESSORS (Sept. 10, 2010), <https://www.feministlawprofessors.com/2010/09/banner-year-gay-rights-litigation/>; Tony Infanti, *Letting Military Recruiters Back on Campus*, FEMINIST L. PROFESSORS (July 26, 2011), <https://www.feministlawprofessors.com/2011/07/letting-military-recruiters-campus/>.

<sup>15</sup> See, e.g., Ruthann Robson, *Women, the Super Committee, and Medicaid*, FEMINIST L. PROFESSORS (Nov. 18, 2011), <https://www.feministlawprofessors.com/2011/11/women-super-committee-medicaid/> (quoting at length from a blog post by a staff attorney at the National Health Law Program); Ann Bartow, *Some Links About Grading*, FEMINIST L. PROFESSORS (Dec. 23, 2009), <https://www.feministlawprofessors.com/2009/12/some-links-about-grading/> (containing six links to related articles).

<sup>16</sup> See, e.g., *About This Blog*, *supra* note 2.

<sup>17</sup> For purposes of this Essay, I refer to her as "Bartow" in deference to academic conventions, but to her friends, she is "Ann," of course.

<sup>18</sup> See Crawford, *Blogging Do's and Don'ts*, *supra* note 7 ("Blogging presents many opportunities to highlight the work of others, even as you are blogging to serve your own purposes. Recognize someone else's accomplishments or ideas. Promote the work of students, colleagues, programs, groups that engaged with the world" and urging those who take up blogging to "use the platform to help other women, not to the exclusion of men, but as part of a deep commitment to not just 'rethinking equality,' but to doing something concrete, however small, to achieve it").

<sup>19</sup> See Bridget J. Crawford, Kathryn M. Stanchi & Linda L. Berger, *Feminist Judging Matters: How Feminist Theory and Methods Affect the Process of Judgment*, 47 U. BALT. L. REV. 167, 193-94 (2018).

just cheerleading (even though the promotion of others' work was sometimes the most enjoyable part of blogging, at least for me).<sup>20</sup> *Feminist Law Professors* demonstrated that feminist disagreement could be generative, even if not always comfortable.

The blog was eventually recognized several times by the *ABA Journal* in its "Blawg 100" best lists of best legal blogs, a nod to *Feminist Law Professors'* role in shaping legal discourse beyond the traditional confines of law review pages.<sup>21</sup> But its truest influence lay elsewhere: in the connections it fostered, the scholars it encouraged, and the sense—sometimes fleeting, sometimes lasting—that one's feminist voice had a place in the legal academy. *Feminist Law Professors* made feminist law professors visible to each other, our law school colleagues, and a broader readership.

### III. BREADTH, VOICE, AND INFRASTRUCTURE: THE BLOG AS A FEMINIST COMMONS

From its inception, the *Feminist Law Professors* blog served as both a digital commons and a distributed scholarly voice. More than one hundred posters—law professors, legal academics, practicing lawyers, journalists, and graduate students, men, women, and gender diverse individuals alike—contributed material to the blog over the years, reflecting a wide range of backgrounds, interests, and geographies. This diversity was intentional. The blog welcomed posts from authors at public and private institutions in the United States and beyond. By the blog's 2024 closure, the blogroll contained more than 750 professors from over 200 schools spread across multiple continents.<sup>22</sup> Members came from schools of all ranks and distinctions, underscoring that feminist legal thought emerges from many corners of legal education.<sup>23</sup>

The breadth of topics reflected an expansive view of feminism shared by its editors and contributors. Categories included not only traditional legal issues such as employment discrimination, family law, and judicial appointments, but also "Feminism and Animal Law," "Feminism and the Arts," "Feminism and Technology," and "Feminism and the Environment."<sup>24</sup> As the inaugural post in 2006 had noted, the blog's purpose was "to build a stronger feminist law prof community across scholarly subject areas."<sup>25</sup> Recurring themes ranged from the "pink tax" to gender parity in speaker lineups and law review authorship, as well as commentary on pop culture and the formulation of new feminist legal theories.<sup>26</sup>

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<sup>20</sup> Crawford, *Blogging Do's and Don'ts*, *supra* note 7.

<sup>21</sup> See, e.g., McDonough & Randag, *supra* note 5 (listing *Feminist Law Professors* in the "Ivory Tower" category); Molly McDonough & Sarah Randag, *The Blawg 100*, *ABA J.* (Dec. 2, 2008, 5:50 AM CST), [https://www.abajournal.com/magazine/article/blawg\\_100\\_2008](https://www.abajournal.com/magazine/article/blawg_100_2008) (listing *Feminist Law Professors* in the "Legal Theory" category).

<sup>22</sup> See, e.g., FEMINIST L. PROFESSORS, <http://www.feministlawprofessors.com>.

<sup>23</sup> See *id.*

<sup>24</sup> See *Categories*, FEMINIST L. PROFESSORS, <http://www.feministlawprofessors.com>.

<sup>25</sup> See *supra* note 1 and accompanying text.

<sup>26</sup> See, e.g., Bridget Crawford, *False Consciousness Theory in Feminism and Anti-Speciesism*,

One widely viewed post addressed the gender imbalances in conference speakers; another offered a sharp critique of a sexist advertising campaign for a popular soft drink.<sup>27</sup> Posts linking to material on other sites amplified the blog's curatorial role.<sup>28</sup> One such post critiqued the Supreme Court's reproductive rights jurisprudence; another linked to work exploring tensions between feminism and religious observance.<sup>29</sup> Other high-traffic posts addressed the gendered impacts of the COVID pandemic on the legal academy.<sup>30</sup> Some posts used humor to convey complicated messages; for example, the blog's most-viewed post for 2010, *Sexual Assault Prevention Tips Guaranteed to Work!*, included this advice:

Don't pretend to be a caring friend in order to gain the trust of someone you want to assault. Consider telling them you plan to assault them. If you don't communicate your intentions, the other person may take that as a sign that you do not plan to rape them.<sup>31</sup>

Stylistically, the blog struck a balance between commentary and curation. Many posts provided signal boosts directing readers to articles, judicial decisions, or op-eds. Other posts adopted a more reflective posture; this was especially true of posts by tenured faculty responding to institutional dynamics or current events.

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FEMINIST L. PROFESSORS (Mar. 13, 2009), <https://www.feministlawprofessors.com/2009/03/false-consciousness-theory-in-feminism-and-anti-speciesism/>; Bridget Crawford, *Where Are the Women? Hard to Find Many Among Speakers at Upcoming Harvard Journal of Law and Public Policy Symposium or on the Journal's List of "Advisors" @HarvardJLPP #manel*, FEMINIST L. PROFESSORS (Aug. 12, 2022), <https://www.feministlawprofessors.com/2022/08/where-are-the-women-hard-to-find-many-among-speakers-at-upcoming-harvard-journal-of-law-and-public-policy-symposium-or-on-the-journals-list-of-advisors-harvardjlpp-manel/>; Bridget Crawford, *Against Menstrual Capitalism*, FEMINIST L. PROFESSORS (June 25, 2018), <https://www.feministlawprofessors.com/2018/06/against-menstrual-capitalism/>.

<sup>27</sup> See, e.g., Ann Bartow, *Pepsi Amps Up the Sexism*, FEMINIST L. PROFESSORS (Oct. 15, 2009), <https://www.feministlawprofessors.com/2009/10/pepsi-amps-up-the-sexism/>.

<sup>28</sup> See, e.g., Ann Bartow, *Link Round-Up, "Recession, Job Loss & Their Economic Impact on Women,"* FEMINIST L. PROFESSORS (Mar. 23, 2009), <https://www.feministlawprofessors.com/2009/03/link-round-up-recession-job-loss-their-economic-impact-on-women/>.

<sup>29</sup> See, e.g., Ann Bartow, *U.S. Supreme Court Upholds Partial Birth Abortion Ban Act*, FEMINIST L. PROFESSORS (Apr. 18, 2007), <https://www.feministlawprofessors.com/2007/04/supreme-court-upholds-partial-birth-abortion-ban-act/>; Christine Corcos, *Secular Governments, Religious Courts, and Women's Rights in Canada, the UK, and the US*, FEMINIST L. PROFESSORS (Mar. 23, 2015), <https://www.feministlawprofessors.com/2015/03/secular-governments-religious-courts-and-womens-rights-in-canada-the-uk-and-the-us/>.

<sup>30</sup> See, e.g., Admin, *A Letter to Law Review Editors and Promotion and Tenure Committees at Law Schools*, FEMINIST L. PROFESSORS (July 17, 2020), <https://www.feministlawprofessors.com/2020/07/a-letter-to-law-review-editors-and-promotion-and-tenure-committees-at-law-schools/> (posting a letter by professors Cyra Akila Choudhury, Meera E. Deo, Angelique Eaglewoman, Jennifer S. Hendricks, Saru Matambanadzo, Shruti Rana, and Maybell Romero).

<sup>31</sup> See Bridget Crawford, *FLP's Busiest Blog Posts in 2010*, FEMINIST L. PROFESSORS, <https://www.feministlawprofessors.com/2010/12/read-posts-2010/> (linking to Ann Bartow, *Sexual Assault Prevention Tips Guaranteed to Work!*, FEMINIST L. PROFESSORS (Sept. 16, 2009), <https://www.feministlawprofessors.com/2009/09/sexual-assault-prevention-tips-guaranteed-to-work/>).

The tone was assertive and occasionally humorous, aiming to appeal to a broad audience.<sup>32</sup> Guest posts and cross-posts were frequent, expanding the network of voices. The blog regularly called for new contributors; Ann Bartow and I mentioned the blog when we presented at conferences and spoke to colleagues, always encouraging others to contribute new material or send content they would like to see posted.<sup>33</sup>

The blogroll and the sidebar of categories (including “Feminist Legal Scholarship,” “Feminism and Culture,” and “Calls for Papers and Participation”) were more than navigational aids: They created feminist digital infrastructure. The blogroll linked to faculty bios; the categories helped readers find relevant content. The blogroll functioned as an informal directory of scholars engaged in or sympathetic to gender-related work. As Bartow later explained, “The blogroll was a conscious effort to build a feminist scholarly community that reflected self-identification, not gatekeeping.”<sup>34</sup> The blog itself became a kind of bulletin board of feminist legal thought, whether tentative or fully developed.

The blog’s archive is not only a record of feminist engagement with the law but also a participatory infrastructure. The blog helped shape legal and cultural discourse by amplifying feminist voices and connecting scholars across institutional boundaries. In doing so, the *Feminist Law Professors* blog cultivated collective feminist critique within and beyond the legal academy.<sup>35</sup> Its long run, with sustained attention to politics, pop culture, legal reform, and feminist theory, affirms the persistent relevance of digital platforms in shaping academic discourse. As platforms and user practices continue to evolve, the *Feminist Law Professors* blog remains a case study in how scholarly blogging challenged structural exclusions of mainstream media and legal academia alike.

#### IV. CHALLENGES, COSTS, AND CLOSURE

The *Feminist Law Professors* blog operated in a digital ecosystem shaped by both the promise of broad engagement and the perils of exposure. From its earliest years, the blog encountered pressures common to feminist digital spaces: backlash, harassment, and the emotional toll of sustained public critique.<sup>36</sup> Although contributors typically published under their real names and academic

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<sup>32</sup> See, e.g., Ann Bartow, *Sexual Assault Prevention Tips Guaranteed to Work!*, FEMINIST L. PROFESSORS (Sept. 16, 2009), <https://www.feministlawprofessors.com/2009/09/sexual-assault-prevention-tips-guaranteed-to-work/>.

<sup>33</sup> See, e.g., Bridget Crawford, Email to Am. Ass’n L. Schools Sec. on Women in Leg. Ed. Listserv (Sept. 7, 2018, 4:48 PM) (on file with the author) (inviting all colleagues to join the blogroll, send material for posting, or blog themselves).

<sup>34</sup> Email from Ann Bartow to Bridget Crawford, *supra* note 7.

<sup>35</sup> In this sense, the *Feminist Law Professors* blog might be understood as a form of what media scholars call “networked advocacy.” See, e.g., R.L. Bince, *Networked Advocacy and Social Media: Conceptualizing Persuasion at a Network Scale*, 60 ARGUMENTATION & ADVOC. 169, 170 (2024) (defining networked advocacy as “the prioritization of strategies that aim to intervene on the structure of a network in order to promote a particular discourse”).

<sup>36</sup> See, e.g., Rosa Brooks, *What the Internet Age Means for Female Scholars*, YALE L.J.F. (Sept. 19, 2006), <https://www.yalelawjournal.org/forum/what-the-internet-age-means-for-female-scholars>.

affiliations, that transparency carried risks. As co-founder Ann Bartow noted in a post about commenting on blogs, “The pushback can be ugly if you comment about sexism under your own name.”<sup>37</sup> Bartow documented the online harassment experienced by another law professor who had contributed to the blog a series of posts about discrimination.<sup>38</sup>

Bartow herself experienced sustained online harassment, much of it gendered and personal.<sup>39</sup> In a law review article, she later reflected on the misogynistic and disturbing online vitriol that women experience—using her own experience as an example—in blog comment sections and message boards. Once an online author has identified a visible woman or group of women and girls as “deserving of opprobrium,” Bartow explained, that encourages other commentators to make negative comments in online fora, and some of them become abusive, “contacting the employers or e-mailing or phoning threats to the targets of harassment,” including threats of rape.<sup>40</sup> Bartow reflected: “I have observed and experienced this both as a blogger and as an attorney who has assisted other bloggers.”<sup>41</sup> Such experiences are not unique to Bartow, unfortunately.<sup>42</sup> While the *Feminist Law Professors* blog initially had no formal comment policy, we ultimately articulated a simple one in 2010: Anyone on the blogroll could write whatever they wanted without restriction; all other comments were moderated by us “with a heavy hand.”<sup>43</sup> As one of the blog’s editors, I routinely monitored comments and closed threads when conversations became personal or hostile.

Beyond harassment, resource demands also influenced the blog’s trajectory. While posts were typically short and written quickly, the work of curating content, updating the blogroll, and maintaining the site’s back-end required time, energy, and out-of-pocket funds.<sup>44</sup> Over time, the core group of regular contributors narrowed. As early as 2010, we were actively seeking new voices to join.<sup>45</sup>

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<sup>37</sup> Ann Bartow, *Why Pointing Out Sexism in Blog Comments Threads Is Important*, FEMINIST L. PROFESSORS (Apr. 14, 2014), <https://www.feministlawprofessors.com/2006/04/why-pointing-out-sexism-in-blog-comments-threads-is-important/>.

<sup>38</sup> Ann Bartow, *Online Harassment and Silencing*, FEMINIST L. PROFESSORS (Dec. 26, 2013), <https://www.feministlawprofessors.com/2013/12/online-harassment-silencing/>.

<sup>39</sup> See, e.g., Ann Bartow, *Forget What Misogyny Toward Feminist Law Profs Looks Like?*, FEMINIST L. PROFESSORS (Mar. 15, 2008), <https://www.feministlawprofessors.com/2008/03/forget-what-misogyny-toward-feminist-law-profs-looks-like/> (linking to comments posted on Ann Althouse’s blog).

<sup>40</sup> Ann Bartow, *Internet Defamation as Profit Center: The Monetization of Online Harassment*, 32 HARV. J. L. & GENDER 383, 398 (2009).

<sup>41</sup> *Id.*

<sup>42</sup> See, e.g., DANIELLE KEATS CITRON, HATE CRIME IN CYBERSPACE 13 (2014) (“Cyber harassment disproportionately impacts women.”).

<sup>43</sup> *Comment Policy*, FEMINIST L. PROFESSORS, <https://www.feministlawprofessors.com/comment-policy-2/>.

<sup>44</sup> The University of South Carolina School of Law hosted the blog for a few years, but we then migrated to our own (self-funded) site.

<sup>45</sup> See, e.g., Bridget Crawford, *Call for Guest Bloggers*, FEMINIST L. PROFESSORS (Sept. 27, 2010), <https://www.feministlawprofessors.com/2010/09/call-guest-bloggers/>; see also Bridget Crawford, Email to the Am. Ass’n of L. Schools Women in Legal Ed. List Serv. (Sept. 7, 2018) (inviting additions to the blogroll, guest bloggers, or material for posting).

Despite these internal pressures, the blog gained attention from audiences beyond the legal academy. A 2010 post critiqued the New York State Bar Association's fielding of an all-male panel opining on "the strengths and weaknesses of women in the areas of communication, negotiation, mediation, arbitration, organization, and women's overall management of their legal work."<sup>46</sup> I called for a boycott of that panel, saying:

Yes, the speakers have a right to speak, but we don't have to go and listen. . . . [T]o have a panel of men, endorsed by the New York State Bar Association, discussing our "strengths and weaknesses," is a regression and an insult to all women in the legal profession.<sup>47</sup>

That short and pointed post drew notice from practicing lawyers and bar officials alike. It led the NYSBA leadership to diversify the speakers at the program, showing the blog's capacity to influence legal institutions well beyond the classroom or conference room.<sup>48</sup>

In the blog's final years, new postings on *Feminist Law Professors* slowed considerably. Because Bartow had stopped posting to the blog entirely in 2014, I became the sole contributor and editor. One of the longstanding blogroll members continued to make occasional posts. At the same time that my blog posting became less frequent, social media platforms like Twitter (now known as X) and even Facebook had begun to eclipse blogs as the preferred venues for rapid academic exchange. *Feminist Law Professors* was part of that trend, maintaining an active Twitter/X account from 2009 to 2024; in fact, the rate of my tweets outpaced the rate of my blog posts.<sup>49</sup> Meanwhile, one other prominent blog went behind the paywall of a mainstream newspaper, and other blogs consolidated into networks.<sup>50</sup> More recently, writers from all fields (not just law) have begun migrating to sites like Substack and Medium to connect directly with readers, control access, and monetize their content.<sup>51</sup>

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<sup>46</sup> Bridget Crawford, *The NYSBA Sponsors Panel of Men Opining on Women's "Strengths and Weaknesses" as Lawyers*, FEMINIST L. PROFESSORS (Jan. 14, 2010), <https://www.feministlawprofessors.com/2010/01/the-nysba-sponsors-panel-of-men-opining-on-womens-strengths-and-weaknesses-as-lawyers/>.

<sup>47</sup> *Id.*

<sup>48</sup> See, e.g., Bridget Crawford, *NYSBA Responds to Concerns Regarding Annual Meeting Panel Presentation by the Committee of Women in the Law*, FEMINIST L. PROFESSORS (Jan. 17, 2010), <https://www.feministlawprofessors.com/2010/01/nysba-responds-to-concerns-regarding-annual-meeting-panel-presentation-by-the-committee-of-women-in-the-law/>.

<sup>49</sup> See Bridget Crawford (@FeministLawPrfs), X (archive on file with the author); Bridget Crawford, *Follow Feminist Law Professors on Twitter*, FEMINIST L. PROFESSORS (Mar. 27, 2009), <https://www.feministlawprofessors.com/2009/03/follow-feminist-law-professors-on-twitter/>.

<sup>50</sup> See generally Jane Murphy & Solangel Maldonado, *Reproducing Gender and Race Inequality in the Blawgosphere*, 41 HARV. J. L. & GENDER 239, 243 (2018) (describing the move of *The Volokh Conspiracy* behind the *Washington Post*'s paywall and the rise of law professor blog networks).

<sup>51</sup> See, e.g., Clio Chang, *The Substackerati*, COLUM. JOURNALISM REV. (Nov. 16, 2020), [https://www.cjr.org/special\\_report/substackerati.php](https://www.cjr.org/special_report/substackerati.php).

At the end of 2024, we decided to shut the *Feminist Law Professors* blog.<sup>52</sup> The decision was not the result of any single factor, but rather the culmination of a shifting digital terrain, a waning contributor base, and the sense that the blog's work had been absorbed into other formats. The final post in 2024 read, in part: "The blog served its purposes, and now conversations have moved elsewhere, both digitally and in real life. Feminist law professors are organizing, gathering, and building community in lots of different ways beyond traditional blogs, too."<sup>53</sup> At the time, I could not have predicted the pace or tenor of the federal government's efforts to roll back the rights of women, LGBTQ+ people, and other vulnerable groups.<sup>54</sup> While I do not miss the burden of maintaining the site alone, I am concerned about the shrinking space for feminist legal discourse in public life.

Although the *Feminist Law Professors* blog closed in 2024, its spirit of feminist critique and community continues to evolve in various academic, cultural, and digital formats.<sup>55</sup> The site helped inaugurate a period in which feminist academics could speak publicly, critically, and collectively. In doing so, it faced the full complexity of feminist digital labor: the joy of connection and the weight of exposure, the generativity of critique and the pain of rupture. Its archive at *feministlawprofessors.com* remains a record not just of ideas, but of the community that gave them life. Admittedly, though, something is lost in the closing of the blog. The point of *Feminist Law Professors*, of course, was not just to write about feminism—it was to write alongside other feminists, in view of each other.<sup>56</sup> New feminist projects have the opportunity to fill that void.

## V. BLOGGING AS SCHOLARSHIP AND THE FUTURE OF DIGITAL LEGAL DISCOURSE

From the outset, *Feminist Law Professors* and other law professor blogs complicated traditional understandings of legal scholarship.<sup>57</sup> A blog post was not "scholarship" in the same sense as a law review article, but its brevity and topicality did not necessarily undermine its legitimacy. Instead, the short format revealed new forms of intellectual labor of the type that the academy has long undervalued. While the blog did not offer a unified stance, my actions as a writer and editor conveyed a distinct view: Blogging was a valuable part of the scholarly

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<sup>52</sup> See Bridget Crawford, *Farewell to the "Feminist Law Professors" Blog*, FEMINIST L. PROFESSORS (Dec. 31, 2024), <https://www.feministlawprofessors.com/2024/12/farewell-to-the-feminist-law-professors-blog/>.

<sup>53</sup> *Id.*

<sup>54</sup> See, e.g., *Donald Trump's First 100 Days of Project 2025: Harms to Women, Girls, and LGBTQI+ People*, NAT'L WOMEN'S L. CTR. (Apr. 30, 2025), <https://nwlc.org/resource/donald-trumps-first-100-days-of-project-2025-harms-to-women-girls-and-lgbtqi-people/>.

<sup>55</sup> These evolving formats include law-related podcasts, many of which have appeal to the general public. See, e.g., *Law Professor Podcasts*, PLAYERFM, <https://player.fm/podcasts/law-professor> (last visited Jan. 18, 2026) (listing more than twenty podcasts created by law faculty members).

<sup>56</sup> See *supra* note 1 and accompanying text.

<sup>57</sup> See generally Murphy & Maldonado, *supra* note 50, at 243-45 (summarizing the debate over blogging as legal scholarship and concluding that there is "consensus now that blog posts make significant contributions to the development and dissemination of legal scholarship").

project, especially for academics whose methods or subject matters were routinely excluded from mainstream publication venues. However, blogging was not a substitute for long-form legal scholarship. In a 2011 post titled *Blogging Do's and Don'ts*, I wrote, “blogging decidedly is not scholarship, in the sense that I would not advise any untenured person to think that blogging can substitute for a scholarly article.”<sup>58</sup>

A recurring theme in posts was the capacity of blogging to shape scholarly conversations in real time. Notwithstanding the form's limitations, blogging still could be “a great contribution to scholarly and popular debates.”<sup>59</sup> This observation suggests key interventions the blog made in the ecology of legal ideas: accelerating the diffusion of new arguments, legitimizing subfields such as feminist tax theory and critical menstruation studies, and providing a forum for marginalized topics and voices.<sup>60</sup> Law reviews might offer permanence and prestige, but blogs provide immediacy and reach.<sup>61</sup>

Citation practices bear this out. Although courts rarely cite blogs, legal scholarship does. The *Feminist Law Professors* blog has been cited in student-edited law reviews, peer-reviewed journals, legal newsletters, and general-interest newspapers.<sup>62</sup> The Library of Congress even archives the blog.<sup>63</sup> Other bloggers regularly linked to content on *Feminist Law Professors* as well.<sup>64</sup> By the 2010s, it was not unusual for other law professor blogs to link to *Feminist Law Professors*, a tacit acknowledgment of the blog's academic influence, even if blogging itself was not likely to receive formal recognition in any law school's promotion and tenure process.<sup>65</sup>

Blogging's archival value became more apparent as posts aged. Unlike Twitter threads or Facebook posts, the blog maintained a searchable, categorized archive stretching across eighteen years. One could trace the evolution of debates about abortion, Title IX, or legal education with greater continuity than any single law review symposium might provide.

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<sup>58</sup> Crawford, *Blogging Do's and Don'ts*, *supra* note 7.

<sup>59</sup> *Id.*

<sup>60</sup> See Bridget Crawford, *CFP: It's a Man's World: Revealing and Addressing Hidden Gender Bias in Tax Law and Policy*, FEMINIST L. PROFESSORS (Feb. 27, 2024), <https://www.feministlawprofessors.com/2024/02/cfp-its-a-mans-world-revealing-and-addressing-hidden-gender-bias-in-tax-law-and-policy/>.

<sup>61</sup> See Murphy & Maldonado, *supra* note 50, at 246.

<sup>62</sup> See, e.g., Robin Boyle-Laisure & Stephen Paskey, *Swimming with Broad Strokes: Publishing and Presenting Beyond the LW Discipline*, 29 PERSPS. 77 (2022); Nancy Chi Cantalupo & William C. Kidder, *Mapping the Title IX Iceberg: Sexual Harassment (Mostly) in Graduate School by College Faculty*, 66 J. LEGAL EDUC. 850 (2017); *A Nightmare on Facebook for the Obama Crew*, BALTIMORE SUN (Dec. 12, 2008), <https://www.baltimoresun.com/2008/12/12/a-nightmare-on-facebook-for-the-obama-crew/>; Leslie M. Rose, *The Supreme Court and Gender-Neutral Language: Setting the Standard or Lagging Behind?*, 17 DUKE J. GENDER L. & POL'Y 81, 96 (2010).

<sup>63</sup> See Library of Congress, Web Archive: *Feminist Law Professors*, <https://www.loc.gov/item/lcwaN0001704/> (last visited Jan. 6, 2026).

<sup>64</sup> See, e.g., Brian Leiter, *Autoadmit Redux: Cyber-misogyny and Racism*, BRIAN LEITER L. SCH. REPS. (Nov. 13, 2013), <https://leiterlawschool.typepad.com/leiter/2013/11/autoadmit-redux-cyber-misogyny-and-racism.html> (linking to a post by Nancy Leong on the *Feminist Law Professors* blog).

<sup>65</sup> *Id.*

Despite the value that blogging can bring to the legal field, there is no professional consensus among legal academics about the value of such efforts. Faculty members (including but not limited to contributors to *Feminist Law Professors*) faced questions about whether time spent writing online came at the expense of more “serious” scholarly work, or whether blogging had adequate quality controls.<sup>66</sup> This skepticism reflects a broader discomfort with measuring the value of nontraditional forms of academic labor.<sup>67</sup> Blogging eludes easy categorization because it is a hybrid: part scholarship, part pedagogy, part advocacy, and part community-building. As such, it challenges traditional understandings of academic work by blurring the lines between scholarship and public engagement, as well as between individual authorship and collaborative discourse. Blogging’s accessibility, informality, and responsiveness challenge the norms that often privilege insularity, exclusivity, and slow production in legal academia.

It is revealing to contrast blogs with the online “companions” of traditional law reviews—such as *Yale Law Journal Forum* (formerly the *Yale Pocket Part*), the *Harvard Law Review Forum*, and the *Columbia Law Review Sidebar*.<sup>68</sup> Many flagship journals launched these platforms in the early 2000s to offer more timely or informal commentary.<sup>69</sup> Yet these projects were institutional, not communal, and they essentially replicated the formalism of their parent publications: careful footnotes, cautious tones, and editorial gatekeeping. While they expanded the formats of legal publishing, they did not disrupt its conventions as blogs did.

Blogs like *Feminist Law Professors* went even further. More than a publishing platform, *Feminist Law Professors* offered a model of polyphonic, collaborative feminist labor. The blog demanded neither uniformity of opinion nor adherence to any particular doctrinal or theoretical stance. Its contributors disagreed, debated, and diverged, united by a shared commitment to visibility and critique. In this way, the blog constituted scholarship not just in content but in method. It reimaged intellectual labor as not only *what* is written but *how*, with *whom*, and for *what purpose*, thereby expanding both the definition of legal scholarship and the range of those recognized as legal scholars.

## VI. CONCLUSION

The winding down of the *Feminist Law Professors* blog marked more than the closure of a website. Its closure represented the loss of a space where feminist legal scholars could speak publicly, swiftly, and collectively, unbound by the

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<sup>66</sup> Douglas A. Berman, *Scholarship in Action: The Power, Possibilities, and Pitfalls for Law Professor Blogs*, 84 WASH. U. L. REV. 1043, 1055 (2006); see Brian Leiter, *Why Blogs Are Bad for Legal Scholarship*, 116 YALE L. J. F. 53 (2006), <https://www.yalelawjournal.org/forum/why-blogs-are-bad-for-legal-scholarship>.

<sup>67</sup> See, e.g., Meera E. Deo, *The Ugly Truth About Legal Academia*, 80 BROOKLYN L. REV. 943, 992 (2015) (discussing the disproportionate and uncompensated service activity performed by female law school faculty members).

<sup>68</sup> See Stephanie L. Plotin, *Legal Scholarship, Electronic Publishing, and Open Access: Transformation or Steadfast Stagnation?*, 101 L. LIBR. J. 31, 50 (2009).

<sup>69</sup> *Id.*

conventions of traditional academic publishing. What disappeared was not just content, but an ethos: one that valued responsiveness over polish, community over prestige, and insight over metrics.

To be sure, the blog's disappearance does not negate its impact. *Feminist Law Professors* demonstrated the possibilities of public, scholar-activist engagement within law. It made visible forms of labor often overlooked in legal academia, including building community, mentoring junior scholars, amplifying emerging voices, translating theory for broader audiences, and challenging the assumptions of both the left and the right. At its best moments, *Feminist Law Professors* was not just reactive but visionary, sketching a feminist legal agenda in real-time.

Today, amid intensifying political retrenchment and sustained attacks on reproductive freedom, LGBTQ+ rights, racial justice, and gender equity, the need for public-facing feminist critique has only grown more urgent. While the infrastructure that once sustained the *Feminist Law Professors* blog is gone, the impulses that fueled it call for renewal through new tools, platforms, and modes of collective engagement.

The legacy of *Feminist Law Professors* is both archival and aspirational. It modeled an ethos rooted in generosity, provocation, and the belief that law must be shaped and reshaped in the public sphere. If blogging was the medium of its moment, the challenge now is to cultivate new spaces: on Substack, on Medium, through podcasts, on TikTok, or in forms yet to be imagined. The blog's lifespan serves as a reminder that feminist legal scholarship is not confined to traditional print; it arises wherever people read, think, and resist together. Digital feminist legal scholarship will endure. Its future shape depends on who carries the work forward and whether those creators make space for the unfinished, the informal, and the urgent truths of gendered injustice, systemic inequality, and everyday resistance.



# INCLUSIVITY IN CORPORATE SCHOLARSHIP

Afra Afsharipour, Naomi Cahn, June Carbone, and Darren Rosenblum\*

## I. INTRODUCTION

For the past two decades, a growing number of women, people of color, and LGBTQ+ scholars have reshaped corporate law scholarship. This Essay explores how their contributions have challenged dominant narratives in corporate law. While these contributions span a wide range of issues, three central themes emerge.<sup>1</sup> First, much of this scholarship contributes to long-standing debates in corporate law by critically examining existing governance structures and introducing new perspectives that challenge conventional views on corporate purpose, power, and value. Second, and strongly connected to the first theme, women and queer scholars have led inquiries into Environmental, Social, and Governance (ESG) frameworks. Third, a substantial body of scholarship confronts the persistent gap and underrepresentation of women, including women of color, in corporate law, governance, and leadership. These works reveal how structural exclusion, entrenched networks, and persistent biases sustain that underrepresentation.<sup>2</sup> Much of this scholarship adopts an interdisciplinary perspective to demonstrate the business advantages of diversity, equity, and inclusion (DEI) in corporate governance.

In line with this symposium, we focus on the latter two themes, having addressed the first in previous and ongoing work. Building on those themes, this Essay explores the Trump administration's attacks on DEI across numerous sectors, with a focus on corporate actors. It is too soon to ascertain if this assault will also undermine inclusion-focused scholarship in corporate law and governance—or spur a new wave of scholarship on the governance risks associated with crony capitalism.

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<sup>1</sup> While we identify three major themes, there are large overlaps between each theme, particularly in analyzing Environmental, Social and Governance (ESG) and Diversity, Equity & Inclusion (DEI) as subsets of broader corporate governance concerns.

<sup>2</sup> See Afra Afsharipour & Matthew Jennejohn, *Gender and the Social Structure of Exclusion in U.S. Corporate Law*, 90 U. CHI. L. REV. 1819, 1819 (2023); Sarah C. Haan, *Corporate Governance and the Feminization of Capital*, 74 STAN. L. REV. 515, 515 (2022); Afra Afsharipour, *Women and M&A*, 12 U.C. IRVINE L. REV. 359, 377 (2022); see also NAOMI CAHN, JUNE CARBONE & NANCY LEVIT, FAIR SHAKE: WOMEN AND THE FIGHT TO BUILD A JUST ECONOMY 139 (2024) (arguing that women's marginalization within corporate workplaces corresponds to winner-take-all environments that prize those who can break the rules and get away with it).

## II. WIDENING THE APERTURE OF CORPORATE LAW SCHOLARSHIP

In the past two decades, women, people of color, and LGBTQ+ scholars have widened the aperture of corporate governance scholarship and contributed to institutional reform. For example, an influential 2001 paper proclaimed the “end of history” in corporate law—claiming that there was “no longer any serious competitor” to the view that corporate law should prioritize long-term shareholder value.<sup>3</sup> However, thanks in part to a broader group of scholars, that debate has flourished and evolved.

Diverse voices have challenged long-standing assumptions about corporate law’s goals and values. This section addresses two aspects of this re-examination: ESG and representation.

### A. ESG: Evolving Debates and Emerging Models in ESG

Over the past decade, a large body of scholarship has examined ESG issues, closely linking them to broader debates on corporate purpose.

Women scholars have led much of this inquiry. They have illustrated how various actors—including investors, stakeholders, governments, international and transnational institutions, academics, and even corporate managers themselves—pressure companies to address environmental and social concerns.<sup>4</sup> Some scholars have advanced rationales for ESG that emphasize the necessity for companies to prioritize sustainability, employee welfare, and local communities.<sup>5</sup> They often draw upon the contributions of women and queer scholars who have both reconceptualized the corporation<sup>6</sup> and urged corporate boards and managers to serve as “trustees for the entity and for the society in which that entity is situated.”<sup>7</sup> Others have critically assessed ESG’s opportunities and challenges.<sup>8</sup>

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<sup>3</sup> Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 447-54 (2001) (providing only two references to the work of women scholars, the exceptions being Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999), and ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* (1993)).

<sup>4</sup> See Cynthia A. Williams, *Comparative and Transnational Developments in Corporate Social Responsibility*, in RESEARCH HANDBOOK ON COMPARATIVE CORPORATE GOVERNANCE 92 (Afra Afsharipour & Martin Gelter eds., 2021); Jennifer S. Fan, *Woke Capital: The Role of Corporations in Social Movements*, 9 HARV. BUS. L. REV. 441, 441 (2019).

<sup>5</sup> See Blair & Stout, *supra* note 3, at 250; Virginia Harper Ho, *Enlightened Shareholder Value: Corporate Governance Beyond the Shareholder-Stakeholder Divide*, 36 J. CORP. L. 59, 60 (2010); Ann M. Lipton, *Not Everything is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE J. ON REG. 499, 527 (2020); Lisa M. Fairfax, *Stakeholderism, Corporate Purpose, and Credible Commitment*, 108 VA. L. REV. 441, 488 (2022).

<sup>6</sup> See Blair & Stout, *supra* note 3, at 253.

<sup>7</sup> See Kellye Y. Testy, *Capitalism and Freedom—For Whom? Feminist Legal Theory and Progressive Corporate Law*, 67 LAW & CONTEMP. PROBS. 87, 92 (2004).

<sup>8</sup> See Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563, 2563 (2021); Elizabeth Pollman, *The Making and Meaning of ESG*, 14 HARV. BUS. L. REV. 403, 407 (2024); see also Kristin N. Johnson, *Banking on Diversity: Does Gender Diversity Improve Financial Firms’ Risk Oversight?*, 70 SMU L. REV. 327, 376 (2017) (describing the value of diversity in combating groupthink).

Several scholars have underscored the need for standardized and stakeholder-inclusive disclosures, advocating for a shift from performative rhetoric to more robust, enforceable practices that can drive meaningful change. Accordingly, they have examined the evolution to mandatory ESG disclosures, with some arguing that voluntary disclosures inadequately serve investors and stakeholders assessing ESG performance. This focus builds on early work by scholars such as Cynthia Williams, who called for expanded corporate disclosure to promote corporate social transparency, including on human rights and environmental issues.<sup>9</sup> As Jill Fisch has noted, “despite the growth in the volume of sustainability disclosure, private ordering has not been successful in producing sustainability disclosures that meet investors’ needs.”<sup>10</sup> Thus, Fisch calls for a mandatory “Sustainability Discussion and Analysis (SD&A)” in SEC filings to “promote comparability and reliability.”<sup>11</sup> Other scholars have critiqued the current U.S. corporate disclosure regime, noting the SEC’s “blind spots” in ESG disclosures and its narrow, investor-focused framework.<sup>12</sup> These scholars have argued for a more inclusive approach to ensure meaningful transparency and accountability.<sup>13</sup> Lisa Fairfax, however, has challenged the framing of voluntary versus mandatory ESG disclosure as a “false disclosure choice,” noting that voluntary and mandatory disclosures are part of a continuum and that voluntary reporting often precedes and shapes regulatory mandates.<sup>14</sup>

Some scholars have grappled with the intersection of directors’ responsibilities and ESG. For example, Williams suggests that the evolving legal landscape may require directors and officers to take climate and ESG risks seriously as part of their fiduciary duties, suggesting that legal obligations may help ensure better ESG efforts and accountability.<sup>15</sup> Virginia Harper Ho examines ESG as part of the board’s monitoring and risk management responsibilities.<sup>16</sup> Others agree that ESG has the potential to drive change in corporate law and corporate conduct, but recognize that the absence of standardized metrics and robust enforcement undermines this potential.<sup>17</sup>

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<sup>9</sup> See Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1301-02 (1999).

<sup>10</sup> Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 GEO. L.J. 923, 947 (2019).

<sup>11</sup> *Id.* at 952.

<sup>12</sup> See Lipton, *supra* note 5, at 502-03; Cynthia A. Williams & Donna M. Nagy, *ESG and Climate Change Blind Spots: Turning the Corner on SEC Disclosure*, 99 TEX. L. REV. 1453, 1455-56 (2020).

<sup>13</sup> See Lipton, *supra* note 5, at 503; Williams & Nagy, *supra* note 12, at 1484.

<sup>14</sup> Lisa M. Fairfax, *Dynamic Disclosure: An Exposé on the Mythical Divide Between Voluntary and Mandatory ESG Disclosure*, 101 TEX. L. REV. 273, 279-81 (2022).

<sup>15</sup> Cynthia A. Williams, *Fiduciary Duties and Corporate Climate Responsibility*, 74 VAND. L. REV. 1875, 1896-03, 1916 (2021); see also *In re McDonald’s Corp. S’holder Derivative Litig.*, 289 A.3d 343 (Del. Ch. 2023) (ruling that the failure to investigate sexual harassment complaints can be a breach of fiduciary duties).

<sup>16</sup> See Virginia Harper Ho, *Board Duties: Monitoring, Risk Management & Compliance*, in RESEARCH HANDBOOK ON COMPARATIVE CORPORATE GOVERNANCE, *supra* note 4, at 242.

<sup>17</sup> See Lisa M. Fairfax, *From Apathy to Activism: The Emergence, Impact, and Future of Shareholder Activism as the New Corporate Governance Norm*, 99 B.U. L. REV. 1301, 1301-07, 1322-23 (2019); Michal Barzuza, Quinn Curtis & David H. Webber, *The Millennial Corporation: Strong Stakeholders, Weak Managers*, 28 STAN. J.L. BUS. & FIN. 255, 255-58, 262-63 (2023).

Scholars have also shed light on the rise of ESG frameworks, examining their origins, evolution, and potential future. A significant concern with ESG is a lack of consensus on both its definition and measurement. Here, Elizabeth Pollman's contribution unpacks the history of ESG, showing how it has developed into a "highly flexible moniker that can vary widely by context, evolve over time, and collectively appeal to a broad range of investors and stakeholders."<sup>18</sup> Pollman contends, however, that this same flexibility has "engender[ed] confusion, unrealistic expectations, and greenwashing that could inhibit corporate accountability or crowd out other solutions to pressing environmental and social issues."<sup>19</sup>

### B. Inclusion: Barriers, Accountability, and Reforms

Substantial scholarship addresses the persistent underrepresentation of women, including women of color, in corporate law, governance, and leadership. These works show that underrepresentation stems not from pipeline or individual ambition, but from structural exclusion, entrenched networks, and persistent biases.<sup>20</sup> Many also offer a comprehensive understanding of the obstacles to greater inclusion and outline multifaceted strategies for achieving meaningful inclusion in corporate governance.

Recent work on gender and corporate governance builds on the scholarly contributions of scholars such as Kathleen Lahey, Sarah Salter, Theresa Gabaldon, and Ronnie Cohen.<sup>21</sup> They were among the first to build on the insights of feminist legal theory to analyze the basis of structural exclusion in corporate governance, and their work continues to shape the discourse today.<sup>22</sup> As early as 1985, Lahey and Salter argued that corporate law scholarship prioritized traditional (masculinist) inquiry and that "[o]nly when female legal scholars actively study and promote feminist values such as participation, decentralization, and power sharing will a serious challenge to the patriarchal mentality of the business [] be possible."<sup>23</sup>

This transformative vision surfaced in Gabaldon's foundational work, which introduced feminist approaches that exposed how core doctrines, such as

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<sup>18</sup> Pollman, *supra* note 8, at 407.

<sup>19</sup> *Id.* at 403.

<sup>20</sup> See, e.g., Afsharipour & Jennejohn, *supra* note 2, at 1823; Haan, *supra* note 2, at 523; Afsharipour, *Women and M&A*, *supra* note 2, at 359.

<sup>21</sup> Both Professors Gabaldon and Cohen build upon the work of Kathleen A. Lahey & Sarah W. Salter. See generally Kathleen A. Lahey & Sarah W. Salter, *Corporate Law in Legal Theory and Legal Scholarship: From Classicism to Feminism*, 23 OSGOODE HALL L.J. 543 (1985) (Lahey and Salter's scholarship is recognized as one of the earliest and most rigorous feminist critiques of corporate law's structural biases). See Theresa A. Gabaldon, *The Lemonade Stand: Feminist and Other Reflections on the Limited Liability of Corporate Shareholders*, 45 VAND. L. REV. 1387, 1414 (1992); Ronnie Cohen, *Feminist Thought and Corporate Law: It's Time to Find Our Way up from the Bottom (Line)*, 2 AM. U. J. GENDER & L. 1, 26-27 (1994).

<sup>22</sup> See Testy, *supra* note 7, at 96-98; Janis Sarra, *The Gendered Implications of Corporate Governance Change*, 1 SEATTLE J. SOC. JUST. 457, 469-71 (2002).

<sup>23</sup> Lahey & Salter, *supra* note 21, at 543.

limited liability, reinforce social values that disadvantage vulnerable groups.<sup>24</sup> Building on Gabaldon's contributions, Cohen's analysis highlighted how corporate law's focus on competition, hierarchy, and profit maximization excludes values associated with women's experiences, such as care, cooperation, and social responsibility.<sup>25</sup>

Expanding on these foundational critiques, important literature by scholars such as Jayne Barnard, Lisa Fairfax, and Marleen O'Connor examined corporate governance power structures and highlighted persistent barriers facing women and people of color in corporate leadership. Barnard, an early advocate for board diversity, examined the barriers to women's advancement on corporate boards,<sup>26</sup> criticizing boards' "cohesiveness" and "clubbiness," while citing "shrinking board sizes" and "old-fashioned gender bias" as persistent barriers.<sup>27</sup> Some scholars explore this effect in more specific contexts, such as family firms. For example, Mary Condon asserted that corporate structures reinforce traditional gender roles and power imbalances within family businesses by structuring ownership, control, and recognition in ways that often disadvantage women.<sup>28</sup> Fairfax's work targeted board nomination processes, which systematically disadvantaged people of color and women. She advocated for more intentional efforts to disrupt boards' "good old boys network."<sup>29</sup> This early board diversity scholarship spawned a multi-faceted array of literature examining board diversity.<sup>30</sup>

Beyond this scholarship, an emerging body of literature examined women leaders' experiences beyond the board. O'Connor described the "double bind" where women executives "cannot be too masculine or feminine,"<sup>31</sup> noting that even women with higher moral tendencies will not last because "occupational experiences will override socialized gender roles."<sup>32</sup> Recent work layers on a "triple bind" that women face.<sup>33</sup> As June Carbone, Naomi Cahn, and Nancy Levit explain, corporate women lose not only when they do not follow men's rules, but also when they do, facing harsher penalties than men for self-centered, rule-

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<sup>24</sup> See Gabaldon, *supra* note 21, at 1429.

<sup>25</sup> See Cohen, *supra* note 21, at 11; see also Naomi Cahn, June Carbone & Nancy Levit, *Gender and the Tournament: Reinventing Antidiscrimination Law in an Age of Inequality*, 96 TEX. L. REV. 425, 425 (2018) (arguing that modern antidiscrimination law is ineffective in addressing gender disparities in "tournament" style corporate environments).

<sup>26</sup> Jayne W. Barnard, *More Women on Corporate Boards? Not So Fast*, 13 WM. & MARY J. WOMEN & L. 703, 703-04 (2007).

<sup>27</sup> *Id.* at 710-15.

<sup>28</sup> Mary G. Condon, *Limited by Law? Gender, Corporate Law and the Family Firm*, in LAW AS A GENDERING PRACTICE 181 (Dorothy E. Chunn & Dany Lacombe, eds., 73d ed. 2000).

<sup>29</sup> Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, 58 WIS. L. REV. 795, 839-40 (2005).

<sup>30</sup> See Darren Rosenblum, *Diversity and the Board of Directors: A Comparative Perspective*, in RESEARCH HANDBOOK ON COMPARATIVE CORPORATE GOVERNANCE, *supra* note 4, at 179.

<sup>31</sup> Marleen A. O'Connor, *Women Executives in Gladiator Corporate Cultures: The Behavioral Dynamics of Gender, Ego, and Power*, 65 MD. L. REV. 465, 468 (2006).

<sup>32</sup> *Id.* at 475.

<sup>33</sup> See June Carbone, Naomi Cahn & Nancy Levit, *Women, Rule-Breaking, and the Triple Bind*, 87 GEO. WASH. L. REV. 1105 (2019).

breaking behavior.<sup>34</sup> The resulting exclusion perpetuates a perception that women lack what it takes to succeed.<sup>35</sup>

Such work provided the conceptual groundwork for subsequent research examining institutional governance. Recent empirical studies build on and reinforce theoretical critiques by women authors in the 1990s. Afra Afsharipour and Matthew Jennejohn's research on the Delaware Chancery litigation network—U.S. corporate law's hub—shows that women are not only underrepresented but also occupy peripheral positions within the litigation network.<sup>36</sup> This structural exclusion also surfaces in the M&A context, where Afsharipour shows that “over a seven-year period, women make up [an] average [of] 10.5% of lead legal advisors for buyers in large M&A deals,” even though women constituted over 20% of partners and close to half of associates.<sup>37</sup> Jennifer Fan's analysis of private company boards in tech sectors supported similar findings.<sup>38</sup> Fan argues that lasting change requires cultural, business, and legal factors aligning to prioritize gender diversity, laying the blame for women's exclusion on entrenched structures, networks, and attitudes.<sup>39</sup>

Some scholars present more systemic and historical analyses of governance. Janis Sarra examined how corporate governance instantiates highly gendered power dynamics in corporate leadership, particularly in the way traditional governance structures exclude or devalue women's contributions to corporate life.<sup>40</sup> These gendered power dynamics mirror those in the domestic sphere, where women's labor has similarly been undervalued.<sup>41</sup> Sarah Haan's history of the “feminization of capital”—the transformation of American shareholders from majority male to majority female—shows how this transformation “shape[d] foundational ideas of corporate governance theory.”<sup>42</sup> Haan proposes that we should thus re-examine core concepts in corporate governance through a gender-focused lens that assesses the intersection of gender and capital in shaping corporate norms.<sup>43</sup>

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<sup>34</sup> *Id.* at 1126–27.

<sup>35</sup> *Id.*

<sup>36</sup> Afsharipour & Jennejohn, *supra* note 2, at 1853.

<sup>37</sup> Afsharipour, *Women and M&A*, *supra* note 2, at 359; Tracey E. George, Mitu Gulati & Albert Yoon, *Gender, Credentials and M&A*, 48 *BYU L. REV.* 723, 723 (2022).

<sup>38</sup> Jennifer S. Fan, *Innovating Inclusion: The Impact of Women on Private Company Boards*, 46 *FLA. ST. U. L. REV.* 345, 372–73 (2018).

<sup>39</sup> *Id.* at 348, 364–67.

<sup>40</sup> Sarra, *supra* note 22, at 469–71.

<sup>41</sup> See Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 *HARV. L. REV.* 1497, 1573 (1983); see also Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 *YALE J.L. & FEMINISM* 51, 52 (1997) (showing the double devaluation of Black women's domestic work).

<sup>42</sup> Haan, *supra* note 2, at 516.

<sup>43</sup> *Id.* at 516, 573–74; see also Carol Liao, *Power and the Gender Imperative in Corporate Law*, in *CREATING CORPORATE SUSTAINABILITY: GENDER AS AN AGENT FOR CHANGE* 282 (Beate Sjøfjell & Irene Lynch Fannon eds., 2018) (highlighting the gendered predisposition of entrenched ideologies in corporate law); see also Carol Liao, *An Anti-Racist Feminist Agenda for Sustainable Corporate Law*, in *A RESEARCH AGENDA FOR CORPORATE LAW* 143 (Christopher M. Bruner & Marc Moore eds., 2023) (arguing that gendered, colonial, and racist foundations of the corporation have influenced how corporate interests are prioritized and protected).

Other scholarship has explored remedies for leadership underrepresentation. Darren Rosenblum argued that mandates requiring the inclusion of women on boards reflected a consequential feminization of capital.<sup>44</sup> Rosenblum and Daria Roithmayr conducted a qualitative study of the French quota, showing that the inclusion of women made governance more methodical, while Aaron Dhir examined the Norwegian quota model and found similar results regarding the benefits of women's inclusion.<sup>45</sup> Afsharipour examined the controversial Indian quota system, revealing that the "token" requirement of one woman still made a significant difference.<sup>46</sup> And, of course, there is an extensive body of literature outside of law, in the fields of management and finance, that evaluates various remedies for underrepresentation.<sup>47</sup>

Women scholars have also led research analyzing intersections of racial equality, board diversity, and corporate accountability. Cheryl Wade's contribution connecting racial discrimination and board fiduciary duties demonstrates how racism is associated with fiduciary duty shortcomings.<sup>48</sup> Her analysis of high-profile discrimination cases against leading firms reveals a persistent pattern of board denial and inaction in the face of discrimination complaints.<sup>49</sup> Wade contends that corporate racism not only disadvantages people of color but also reflects and reinforces the privileged status of whites.<sup>50</sup> The result is a pattern of "irrational defensiveness" and "cosmetic reforms that fail to address root causes."<sup>51</sup>

Recent work directly addresses many companies' cosmetic engagement with racial matters, arguing that much engagement presents "market fundamentalist, value-extractive" approaches to racial equity that reify "existing racial hierarchies and fails to produce change."<sup>52</sup> Using examples from civil rights movements and recent corporate responses to the 2020 racial justice protests, Gina-Gail Fletcher and H. Timothy Lovelace argue that, rather than achieving meaningful racial equity, corporate actions frame racial equity as a means to

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<sup>44</sup> See Darren Rosenblum, *Feminizing Capital: A Corporate Imperative*, 6 BERKELEY BUS. L.J. 55, 73 (2009).

<sup>45</sup> See Darren Rosenblum & Daria Roithmayr, *More Than a Woman: Insights into Corporate Governance After the French Sex Quota*, 48 IND. L. REV. 889, 911-13 (2015); see AARON A. DHIR, CHALLENGING BOARDROOM HOMOGENEITY: CORPORATE LAW, GOVERNANCE, AND DIVERSITY 147-172 (2015).

<sup>46</sup> See Afra Afsharipour, *The One Woman Director Mandate: History and Trajectory*, in CORPORATE GOVERNANCE IN INDIA: CHANGE AND CONTINUITY 85 (Asish K. Bhattacharyya ed., 2016).

<sup>47</sup> See, e.g., Daniel T. Greene et al., *Reconciling the Evidence on Board Diversity Mandates*, 95 HKU JOCKEY CLUB ENTER. SUSTAINABILITY GLOB. RSCH. INST. (forthcoming 2025); Costanza De Acutis, Andrea Weber & Elisabeth Wurm, *The Effects of Board Gender Quotas: A Meta-Analysis*, IZA INST. LAB. ECON. NO. 17333 (Sept. 2024).

<sup>48</sup> See Cheryl L. Wade, *Racial Discrimination and the Relationship Between the Directorial Duty of Care and Corporate Disclosure*, 63 U. PITT. L. REV. 389, 390, 395-96 (2001) (in the Texaco case, for example, management dismissed complaints as "a bunch of militants," yet the complaints led to a \$176 million settlement and significant reputational damage for the companies).

<sup>49</sup> *Id.* at 394.

<sup>50</sup> *Id.* at 429-30.

<sup>51</sup> *Id.* at 394, 399.

<sup>52</sup> Gina-Gail S. Fletcher & H. Timothy Lovelace, Jr., *Corporate Racial Responsibility*, 124 COLUM. L. REV. 361, 367 (2024).

“wealth maximization without government intervention.”<sup>53</sup> Such framing, they contend, subordinates human dignity and advances an antiregulatory agenda that “reifies existing hierarchies, keeping the status quo fixed” for current beneficiaries.<sup>54</sup> Fletcher and Lovelace emphasize that greater inclusion in board and C-suite composition is one step toward advancing racial justice.<sup>55</sup>

LGBTQ+ inclusion entered corporate governance debates after California and Nasdaq incorporated it into broader diversity mandates.<sup>56</sup> Rosenblum and Jeremy McClane explored governance benefits arising from their inclusion, focusing on the traits that might open board engagement to difference.<sup>57</sup> Rosenblum then examined the challenge of LGBTQ+ inclusion, given that many leaders already hold power while remaining in the closet, arguing that inclusion requires making corporate hierarchies less heterosexist.<sup>58</sup> Considering queer inclusion raises questions about how governance should account for other differences, such as class, national or generational status, or even ability.

Beyond board diversity, scholarship addresses market-driven DEI accountability through “equality metrics”<sup>59</sup> and diversity disclosures.<sup>60</sup> Fletcher and Veronica Root Martinez argue that such standardized, empirical disclosures can reveal “current demographic diversity of the workforce and supply chain” while helping advance “measurable, specific plans to improve racial equity.”<sup>61</sup> In the international human rights context, Erika George examines the role of metrics in corporate accountability.<sup>62</sup> Similarly, Atinuke Adediran makes a strong case that diversity should be central to the burgeoning debate over ESG disclosures, convincingly showing that diversity disclosure benefits both shareholders and stakeholders.<sup>63</sup> These calls for additional disclosure echo earlier calls by scholars like Wade, who advocated mandatory disclosures of potential civil rights liability to prevent companies from issuing “self-serving distortions” about their diversity efforts.<sup>64</sup>

Much of this literature clarifies the importance of gender and racial equality for effective corporate governance, especially within broader ESG goals. Meaningful change requires sustained multifaceted efforts, including legal and

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<sup>53</sup> *Id.* at 411.

<sup>54</sup> *Id.* at 415.

<sup>55</sup> *See id.* at 422.

<sup>56</sup> *See* Darren Rosenblum, *Queers, Closets and Corporate Governance*, 80 *BUS. LAW.* 413, 415 (2025).

<sup>57</sup> Jeremy McClane & Darren Rosenblum, *Why Corporate Boards Should Include LGBTQ+ People*, 46 *SEATTLE U. L. REV.* 255 (2023).

<sup>58</sup> *See* Rosenblum, *supra* note 56.

<sup>59</sup> *See* Veronica Root Martinez & Gina-Gail S. Fletcher, *Equality Metrics*, 130 *YALE L.J. FORUM* 869, 869-70 (2021).

<sup>60</sup> *See* Atinuke O. Adediran, *Disclosing Corporate Diversity*, 109 *VA. L. REV.* 307 (2023).

<sup>61</sup> Martinez & Fletcher, *supra* note 59, at 875.

<sup>62</sup> ERIKA GEORGE, *INCORPORATING RIGHTS: STRATEGIES TO ADVANCE CORPORATE ACCOUNTABILITY* 147 (2021).

<sup>63</sup> *See* Adediran, *supra* note 60, at 309-10.

<sup>64</sup> Wade, *supra* note 48, at 420.

regulatory reforms and efforts from various corporate governance actors, including investors.<sup>65</sup>

### III. THE DEI BACKLASH AND THE FUTURE OF CORPORATE SCHOLARSHIP

Diverse corporate law scholars have led the way not only in examining the advantages of greater diversity but also in discussing its limitations, pressing for reforms, and showing the links between greater diversity and corporate performance. From the century's beginning, when Norway adopted corporate board mandates, until 2023, the corporate world witnessed a seemingly inexorable rise in the emphasis on diversity as a critical element of good governance. Champions of greater diversity have emphasized, however, that the impact of gender diversity does not come from "adding women and stirring."<sup>66</sup> Instead, scholars work to tease out the causal factors: recruiting, retaining, and maintaining a diverse workforce requires different management practices than sustaining a corporate monoculture.<sup>67</sup> The study of corporate diversity thus offers an opportunity to examine which management practices matter and the impact they have not just on recruiting a more diverse workforce but also on corporate performance.

Most proposals to mandate increased diversity combine the normative case for diversity with an instrumental case, suggesting that the absence of diverse boards and management teams signals problems with a company that go beyond the lack of diversity itself. In 2020, for example, California passed statutes mandating that publicly held corporations, with principal offices in California, include at least one woman and one director from an underrepresented community, including racial and sexual minorities.<sup>68</sup> The legislation was justified both on the basis of past discrimination, including the dramatic underrepresentation of women on California boards, where a quarter of publicly traded companies had none, and by the value that more diverse perspectives bring to corporate management.<sup>69</sup>

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<sup>65</sup> See, e.g., Cathy Hwang & Emily Winston, *The Limits of Corporate Governance*, 47 SEATTLE U.L. REV. 677 (2024) (challenging shareholder primacy and arguing that regulation is the optimal means for curtailing misbehavior by corporations).

<sup>66</sup> June Carbone, *Board Diversity: People or Pathways?*, 85 LAW & CONTEMP. PROBS. 167, 168 (2022).

<sup>67</sup> See Deborah L. Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?*, 39 DEL. J. CORP. L. 377, 384 (2014) (concluding that that social science literature does not establish that the addition of women per se increases diversity); see also Alice H. Eagly, *When Passionate Advocates Meet Research on Diversity, Does the Honest Broker Stand a Chance?*, 72 J. SOC. ISSUES 199, 201 (2016) (generally critiquing failure to establish diversity as a causal factor once appropriate controls are added); see also Darren Rosenblum, *When Does Sex Diversity on Boards Benefit Firms?*, 20 U. PA. J. BUS. L. 429, 443 (2018) (arguing that the "big tent of instrumentalists, filled with both sincere instrumentalists and normative proponents and opponents, seems to inflate diversity's value").

<sup>68</sup> CAL. CORP. CODE §§ 301.3-301.4 (West 2021).

<sup>69</sup> See Laurel Wamsley, *California Becomes 1st State to Require Women on Corporate Boards*, NPR (Oct. 1, 2018, at 04:47 PM), <https://www.npr.org/2018/10/01/653318005/california-becomes-1st->

Nasdaq similarly recognized this when it required corporate boards trading on the exchange to have at least one female director and one who identified as a member of certain racial groups or as LGBTQ+ (or to publicly disclose the company's reasons for not meeting this diversity objective), and to report their diversity statistics.<sup>70</sup> Before adopting the rule, Nasdaq issued a report finding that: "There is substantial evidence that board diversity enhances the quality of a company's financial reporting, internal controls, public disclosures, and management oversight."<sup>71</sup> It concluded that greater diversity contributed to better management and fraud prevention.<sup>72</sup>

The increasingly visible diverse voices in the legal academy and the compelling research on the business advantages of more diverse workforces have prompted a backlash. The major shift in diversification efforts began with the Supreme Court's *Students for Fair Admissions (SFFA)* decision, which voided affirmative action policies at public and private universities, overturning decades of precedent.<sup>73</sup> The prior year, courts found both California mandates—SB826 and AB979—unconstitutional.<sup>74</sup> The Nasdaq rule, imposing only disclosure mandates,

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state-to-require-women-on-corporate-boards#:~:text=%22We%20are%20not%20going%20to,will%20draw%20a%20\$300%2C000%20fine [https://perma.cc/ZDV4-L8YN].

<sup>70</sup> See Order Approving Proposed Rule Changes, as Modified by Amendments No. 1, To Adopt Listing Rules Related to Board Diversity and To Offer Certain Listed Companies Access to a Complimentary Board Recruiting Service, Exchange Act Release No. 34-92590, 86 Fed. Reg. 44424, 4424-25 (Aug. 6, 2021); see also *Nasdaq's Board Diversity Rule: What Companies Should Know*, NASDAQ 1, 2 (Feb. 28, 2023), <https://listingcenter.nasdaq.com/assets/Board%20Diversity%20Disclosure%20Five%20Things.pdf>; see also Dan Mangan, *Appeals Court Will Rehear Challenge to Nasdaq Board Diversity Rule, Putting Mandate at Risk*, CNBC (Feb. 20, 2024, at 03:20 PM), <https://www.cnbc.com/2024/02/20/appeals-court-to-rehear-nasdaq-diversity-rule-challenge.html> [https://perma.cc/ED5Q-474G] (emphasizing that these efforts have been attacked as "woke" or as discriminatory quotas); Dan Byrne, *Nasdaq's Diversity Rule Faces a Conservative Backlash*, CORP. GOVERNANCE INST., <https://www.thecorporategovernanceinstitute.com/insights/news-analysis/nasdaqs-diversity-rule-faces-a-conservative-backlash/> [https://perma.cc/39VU-NFE3] (last visited June 5, 2024).

<sup>71</sup> Order Approving Proposed Rule Changes, as Modified by Amendments No. 1, To Adopt Listing Rules Related to Board Diversity and To Offer Certain Listed Companies Access to a Complimentary Board Recruiting Service, Exchange Act Release No. 34-92590, 86 Fed. Reg. at 4431; see also Afra Afsharipour, *Investment Bankers and Inclusive Corporate Leadership*, 46 SEATTLE U. L. REV. 221, 226-29 (2023) (describing investor pressure for greater diversity); see also Naomi Cahn, June Carbone & Nancy Levit, *The Instrumental Case for Corporate Diversity*, 40 MINN. J. L. & INEQ. 117, 139-40 (2022) ("In short, Nasdaq reported that firms with greater diversity were less likely to be engaged in the practices most closely associated with short-termism and competitive pay: earnings management, accounting manipulation and fraud, and the suborning of internal controls.").

<sup>72</sup> See NASDAQ, *supra* note 70; see also Notice of Filing of Proposed Rule Change to Adopt Listing Rules Related to Board Diversity, Exchange Act Release No. 34-90574, 85 Fed. Reg. 80472, 80473 (Dec. 4, 2020).

<sup>73</sup> See *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 230 (2023).

<sup>74</sup> See Herbert Smith Freehills Kramer, *Diversity in the Boardroom: Nasdaq's Diversity Disclosure Rules Struck Down by En Banc Fifth Circuit Court of Appeals*, JD SUPRA (Jan. 6, 2025), <https://www.jdsupra.com/legalnews/diversity-in-the-boardroom-nasdaq-s-7672812/> [https://perma.cc/2EU7-TGHJ].

was overturned by the Fifth Circuit in a 9-8 split, finding that the SEC exceeded its authority.<sup>75</sup>

The following month, President Trump took office for the second time and immediately began targeting DEI. Trump's January 20, 2025, Executive Order entitled "Ending Radical and Wasteful Government DEI Programs and Preferencing"<sup>76</sup> barred all governmental DEI efforts. The next day, Trump's order, "Ending Illegal Discrimination and Restoring Merit-Based Opportunity"<sup>77</sup> sought to "encourage the private sector to end illegal discrimination and preferences, including DEI."<sup>78</sup> This federal effort sparked similar pushes by ten state attorneys general, who published a letter targeting the six most prominent financial institutions, pressuring them to eliminate DEI and ESG programs while warning of reprisals for advancing "discriminatory employment quotas."<sup>79</sup>

This backlash is part of a broader anti-DEI movement driven by politicians, activists, and segments of the public challenging these programs' effectiveness and legality. Firms that previously led the push for inclusion and DEI efforts after 2020, such as BlackRock, made a direct about-face on many of their core diversity commitments.<sup>80</sup> Dozens of major employers identified DEI as a *risk factor* in 2024 filings, and some high-profile companies publicly abandoned diversity targets, cancelled inclusion trainings, or even dropped the term "DEI" from communications.<sup>81</sup> The trend of eliminating DEI roles and programs, including a decrease in the number of chief diversity officers, began in 2023 amid political shifts and has since greatly intensified.<sup>82</sup> Some academics have also questioned the effectiveness of existing DEI programs.<sup>83</sup>

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<sup>75</sup> See *All. for Fair Bd. Recruitment v. SEC*, 85 F.4th 226, 232 (5th Cir. 2023) (noting Edward Blum, the conservative legal activist who overturned U.S. affirmative action policies in *Students for Fair Admission v. Harvard*, initiated the suit); *All. for Fair Bd. Recruitment v. SEC*, 125 F.4th 159, 168 (5th Cir. 2024); Jody Godoy, *Conservatives Challenging Nasdaq Board Diversity Rule Appeal to Full 5th Circuit*, REUTERS (Oct. 25, 2023, at 03:41 PM), <https://www.reuters.com/legal/conservatives-challenging-nasdaq-board-diversity-rule-appeal-full-5th-circuit-2023-10-25/>; Andrew Ramonas, *Nasdaq Board Diversity Rules Struck Down by Fifth Circuit (2)*, BLOOMBERG L. (Dec. 11, 2024, at 9:02 PM), <https://news.bloomberglaw.com/esg/nasdaq-board-diversity-regulations-struck-down-by-fifth-circuit>.

<sup>76</sup> Exec. Order No. 14151, 90 Fed. Reg. 8339 (Jan. 29, 2025).

<sup>77</sup> Exec. Order No. 14173, 90 Fed. Reg. 8633 (Jan. 31, 2025).

<sup>78</sup> *Id.*

<sup>79</sup> See Letter from Ken Paxton, Att'y Gen. of Tex., to JPMorgan Chase, Bank of America, Morgan Stanley, Goldman Sachs, Citigroup, & BlackRock (Jan. 23, 2025), <https://www.texasattorneygeneral.gov/sites/default/files/images/press/Paxton%20Financial%20Institutions%20Letter%20Final.pdf>.

<sup>80</sup> See Silla Brush, *BlackRock Ends Diversity Goals, Merges DEI Staff into New Team*, FORTUNE (Feb. 28, 2025, at 02:05 PM), <https://fortune.com/2025/02/28/blackrock-diversity-dei-new-team/> [<https://perma.cc/N2Q5-ARM8>].

<sup>81</sup> See *id.*

<sup>82</sup> See Lisa Talbot, Rebecca Wise & Rima Ramchandani, *The Backlash Against DEI in the U.S. and What It Means for Canadian and Cross-Border Companies*, MONDAQ (Feb. 12, 2025), [mondaq.com/canada/diversity-equity-inclusion/1582918/the-backlash-against-dei-in-the-us-and-what-it-means-for-canadian-and-cross-border-companies](https://mondaq.com/canada/diversity-equity-inclusion/1582918/the-backlash-against-dei-in-the-us-and-what-it-means-for-canadian-and-cross-border-companies) [<https://perma.cc/GZX7-TQS5>].

<sup>83</sup> See e.g., Denise Robb & Sarah Rana, *Cutting the Cord: Good Riddance to Ineffective DEI Programs*, 17 INDUS. & ORGANIZATIONAL PSYCH. 507, 508 (2024).

While these attacks have undermined many corporate inclusion efforts, women have seen a rise in representation—with benefits for their companies. One of the most striking shifts has been in the number of female CEOs at Fortune 500 companies. Female representation increased from under 1% in 2000 to 6% in 2017,<sup>84</sup> and, for the first time, surpassed 10% in 2023.<sup>85</sup> During the ten-year period from 2013 to 2023, in which the increase occurred, female CEOs outperformed their male counterparts, producing returns of 384% compared to 261% for the male-led companies.<sup>86</sup>

The backlash has not fazed scholars interested in inclusion. Research on *who* occupies leadership positions, and *how* people from different backgrounds contribute to effective corporate governance, will continue. Corporate scholars have been careful in their efforts to tease out the differences between mandated diversity and greater diversity more generally. Today, in any company of significant size, an all-white, all-male management team should be a red flag, suggesting an unusual degree of cronyism, in-group favoritism, politicized decision-making, or distrust. This observation aligns with Nasdaq's findings that link shoddy practices to a lack of diversity. The ongoing study and critique of these patterns, and of the subtle, sometimes pernicious causal mechanisms behind them, is critical to assessing and reforming corporate management in theory and in practice, continuing the work of prior generations of diverse scholars who reshaped the debate.<sup>87</sup>

Attacks—whether valid counterpoints or *ad hominem*—provide a moment to pause. Scholars must revisit how to communicate to a broader audience to clarify the reasons that inclusion mattered in the first place. Indeed, this challenge requires us to stand up to advance inclusion during an even more challenging time. How will inclusion-focused scholars respond when the wind is facing them instead

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<sup>84</sup> See Richard L. Zweigenhaft, *Diversity Among Fortune 500 CEOs from 2000 to 2020: White Women, Hi-Tech South Asians, and Economically Privileged Multilingual Immigrants from Around the World*, WHO RULES AM. (Jan. 2021), [https://whorulesamerica.ucsc.edu/diversity/diversity\\_update\\_2020.html](https://whorulesamerica.ucsc.edu/diversity/diversity_update_2020.html) [<https://perma.cc/B9XG-CSHL>].

<sup>85</sup> Emma Hinchliffe, *Women CEOs Run 10.4% of Fortune 500 Companies. A Quarter of the 52 Leaders Became CEO in the Last Year*, FORTUNE (June 5, 2023, at 06:45 PM), <https://fortune.com/2023/06/05/fortune-500-companies-2023-women-10-percent/> [<https://perma.cc/NT6K-MQDP>].

<sup>86</sup> Jeremy Schneider, *Are Female CEOs Better than Male CEOs?*, PERS. FIN. CLUB (Mar. 7, 2023), <https://www.personalfinanceclub.com/are-female-ceos-better-than-male-ceos/> [<https://perma.cc/MUH3-F55N>] (emphasizing that these figures do not necessarily mean that female CEOs outperform male CEOs because they are women. Instead, the female CEOs' success may indicate that female CEOs outperform the men because they rose to the top executive ranks through different pathways that make them better prepared for leadership or that the companies willing to choose female CEOs are better run in ways that go beyond the identity of their top executives). See also Carbone, *supra* note 66, at 210-11.

<sup>87</sup> Among the contributions different perspectives bring are different conceptions of time and the contributions to the corporate theory debate. See, e.g., Lynn A. Stout, *The Corporation as a Time Machine: Intergenerational Equity, Intergenerational Efficiency, and the Corporate Form*, 38 SEATTLE U. L. REV. 685 (2015); see also June Carbone, *Women and Corporate Governance: Time Horizons and Stakeholder Analysis*, 99 CHI.-KENT L. REV. 199 (2024); June Carbone & Nancy Levit, *The Death of the Firm*, 101 MINN. L. REV. 963 (2017).

of behind them? With so much experience and essential work, we predict ongoing—and expanded—scholarly investigation into how gender, race, and other forms of difference affect firm governance.



# WHAT DO WE HAVE TO LOSE? THE LASTING LEGACIES AND LOST PROMISE OF FEMINIST LEGAL HISTORY

Serena Mayeri\*

## I. INTRODUCTION

In February 1964, the civil rights activist and feminist legal strategist Pauli Murray wrote a widely circulated memorandum that reconfigured the terms of debate over a proposed amendment to Title VII that prohibited discrimination because of sex.<sup>1</sup> Prior to Murray's intervention, civil rights supporters who worried that the amendment was a "poison pill" designed to kill the whole bill sparred with National Woman's Party (NWP) members and congresswomen who argued that without it, "white Christian women of United States origin" would be "last at the hiring gate."<sup>2</sup> The clash reflected broader divisions: between white NWP members who formed strategic alliances with segregationists in Congress to promote the Equal Rights Amendment (ERA), and labor feminists who supported Black civil rights and opposed the ERA as a danger to hard-won protective labor laws for women.<sup>3</sup>

Murray's memo reframed the sex amendment as vital to both racial justice and women's rights—and especially to Black women. Because they disproportionately shouldered the burdens of family breadwinning as well as caregiving, "a common fate of discrimination" awaited Black women if the sex amendment failed.<sup>4</sup> Murray also anticipated, presciently, how the bill could birth new political partnerships. Recalling how an abolitionist-feminist coalition disintegrated after the framers of the Reconstruction Amendments abandoned woman suffrage, Murray warned allies in both movements to avoid a similar rupture by yoking together racial justice and women's rights under one statutory provision.<sup>5</sup>

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\* Arlin M. Adams Professor of Constitutional Law and Professor of History (by courtesy), University of Pennsylvania Carey Law School. I am grateful to Nancy Levit, Judith Resnik, and Laura Rothstein for including me in this symposium and for their insightful feedback; to Madeleine Morales for intrepid research assistance; and to the staff of the *UMKC Law Review* for careful editing.

<sup>1</sup> Pauli Murray, Memorandum in Support of Retaining the Amendment to H.R. 7152, Title VII (Equal Employment Opportunity) to Prohibit Discrimination in Employment Because of Sex (Apr. 14, 1964) [hereinafter Murray, Title VII Memo]. For more on Murray, see *infra* notes 4, 9, & 14 and accompanying text.

<sup>2</sup> 110 CONG. REC. 2577 (1964) (statement of Rep. Griffiths). See also Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CALIF. L. REV. 755, 769-77 (2004) [hereinafter Mayeri, *Constitutional Choices*] (describing how policymakers' and advocates' recognition of the intersections of racial and gender politics resulted in the creation of a new civil rights constituency and enforcement of Title VII's sex amendment).

<sup>3</sup> SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION 12-28 (2011) [hereinafter MAYERI, REASONING FROM RACE]; Serena Mayeri, *Intersectionality and Title VII: A Brief (Pre-)History*, 95 B.U. L. REV. 713, 721-27 (2015) [hereinafter Mayeri, *Intersectionality and Title VII*]; Mayeri, *Constitutional Choices*, *supra* note 2, at 784-96.

<sup>4</sup> Murray, Title VII Memo, *supra* note 1; see also Mayeri, *Intersectionality and Title VII*, *supra* note 3, at 719.

<sup>5</sup> Serena Mayeri, *After Suffrage: The Unfinished Business of Feminist Legal Advocacy*, 129 YALE L. J. F. 512, 515-20 (2020) [hereinafter Mayeri, *After Suffrage*].

Historians credit Murray's memo with helping to save the amendment in the Senate.<sup>6</sup> And the passage of Title VII's sex amendment transformed the legal and political landscape in myriad ways. It eased tensions among advocates for women over sex-specific protective laws; united women's rights advocates around the ERA; and fostered a fragile but powerful alliance between civil rights and feminist movements that previously had been at odds.<sup>7</sup> The EEOC's initial reluctance to enforce the sex discrimination provision sparked the formation of the National Organization for Women (NOW) and catalyzed a movement that produced a host of pivotal legislation in the 1970s.<sup>8</sup> It was not the first time that Murray's critical intervention shaped feminist legal advocacy. Two years earlier, another pivotal Murray memo had launched the strategy for combating sex discrimination under the Fourteenth Amendment, later vindicated by Ruth Bader Ginsburg's ACLU Women's Rights Project in the Supreme Court.<sup>9</sup>

Almost six decades after Murray rescued the sex amendment, the Court decided in *Bostock v. Clayton County* that Title VII protects individuals against discrimination based on what is now known as sexual orientation and gender identity.<sup>10</sup> It was June 2020, amidst a global pandemic and national reckoning over the murders of George Floyd, Breonna Taylor, and Ahmaud Arbery. After years of obscurity, it seemed as if Pauli Murray might finally achieve elusive but richly-deserved recognition. The documentary *My Name Is Pauli Murray*, released the following year, told stories Murray preserved for posterity in papers housed at the Schlesinger women's history library at Radcliffe, and other sources excavated by scholars.<sup>11</sup> Several biographical works detailed various facets of Murray's life and writing.<sup>12</sup> Some press coverage of *Bostock* even recognized Murray's role in the passage of Title VII's sex amendment, long obscured by the persistent myth that the provision was a "joke" or "fluke."<sup>13</sup>

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<sup>6</sup> See CYNTHIA HARRISON, ON ACCOUNT OF SEX: THE POLITICS OF WOMEN'S ISSUES, 1945–68, at 126–32 (1988); NANCY MACLEAN, FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE 117–54 (2006); MAYERI, REASONING FROM RACE, *supra* note 3, at 14–23.

<sup>7</sup> See Mayeri, *Constitutional Choices*, *supra* note 2, at 796–801.

<sup>8</sup> Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENV. U. L. REV. 995, 1023–33 (2015).

<sup>9</sup> Pauli Murray, A Proposal To Reexamine the Applicability of the Fourteenth Amendment to State Laws and Practices Which Discriminate on the Basis of Sex Per Se 10 (Dec. 1, 1962) (PCSW Papers, Doc. 11-20, Box 8, Folder 62, on file with the Schlesinger Library, Radcliffe Institute, Harvard University); see also Pauli Murray, *The Right to Equal Opportunity in Employment*, 33 CALIF. L. REV. 388, 388 (1945).

<sup>10</sup> *Bostock v. Clayton Cnty.*, 590 U.S. 644 (2020).

<sup>11</sup> MY NAME IS PAULI MURRAY, Amazon Prime (Doc10), at 4:00–4:22 (noting that “she saved everything” and “wanted her papers to be at Schlesinger Library . . . where women's historical papers are housed”).

<sup>12</sup> See, e.g., SARAH AZARANSKY, THE DREAM IS FREEDOM: PAULI MURRAY AND AMERICAN DEMOCRATIC FAITH (1st ed. 2011); BRITTNEY C. COOPER, BEYOND RESPECTABILITY: THE INTELLECTUAL THOUGHT OF RACE WOMEN (Anne Firor Scott et al. eds., 2017); KENNETH W. MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER 207–69 (2012); ROSALIND ROSENBERG, JANE CROW: THE LIFE OF PAULI MURRAY (2017).

<sup>13</sup> Leah Rosenbaum & Brianne Garrett, *Meet the Forgotten Woman Who Forever Changed the Lives of LGBTQ+ Workers*, FORBES (Jan. 29, 2021, 1:03 PM), <https://www.forbes.com/sites/leahrosenbaum/2020/06/26/pauli-murray-lgbtq-rights-civil-rights-act-title-vii/>.

Viewers and readers and students could now learn of Murray's pioneering work not only as a civil rights advocate and feminist strategist, but as a historian, legal scholar, poet, and theologian. Of how Murray, grandchild of an enslaved woman and great-grandchild of an enslaver, was orphaned as a child and raised by a schoolteacher aunt. Of how Murray left Durham to attend Hunter College in New York City in 1938, graduated in the midst of the Depression, and befriended Eleanor Roosevelt. Of how the University of North Carolina rejected Murray's application to study with an eminent sociologist of race relations because of Murray's race; how Murray finished at the top of Howard University Law School's 1944 graduating class, where Murray wrote a paper that anticipated the arguments NAACP LDF lawyers would make a decade later in *Brown v. Board of Education*. Yet Murray was not able to use a hard-earned scholarship to study at Harvard Law School because of sex, despite FDR's intervention. These materials also told how Murray broke through race- and sex-based barriers to work at a prestigious New York law firm in the 1950s; authored an epic family history; and earned a doctorate from Yale Law School, writing the compendium *States' Laws on Race and Color*, which became a "bible" for the civil rights movement.<sup>14</sup>

Viewers, readers, and students could also learn of how Murray co-authored a landmark article on sex discrimination law in 1965; worked on a pathbreaking constitutional case establishing women's right to jury service in Alabama; advocated for placing Black women at the center of civil rights and feminist strategy; taught what may have been the first courses on race, gender, and law at Brandeis in the late 1960s; and how, disillusioned with the law and politics of the Nixon era and bereft over the death of an intimate companion, Murray entered a seminary at the age of 63 and was ordained as an Episcopal priest in 1977.<sup>15</sup>

And the world could learn of Murray's struggles with sexuality and gender identity as a young adult. Aunt Pauline called Pauli her "boy/girl" and Murray, who as a young person often dressed as a man and in the 1940s sought hormone therapy from doctors, responded to Harvard's rejection letter with wry sincerity—"Gentlemen, I would gladly change my sex if I could"—and struggled with bouts of depression. Murray had intense romantic relationships with women and a brief and painful encounter with marriage to a man, before finding a life partner in Renee Barlow. Liminal racial, gender, and sexual identities as well as political affiliations stymied Murray's career—and health—at various junctures, even as the perspective of an outsider who fit awkwardly into existing categories lent Murray insights that informed innovative and influential legal strategies.<sup>16</sup>

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<sup>14</sup> PAULI MURRAY, *STATES' LAWS ON RACE AND COLOR* (Univ. Ga. Press ed. 1997) (1951).

<sup>15</sup> MAYERI, *REASONING FROM RACE*, *supra* note 3, at 26-29; ROSENBERG, *supra* note 12, at 293-96; Mayeri, *After Suffrage*, *supra* note 5, at 533-34.

<sup>16</sup> Serena Mayeri, *Pauli Murray and the Twentieth Century Quest for Legal and Social Equality*, 2 *IND. J.L. & SOC. EQUAL.* 80, 88-89 (2013); Mayeri, *After Suffrage*, *supra* note 5, at 527-28. *See also*, e.g., ROSENBERG, *supra* note 12.

Ruth Bader Ginsburg pursued—with considerable success—Murray’s constitutional strategy in a litigation campaign to extend equal protection to women.<sup>17</sup> The addition of sex to Title VII and frustration over initial enforcement failures spurred advocacy for crucial legislation including strengthening amendments to Title VII (1972), Title IX (1972), congressional passage of the ERA (1971-72), the Equal Credit Opportunity Act (1974), and eventually the Pregnancy Discrimination Act (1978).<sup>18</sup> Protections against race and sex discrimination in employment, education, voting, and jury service advanced women’s equal citizenship.<sup>19</sup> Leading lawyers, such as Eleanor Holmes Norton, carried forward Murray’s placement of Black women at the center of legal advocacy, as did plaintiffs who won pivotal victories in cases involving pregnancy discrimination and sexual harassment.<sup>20</sup>

Norton and other Black feminist professionals advanced a vision of egalitarian marriage in which husbands and wives shared caregiving and breadwinning responsibilities, arguing that white families could benefit from a family form pioneered by Black middle-class and professional couples.<sup>21</sup> In the 1970s, legislatures and courts embraced important aspects of this vision. Ginsburg’s lawsuits challenging the differential provision of government benefits based on sex resulted in decisions that turned husbands and wives into spouses.<sup>22</sup> As a matter of formal law, married mothers and fathers became parents with equal rights and responsibilities to their children.<sup>23</sup> Advocates won negative rights to non-interference in decisions about contraception and abortion.<sup>24</sup>

More ambitious challenges—those that sounded in terms of what Black feminists would later name reproductive justice—also proliferated.<sup>25</sup> The feminist

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<sup>17</sup> See, e.g., *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (holding that a widower may collect “mother’s insurance benefits” because the purpose of Social Security benefits for surviving spouses and children is to ensure that the surviving parent can adequately provide for the children).

<sup>18</sup> Civil Rights Act of 1964, tit. VII, 42 U.S.C. §§ 2000e to 2000e-17 (1972); Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified as amended in scattered sections of 42 U.S.C. §§ 2000e to 2000e-17); Education Amendments of 1972, tit. IX, 20 U.S.C. §§ 1681-1688 (2021); H.R.J. Res. 208, 92d Cong., 86 Stat. 1523 (1972) (proposing Equal Rights Amendment to the Constitution); Equal Credit Opportunity Act, Pub. L. No. 93-495, tit. V, 88 Stat. 1500 (codified as amended at 15 U.S.C. §§ 1691-1691f); Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076.

<sup>19</sup> Mayeri, *After Suffrage*, *supra* note 5, at 521.

<sup>20</sup> Serena Mayeri, *Historicizing the “End of Men”: The Politics of Reaction(s)*, B.U. L. REV. 729, 735-42 (2013); Mayeri, *After Suffrage*, *supra* note 5, at 522-25; Mayeri, *Intersectionality and Title VII*, *supra* note 3, at 722-25.

<sup>21</sup> See SERENA MAYERI, MARITAL PRIVILEGE: MARRIAGE, INEQUALITY, AND THE TRANSFORMATION OF AMERICAN LAW 79 (2025) [hereinafter MAYERI, MARITAL PRIVILEGE]; MAYERI, REASONING FROM RACE, *supra* note 3, at ch. 2.

<sup>22</sup> See MAYERI, MARITAL PRIVILEGE, *supra* note 21, at 76; and Serena Mayeri, *Marriage (In)equality and the Historical Legacies of Feminism*, 6 CALIF. L. REV. CIR. 126, 129-31 (2015).

<sup>23</sup> See MAYERI, MARITAL PRIVILEGE, *supra* note 21, at 76; Deborah Dinner, *The Divorce Bargain: The Fathers’ Rights Movement and Family Inequalities*, 102 VA. L. REV. 79, 84 (2016).

<sup>24</sup> See *Griswold v. Connecticut*, 381 U.S. 479, 485-486 (1965); *Eisenstadt v. Baird*, 405 U.S. 438, 443-446 (1972); *Roe v. Wade*, 410 U.S. 113, 153-154 (1973).

<sup>25</sup> See, e.g., SisterSong, *Reproductive Justice*, SISTERSONG, <https://www.sistersong.net/reproductive-justice> (last visited Aug. 27, 2025).

wing of the welfare rights movement demanded a right to subsistence regardless of marital or birth status and an end to the “employer exploitation and punitive state surveillance to which poor single mothers of color were routinely subjected when they worked in low-wage jobs or applied for government benefits.”<sup>26</sup> Single mothers fought for the same federal benefits available to married and widowed parents, opposed laws that required them to disclose the identity of their children’s fathers, and sought the right to enlist in the military without giving up custody of their children.<sup>27</sup> They struggled against an increasingly intrusive system that removed children from homes in the name of child welfare, rather than giving families the support they needed to thrive.<sup>28</sup> They insisted upon single motherhood as a “positive lifestyle worthy of respect and admiration,” and promoted extended family and kinship care as an alternative to the nuclear family ideal.<sup>29</sup> Advocates for reproductive autonomy fought for public funding for and access to reproductive health care including abortion, and against sterilization abuse and other efforts aimed at reproductive control of poor individuals and communities of color.<sup>30</sup>

Murray never publicly acknowledged struggles over gender and sexuality, though they undoubtedly informed Murray’s understanding of how classifications based on sex as well as race compromised individuals’ flourishing and full citizenship.<sup>31</sup> LGBTQ+ activists fought against violence, criminalization, and discrimination in all sectors of American life, including policing, employment, housing, immigration, health care, and family law. They sought both recognition of and liberation from relationships as partners and parents.<sup>32</sup>

Advocates, often led by pioneering people of color and LGBTQ+ activists, made creative and expansive constitutional arguments about how laws that penalized, surveilled, and permitted government and private discrimination against those who did not conform to heterosexual marital family norms violated rights to sexual and reproductive autonomy; racial, gender, and economic justice; freedom of expression and association; privacy and family integrity. They fought for legislative protections at the federal, state, and local levels. When progressive

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<sup>26</sup> See MAYERI, MARITAL PRIVILEGE, *supra* note 21, at 50-54; Mayeri, *After Suffrage*, *supra* note 5, at 526.

<sup>27</sup> MAYERI, MARITAL PRIVILEGE, *supra* note 21, at 185.

<sup>28</sup> DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002); DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD (2022); MARTHA DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973 (1993).

<sup>29</sup> See MAYERI, MARITAL PRIVILEGE, *supra* note 21, at 185; Mayeri, *After Suffrage*, *supra* note 5, at 526.

<sup>30</sup> KHIARA BRIDGES, *Elision and Erasure: Race, Class, and Gender in Harris v. McRae*, in REPRODUCTIVE RIGHTS AND JUSTICE STORIES (Melissa Murray, et al., eds. 2019); see also Melissa Murray, *Abortion, Sterilization, and the Universe of Reproductive Rights*, 63 WM. & MARY L. REV. 1599, 1618–31 (2022) [hereinafter Murray, *Abortion, Sterilization, and the Universe of Reproductive Rights*]; SHERIE RANDOLPH, FLORYNCE “FLO” KENNEDY: THE LIFE OF A BLACK FEMINIST RADICAL (2015).

<sup>31</sup> See Mayeri, *After Suffrage*, *supra* note 5, at 524-28.

<sup>32</sup> See, e.g., MAYERI, MARITAL PRIVILEGE, *supra* note 21, at 89-95; MARIE-AMÉLIE GEORGE, FAMILY MATTERS: QUEER HOUSEHOLDS AND THE HALF-CENTURY STRUGGLE FOR LEGAL RECOGNITION (2024); WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET (1999).

efforts at federal constitutional change had run their course, state and local experimentation continued.<sup>33</sup> The legatees of Murray and other Black feminists continued to fight for voting rights and democratic accountability; for reform or abolition of the police, carceral, and child welfare/family regulation systems; and for reproductive justice in its many dimensions.<sup>34</sup>

These more ambitious efforts faced formidable obstacles in the late twentieth and early twenty-first centuries: the rise of a conservative counterrevolution that realigned the Republican Party and divisions on the center-left about the relationship between poverty and family structure and the role of government in shaping both.<sup>35</sup> The Reagan-Bush era gave way to Clintonian neoliberalism and the political center of gravity shifted right. An increasingly powerful conservative legal movement used issues like abortion to cement support for a much broader agenda to dismantle the administrative state; invalidate legislation and regulation to protect civil rights and civil liberties, labor and workplace rights, the environment, educational opportunity, free and fair elections; and allow the unfettered accumulation of corporate and executive power.<sup>36</sup> Later, Donald Trump's first term as President entrenched many of those gains, as he appointed three Justices to the Supreme Court. And his government rolled back many—but certainly not all—of the civil rights advances achieved during the Obama administration.<sup>37</sup>

By 2020, the 150<sup>th</sup> anniversary of the Fifteenth and centennial of the Nineteenth Amendment, much unfinished business remained—for sex equality, reproductive justice, and multi-racial democracy more broadly. For a brief period after the 2020 election, a victory for Democrats in the wake of a racial reckoning and amid a global pandemic, it seemed as if the country might have turned the page. When a violent mob stormed the U.S. Capitol on January 6, 2021, in a bid to overturn the presidential election results, even leading Republicans broke with Trump.<sup>38</sup> A run-off in Georgia gave Democrats an effective majority in the Senate, with Vice President Kamala Harris available to break the 50-50 tie. Then-President Biden issued a series of executive orders extending *Bostock* to other areas such as health care, education, and immigration. Congress passed major legislation, including a generous pandemic aid package and an unprecedented child tax credit

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<sup>33</sup> MAYERI, MARITAL PRIVILEGE, *supra* note 21, at 324, 332.

<sup>34</sup> See Mayeri, *After Suffrage*, *supra* note 5, at 513, 529–30 (citing Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. L.F. 139; Judy Scales-Trent, *Equal Rights Advocates: Addressing the Legal Issues of Women of Color*, 13 BERKELEY WOMEN'S L.J. 34 (1998); KIMBERLY SPRINGER, *LIVING FOR THE REVOLUTION: BLACK FEMINIST ORGANIZATIONS, 1968-1980* (2005)).

<sup>35</sup> See Mayeri, *After Suffrage*, *supra* note 5, at 529-34.

<sup>36</sup> Serena Mayeri, *The Critical Role of History After Dobbs*, 2 J. AM. CONST. HIST. 171, 186–90 (2024) [hereinafter Mayeri, *Critical Role of History*].

<sup>37</sup> See, e.g., Nikole Hannah-Jones, *How Trump Upended 60 Years of Civil Rights in Two Months*, N.Y. TIMES MAG. (June 27, 2025), <https://www.nytimes.com/2025/06/27/magazine/trump-civil-rights-law-discrimination>.

<sup>38</sup> See MAYERI, MARITAL PRIVILEGE, *supra* note 21, at 335.

estimated to reduce child poverty by more than forty percent and Black child poverty by one half.<sup>39</sup>

But a fierce backlash already was underway. Religious free exercise and free speech challenges weakened antidiscrimination laws, while anti-“critical race theory (CRT)” and “Don’t Say Gay” laws limited expression and attacks on the rights of transgender Americans accelerated.<sup>40</sup> The Equality Act, which would codify protections against discrimination based on sex, sexual orientation, and gender identity across various areas, stalled in Congress and the expanded child tax credit expired.<sup>41</sup> In June 2022, the Supreme Court overruled *Roe v. Wade* (1973) and *Planned Parenthood v. Casey* (1992), eliminating the federal constitutional right to abortion and calling into question precedents from *Griswold v. Connecticut* (1965) to *Obergefell v. Hodges* (2015).<sup>42</sup>

*Dobbs* marked a moment of rupture, but also continuity.<sup>43</sup> For many Americans, *Roe* and *Casey* had never secured meaningful access to reproductive health care, and for all the devastation it wrought, *Dobbs* also presented opportunities. Liberated from the imperative to defend flawed precedents, advocates could think more expansively about how to justify and how to effectuate broader visions of reproductive justice. State constitutional amendments to extend legal protection from government interference in reproductive decision making beyond what had been the bare federal constitutional minimum succeeded.<sup>44</sup> Executive and legislative efforts to provide public funding and infrastructural support for reproductive health care of all kinds proliferated at the state level.<sup>45</sup>

Politically, too, it seemed as if *Dobbs* and its widespread impact—on the privileged as well as the marginalized—might galvanize voters and carry more progressive candidates and platforms to electoral victory. Advocates, again led by Black feminists, emphasized the connections between the repression of women and democratic backsliding, and between reproductive freedom and the defense of

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<sup>39</sup> See *id.* at 1-3, 335.

<sup>40</sup> See Leah M. Watson, *The Anti - “Critical Race Theory” Campaign — Classroom Censorship and Racial Backlash by Another Name*, 58 HARV. C.R.-C.L. L. REV. 487, 503-506 (2023); Jordan Blair Woods, *The New Sexual Deviancy*, 113 GEO. L.J. 911, 937 (2025).

<sup>41</sup> MAYERI, MARITAL PRIVILEGE, *supra* note 21, at 335.

<sup>42</sup> *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 231, 256-57 (2022).

<sup>43</sup> MAYERI, MARITAL PRIVILEGE, *supra* note 21, at 335.

<sup>44</sup> See, e.g., MICH. CONST., art. I, § 28(1) (“Every individual has a fundamental right to reproductive freedom, which entails the right to make and effectuate decisions about all matters relating to pregnancy, including but not limited to prenatal care, childbirth, postpartum care, contraception, sterilization, abortion care, miscarriage management, and infertility care.”).

<sup>45</sup> *Meeting the Moment Post-Dobbs: A Review of Proactive Abortion Policies Passed in States & Localities, June 24 – October 1, 2022*, NAT’L INST. FOR REPROD. HEALTH (2023), <https://nirhealth.org/resources/meeting-the-moment-post-dobbs/> (state-by-state policy review highlighting how states and localities expanded funding, access, and legal protections for abortion care following *Dobbs*); Karen Diep et al., *Abortion Trends Before and After Dobbs*, KAISER FAM. FOUND. (July 15, 2025), <https://www.kff.org/womens-health-policy/issue-brief/abortion-trends-before-and-after-dobbs/> (demonstrating that while abortion declined in banned states post-*Dobbs*, abortion increased significantly in states that proactively invested in access and protection); see also Mayeri, *Critical Role of History*, *supra* note 36, *passim*.

democracy.<sup>46</sup> They declared that “voting rights are reproductive rights,” exhorting voters to see bodily autonomy as central to a healthy body politic and politicians to understand the electoral power of citizens motivated to defend their reproductive and family integrity. After anger over *Dobbs* apparently mitigated Democrats’ losses in the 2022 midterms and Americans turned out to vote on abortion-related ballot measures, it appeared that reproductive rights could win elections.<sup>47</sup> Campaign ads featured harrowing stories of pregnant patients denied access to life- and health-saving reproductive health care. Vice President and (briefly) presidential candidate Kamala Harris gave reproductive freedom a prominent place in her portfolio and campaign.<sup>48</sup>

But then, in January 2025, Trump—twice-impeached and now a convicted felon found liable for sexual abuse and defamation—returned to office after a narrow victory in the 2024 election and a Republican sweep of both houses of Congress. Determined to exact revenge against his political enemies and to undo decades of progress toward racial justice, women’s and LGBTQ+ rights, Trump issued dozens of executive orders and edicts attacking “DEI,” “gender ideology extremism,” “radical indoctrination,” transgender Americans, immigrants, universities, law firms and lawyers; and removed members of the EEOC, NLRB, MSPB, and other independent agency officials as well as prosecutors who had attempted to hold Trump legally accountable. He also authorized the “Department of Government Efficiency (DOGE)” to rampage through the federal government, firing employees en masse, terminating funding, canceling contracts, dismantling government agencies and departments, scrubbing websites, stealing and deleting data. Trump pardoned thousands of people convicted of violent crimes in connection with the January 6 attack; weaponized the DOJ, FBI, National Guard, and national intelligence apparatus; and threatened investigation, prosecution, and retribution for anyone who stood in his way.<sup>49</sup> Masked government agents

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<sup>46</sup> See, e.g., Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025, 2045-46 (2021); Murray, *Abortion, Sterilization, and the Universe of Reproductive Rights*, *supra* note 30; Vanessa Williams, *Stacey Abrams, a Prominent Champion of Choice, Once Opposed Abortion*, WASH. POST (June 8, 2022); Fatima Goss Graves, *Reflections on Black History Month from Fatima Goss Graves*, NATIONAL WOMEN’S LAW CENTER BLOG (Feb. 22, 2024), <https://nwlc.org/reflections-on-black-history-month-from-fatima-goss-graves/>; Fatima Goss Graves, oral testimony, *Senate Hearing on Texas Abortion Law* (Sept. 2021) (transcript), REV.COM, <https://www.rev.com/blog/transcripts/senate-hearing-on-texas-abortion-law-transcript> (last visited Aug. 27, 2025); see also Mayeri, *Critical Role of History*, *supra* note 36, at 198, 220–32.

<sup>47</sup> See generally Mayeri, *Critical Role of History*, *supra* note 36, at Part III.

<sup>48</sup> See, e.g., Colleen Long, Christine Fernando & Amanda Seitz, *Democrats Hope Harris’ Bluntness on Abortion Will Lead to 2024 Wins*, PBS NEWSHOUR (POLITICS) (July 24, 2024), <https://www.pbs.org/newshour/politics/democrats-hope-harris-bluntness-on-abortion-will-lead-to-2024-wins>; Usha Ranji, Alina Salganicoff, Bryana Castillo Sanchez & Laurie Sobel, *Harris v. Trump: Records and Positions on Reproductive Health*, KAISER FAM. FOUND. (Oct. 1, 2024), <https://www.kff.org/womens-health-policy/harris-v-trump-records-and-positions-on-reproductive-health/>; Jennifer Gerson, *Inside the Harris Campaign Strategy Linking Abortion and Freedom*, 19TH NEWS (Nov. 4, 2024), <https://19thnews.org/2024/11/harris-abortion-freedom-campaign-strategy/>.

<sup>49</sup> See Serena Mayeri & Amanda Shanor, *Antidiscrimination as Pretext: The Assault on Equality and Constitutional Democracy* (Constitutional Commentary, forthcoming), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=5525141](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5525141).

kidnapped, arrested, detained, deported, and disappeared immigrants with no process.<sup>50</sup> Administration officials faced accusations that they had defied judges' orders and had sent lawyers into court to lie or obfuscate.<sup>51</sup> They verbally attacked jurists already facing a flood of threats.<sup>52</sup>

Meanwhile, architects and adherents of Project 2025—the Heritage Foundation blueprint for a second Trump presidency—wield unprecedented power within the federal government.<sup>53</sup> The ascendant white Christian nationalist vision promised to undo decades of halting progress toward equal opportunity; to restore a patriarchal vision of family in which husbands and fathers are heads of households and wives and mothers care for home and children; to allow religious and free speech exemptions to swallow what is left of civil rights law; to insist upon a binary “biological” definition of sex that erases and oppresses anyone who deviates from rigid gender roles; to enshrine fetal personhood in constitutional law, threatening not just abortion but most contraception and even lifesaving medical care for pregnant adults and children whose lives are valued no more than a newly fertilized ovum.<sup>54</sup>

Trump and his allies not only attempt to erase advances toward equality and to kneecap equality law itself (often in the name “restoring equal opportunity and merit,” “protecting women and children,” and “combating antisemitism”), but they also attack educational institutions directly: coercing extortionary settlements with universities by threatening every source of funding on which they depend; compromising the collection of data and the capacity for scientific and medical research; censoring dissenting speech; and erasing or altering accurate and inclusive presentations of American history in K-12 schools, government websites, and museums as well as university classrooms.<sup>55</sup>

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One of the many casualties of the Trump administration's purge of people of color, women, individuals with disabilities, and LGBTQ+ people was the National Park Service (NPS) webpage celebrating the Rev. Dr. Pauli Murray, who

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<sup>50</sup> See, e.g., Human Rights Watch, *US: Masked Federal Agents Undermine Rule of Law* (Dec. 18, 2025), <https://www.hrw.org/news/2025/12/18/us-masked-federal-agents-undermine-rule-of-law>.

<sup>51</sup> See, e.g., Suzanne Monyak, *DOJ Lawyers' Courtroom Lies Challenge Judiciary, Ex-Judges Say*, BLOOMBERG L. (Oct. 22, 2025), <https://news.bloomberglaw.com/us-law-week/judiciary-navigates-doj-lawyers-courtroom-lies-ex-judges-say>.

<sup>52</sup> See, e.g., Lawrence Hurley, *Judges Who Ruled Against Trump Say Harassment and Threats Have Changed Their Lives*, NBC NEWS (Dec. 23, 2025), <https://www.nbcnews.com/politics/politics-news/judges-ruled-trump-say-harassment-threats-changed-lives-rcna248445>.

<sup>53</sup> See, e.g., Michael Hirsch, *Project 2025 Architect Says Trump's Executive Orders Are “Beyond My Wildest Dreams,”* POLITICO (Mar. 16, 2025), <https://www.politico.com/news/magazine/2025/03/16/project-2025-paul-dans-qa-00228890>; William Brangham & Harry Zahn, *The Project 2025 Policies the Trump Administration Is Already Implementing*, PBS NEWSHOUR (Feb. 22, 2025), <https://www.pbs.org/newshour/show/the-project-2025-policies-the-trump-administration-is-already-implementing>.

<sup>54</sup> MARY ZIEGLER, *PERSONHOOD: THE NEW CIVIL WAR OVER REPRODUCTION* (2025).

<sup>55</sup> Mayeri & Shanor, *supra* note 49.

was all of those and much more.<sup>56</sup> Even so, the present moment contains echoes of Murray's life. Born in 1910, Murray grew up against a backdrop of segregation and repression, a world inhospitable to a mixed-race person who felt themselves at home in no sex or gender category. Murray resisted the strictures of the time—wrote fiery and poignant poetry; moved North to obtain the education out of reach at home; refused to give up a seat on a segregated Virginia bus in 1940; sometimes dressed and passed as a man; led sit-ins in Washington, D.C. during World War II; sought justice for a Black man sentenced to death; and wrote pivotal works of legal research and strategy for movements facing violent suppression or dismissive indifference. During the McCarthy era and beyond, Murray suspected certain jobs were out of reach due to earlier flirtations with left-wing politics—though it could also have been race or sex or gender nonconformity, or all of the above.<sup>57</sup>

The law firm that hired Murray (and soon after, Ginsburg) when almost no one else would was Paul, Weiss, now known as the first to settle with the Trump administration.<sup>58</sup> The organization on which Murray had perhaps the greatest impact was the ACLU, then as now at the forefront of many civil liberties struggles.<sup>59</sup> Murray felt alienated from a younger generation of Black male activists as a professor at Brandeis; pioneered courses at the intersection of law and nascent Black and Women's Studies; left academia after a hard-won battle for tenure; and became disillusioned with law as Nixon's Southern Strategy prevailed and helped move the country—and the Supreme Court—to the right.<sup>60</sup> By the time a reformist post-Watergate correction restored some public faith in government, Murray had chosen a religious life, writing sermons that advanced a theological version of the universal human rights that Murray had espoused as a legal and constitutional thinker.<sup>61</sup>

Despite being among the most influential legal strategists of twentieth century U.S. social movements, it seems safe to say that most Americans have never heard Pauli Murray's name. The NPS website, the documentary about Murray's life, Yale's Pauli Murray College and the portrait that hangs in its law school, the Pauli Murray Center in Durham, which celebrates and educates the public about Murray's life—all are recent and long-overdue recognitions that barely had penetrated our national consciousness before these latest efforts at deletion. The same might be said of history writ large. For large swaths of the country, the backlash against Black Lives Matter, #MeToo, the 1619 Project, "critical race theory," "DEI," and trans existence hit before the targeted phenomena registered in the lives or education of most Americans.

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<sup>56</sup> María Celeste Masís Ocampo, *Trump Administration Erases Page Honoring Trailblazing Priest, Lawyer and Activist*, 19TH NEWS (Apr. 4, 2025, 10:24 AM), <https://19thnews.org/2025/04/pauli-murray-page-erased-national-park-service-trump/>.

<sup>57</sup> ROSENBERG, *supra* note 12.

<sup>58</sup> *Id.*

<sup>59</sup> See SUSAN HARTMANN, *THE OTHER FEMINISTS: ACTIVISTS IN THE LIBERAL ESTABLISHMENT* 54 (1998).

<sup>60</sup> PAULI MURRAY, *SONG IN A WEARY THROAT: AN AMERICAN PILGRIMAGE* 356-57 (1987).

<sup>61</sup> Anthony B. Pinn, *Introduction*, in PAULI MURRAY: *SELECTED SERMONS AND WRITINGS* XXIX-XXXVIII (2006).

This obscurity likely pervades legal education too, as few students encounter histories like Murray's even in courses devoted to antidiscrimination law, much less in required courses such as constitutional law. To the extent that students do hear these voices, they are rarely given credence by legal decisionmakers or even law professors as part of an essential canon that all aspiring lawyers should know. Americans are in danger of losing a history most of us never really had in the first place.

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Amid an all-out assault on values, basic rights, and institutions, one answer to the question, "what do we have to lose?" is "everything." The current Trump administration's weaponization of antidiscrimination law against itself; its suppression of dissent and stifling of academic freedom; its violent repression of non-citizens; its erasure of history and Orwellian doublespeak; its bald assertions of unchecked autocratic power—all threaten the very foundations of democracy and the rule of law. Another answer—not mutually exclusive—is "nothing," in the sense of nothing left to lose. As institutions are dismantled and demolished, dissenting scholars and advocates can defend them as best we can and at the same time allow ourselves to imagine what we might build in their place.

Feminist legal history offers resources to answer both questions. Histories of resistance can inspire action in the present.<sup>62</sup> To the extent that moments of existential threat liberate us to cease our defense of flawed precedents, feminist legal history provides models for more expansive visions of justice and roadmaps for how to achieve them. We can learn from past mistakes, as Pauli Murray drew lessons from the post-Civil War abolitionist-suffragist split to inform coalition-building in the 1960s.

At a time when the Supreme Court professes to value history and tradition, we can offer critical histories that include the voices not only of elite white male propertied lawmakers from 1790 or 1868 but also those of persons who were not free and could not vote, much less hold public office or other positions of authority. We can both correct the historical record and ask different questions of it; we can consider what it would mean to incorporate feminist legal history into constitutional and historical memory.<sup>63</sup> We can expose how reproductive injustice and attacks on women, people of color, immigrants, LGBTQ+ persons, and those with disabilities historically have been hallmarks of authoritarianism.

The second Trump presidency threatens all the legal gains of the past several decades and even the ability to educate the next generation about the past in all its messiness and struggle. We have so much to lose in part because of how much we won and how much we learned about the shoulders we stand on. Those

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<sup>62</sup> See Serena Mayeri, *Reproductive Injustice, Feminist Resistance, and the Uses of History in Constitutional Interpretation*, 33 WM. & MARY BILL RTS. J. 519, *passim* (2024).

<sup>63</sup> See, e.g., PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* (1997); Reva B. Siegel, *The Politics of Constitutional Memory*, 20 GEO. J.L. & PUB. POL'Y 19 (2022); Jill Hasday, *WE THE MEN: HOW FORGETTING WOMEN'S STRUGGLES FOR EQUALITY PERPETUATES INEQUALITY* (2025); Mayeri, *Critical Role of History*, *supra* note 36, *passim*.

of us in a position to continue studying and teaching and writing this history can exercise our academic freedom and right to free expression for as long as we still have it.

# THE OTHER SIDE OF THE GLASS CLIFF

Angela Onwuachi-Willig and Kellye Testy\*

## I. INTRODUCTION

Over the past three decades, the number of women deans at ABA-approved law schools has increased from fourteen women law deans in 1997 to thirty in 2006 to sixty-one in 2016 to eight-two in 2025.<sup>1</sup> Essentially, in less than thirty years, the number of women law school deans has grown sixfold.<sup>2</sup>

Year	1997	2006	2016	2025
Number of Women Law Deans	14	30	61	82

Alongside the growth in the number of women law deans has been a rise in the number of law deans of color, especially women law deans of color. For example, a 2022 study of law school deans by the Association of American Law Schools (AALS) reported that the number of deans of color had moved up from twenty in 2005 to seventy-four in 2020;<sup>3</sup> that number has since decreased to sixty-

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\* Angela Onwuachi-Willig, Dean and Ryan Roth Gallo Professor of Law, Boston University School of Law. ORCID: <https://orcid.org/0000-0002-5091-7365>. Dean Onwuachi-Willig is the first person of color and the second woman to serve as Dean at Boston University School of Law. She extends thanks to Provost Gloria Waters for her research support, and she gives special thanks to her husband, Jacob Willig-Onwuachi, and their children, Elijah, Bethany, and Solomon, for their constant love and support.

Kellye Testy, Executive Director and Chief Executive Officer (CEO), Association of American Law Schools. Executive Director and CEO Testy previously served as President of the Law School Admission Council (LSAC) and as Dean for both the University of Washington School of Law and Seattle University School of Law. She was the first woman to serve as Dean of the University of Washington and Seattle University Schools of Law. She was the second woman to serve as President of the LSAC. The first woman to serve as President of the LSAC was Marilyn Yarborough, who was the first Black Dean of a major law school in the South, the second Black woman to serve as Dean of a law school, and the first Black woman to serve as Dean of a predominantly white law school. See Charles E. Daye, *Marilyn V. Yarborough—She Was a Great Woman*, 83 N.C. L. REV. 323, 325 (2005); Betsey B. Creekmore, *Marilyn V. Yarborough 1945-2004*, TENN. KNOXVILLE LIBRS. VOLOPEDIA, <https://volopedia.lib.utk.edu/entries/yarbrough-marilyn-virginia/> (Oct. 15, 2018, updated Oct. 21, 2018). She extends thanks to all of her colleagues at Seattle University School of Law who helped conceptualize, organize, and sustain the leadership program discussed herein and to Dean Mark Alexander and Villanova’s School of Law for joining as its east coast partner.

<sup>1</sup> See Cynthia L. Cooper, *Women Ascend in Deanships as Law Schools Undergo Dramatic Change*, A.B.A. (July 9, 2016), [https://www.americanbar.org/groups/diversity/women/publications/perspectives/2016/summer/women\\_ascend\\_deanships\\_law\\_schools\\_undergo\\_dramatic\\_change/](https://www.americanbar.org/groups/diversity/women/publications/perspectives/2016/summer/women_ascend_deanships_law_schools_undergo_dramatic_change/); Richard K. Neumann, Jr., *Women in Legal Education: A Statistical Update*, 73 UMKC L. REV. 419, 423 (2005) (“During 2003-04, 33 of 187 law school deans—18%—were female. That is a good increase, a doubling of the percentage from 1990-91 and more than a doubling of the number (from fifteen female deans in 1990-91 to thirty-three in 2002-03).”).

<sup>2</sup> See Cooper, *supra* note 1; Neumann, *supra* note 1, at 423.

<sup>3</sup> JEFF ALLUM, KATIE KEMPNER, JUDITH AREEN, AMERICAN LAW SCHOOL DEAN STUDY (Ass’n of Am. Law Schs., 2022).

eight law deans of color in 2025.<sup>4</sup> Of that sixty-eight, approximately 53%—or thirty-six of those deans—are women of color,<sup>5</sup> which represents a twelve-fold increase in women of color law deans since academic year 2005-2006, when only three women of color were law deans.<sup>6</sup>

Year	2005	2020	2025
<b>Number of People of Color Law Deans</b>	20	74	68
<b>Number of Women of Color Law Deans</b>	3 (15%)	—	36 (53%)

One of the commonly articulated reasons for this proliferation of female law deans and law deans of color is the glass cliff theory, which “describes a phenomenon in which women and people of color are elevated to leadership positions more often in times of crisis than during more prosperous times—setting them up for failure.”<sup>7</sup> For example, Professor Laura Padilla, an expert on legal education—and specifically on women in law school leadership—once asked, “Is it a coincidence that we have a big jump in women law deans at a time when law schools are struggling?”<sup>8</sup> According to Professor Padilla, “[i]t may be no

<sup>4</sup> AALS ROSENBLATT’S DEAN DATABASE, DEANS BY ETHNICITY—LISTED ALPHABETICALLY, <https://www.lawdeans.com/results.php?s=14> (last visited Nov. 15, 2025) (providing that there are 46 Black or African American Deans; 11 Hispanic or Latino Deans; 6 Asian, Asian American, or Pacific Islander Deans; 3 Native American Deans; 1 Iranian Dean; and 1 Middle Eastern/Arab Dean).

<sup>5</sup> *Id.* (indicating that there are currently 27 Black women deans; 6 Hispanic women or Latina Deans; 2 Native American women deans; and 1 Asian, Asian American, or Pacific Islander woman deans).

<sup>6</sup> Laura M. Padilla, *Women Law Deans, Gender Sidelining, and Presumptions of Incompetence*, 35 BERKELEY J. GENDER L. & JUST. 1, 2 & 9 (2020) (stating that, in the 2005-2006 period, “[o]nly three of thirty-one women law deans were women of color (1.8%)” and asserting that there were only two women of color deans in 2002). Today, women of color comprise 36 of 81 women law deans, which is 47% of women law deans. See AALS ROSENBLATT’S DEAN DATABASE, *supra* note 4. Krystal Studavent Ramsey, Dean Alfreda Robinson, Sharon Bridges, & Desiré C. Boykin, *The State of Black Women in the Law: 2023 DEIB Assessment Report* 10, NAT’L BAR INST. (2023), [https://nationalbarinstitute.org/wp-content/uploads/digital\\_NBA\\_WLD\\_Report\\_Final\\_digital.pdf](https://nationalbarinstitute.org/wp-content/uploads/digital_NBA_WLD_Report_Final_digital.pdf) (noting that the number of Black women law deans hit a high of 28 in 2021 and that “[t]wenty-one of them were appointed dean for the first time within four years”); Candice Norwood, *More Black Women Are Leading U.S. Law Schools and Changing the Conversation on Race and Gender*, 19THNEWS.ORG, <https://19thnews.org/2022/02/black-women-law-school-deans/> (Feb. 8, 2022, 6:00 AM ET) (same).

<sup>7</sup> Molly M. Kruse, *What Is the Glass Cliff—and How Can We Avoid It?*, USC ONLINE (Aug. 20, 2024), <https://online.usc.edu/news/what-is-the-glass-cliff-and-how-can-we-avoid-it/> (noting that “[s]uch an action gives the illusion of diversity, while letting organizations off the hook to once again promote a man to the leadership role if the woman ‘fails’ to salvage the situation”); see generally Alison Cook & Christy Glass, *Glass Cliffs and Organizational Saviors: Barriers to Minority Leadership in Work Organizations?*, 60 SOC. PROBS. 168 (2013) (studying and detailing how the glass cliff theory also applies to people of color); Michelle K. Ryan & S. Alexander Haslam, *The Glass Cliff: Evidence That Women Are Over-Represented in Precarious Leadership Positions*, 16 BRIT. J. MGMT. 81, 83 (2005) (discovering, developing, and naming the glass cliff theory).

<sup>8</sup> Cooper, *supra* note 1.

coincidence that as the job became less desirable, women were appointed [to law school deanships] in greater numbers.”<sup>9</sup>

First articulated by researchers Michelle K. Ryan and S. Alexander Haslam in 2005, the glass cliff theory posits that individuals from traditionally underrepresented groups in leadership, such as women and people of color, are more likely to obtain executive leadership positions during times of crisis, which means that such leaders take on their roles under conditions where they are more prone to fail. In this Essay, we focus on what we have termed “the other side of the glass cliff”: the intentional steps that women and people of color leaders in the legal academy have taken to build structures that can enhance any candidate’s, particularly outsider candidates’, opportunities for obtaining deanships and succeeding within them. To do so, we first describe and analyze the glass cliff theory in Part II, noting the theory’s importance in explaining the circumstances that increase the likelihood that faculties and university leadership will support an outsider’s appointment to an executive leadership role. Additionally, we highlight not only the perils for outsiders appointed to leadership roles on the glass cliff, but also the gender and racial biases they regularly encounter in professional spaces, which further compound the challenges of their entering leadership roles during crisis situations. In Part III, we shift our focus from examining women and people of color deans as artifacts of the glass cliff to acknowledging their agency in both producing leadership opportunities for themselves and enabling structures to aid others on a similar path.

## II. THE GLASS CLIFF IN LAW?

In 2005, psychology professors Michelle K. Ryan and S. Alexander Haslam investigated a claim by one *Times* journalist, Elizabeth Judge, that “[t]he triumphant march of women into the country’s boardrooms ha[d] wreaked havoc on companies’ performance and share prices.”<sup>10</sup> To test Judge’s claim, Ryan and Haslam engaged in a rigorous examination of what was then the Financial Times Stock Exchange (FTSE) 100 companies, scrutinizing the journalist’s claimed association between the presence of women in leadership roles and the financial performance of companies. At the end of their analysis, Ryan and Haslam articulated two important conclusions. First, they shared their finding that the appointment of women to leadership roles “was not associated with a subsequent drop in company performance” and, more pointedly, that “companies that appointed a woman actually experienced a marked *increase* in share price after

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<sup>9</sup> Padilla, *supra* note 6, at 4. Professor Padilla also has proffered other reasons for the major growth in women law deans, asserting “new appointments [might] reflect women’s greater representation in the broader legal population” or the fact that “women bring something new and different to leadership: a greater willingness to change, be flexible, and approach old problems in new ways.” *See id.* at 3.

<sup>10</sup> Ryan & Haslam, *supra* note 7, at 82.

appointment.”<sup>11</sup> Second, and even more critically, the two researchers ascertained the following:

that women are particularly likely to be placed in positions of leadership in circumstances of general financial downturn and downturn in company performance. In this way, such women can be seen to be placed on top of a “glass cliff,” in the sense that their leadership appointments are made in problematic organizational circumstances and hence are more precarious.<sup>12</sup>

In this sense, Ryan and Haslam argued, women leaders are more likely to find themselves set up for failure or instability in their new executive roles.<sup>13</sup> On top of these identified difficulties, experts in the field have also highlighted how women and people of color leaders on the glass cliff are frequently not given the support that they need to succeed once in the role.<sup>14</sup>

Ryan and Haslam then detailed some of the dangers of the glass cliff phenomenon for women leaders. Specifically, they highlighted how women leaders on the glass cliff are more likely to be blamed for their organization’s failures, particularly since poorly performing companies already draw heightened scrutiny.<sup>15</sup> Additionally, the two scholars stressed how the enhanced scrutiny can lead to “tarnished” reputations for such leaders, which in turn can stall their careers by making any future executive appointments less likely.<sup>16</sup>

Since Ryan and Haslam’s groundbreaking article, several other scholars have extended their research of the glass cliff phenomenon, detailing the theory’s relevancy and application in numerous other areas beside corporate board leadership and to other populations like people of color.<sup>17</sup> For example, in a series of articles concerning the glass cliff theory, Professors Christy Glass and Alison Cook confirmed the applicability of Ryan and Haslam’s findings for people of color leaders as well as across different work settings.<sup>18</sup> In Glass’s and Cook’s first study, a study of all Chief Executive Officer (CEO) transitions in Fortune 500

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<sup>11</sup> *Id.* at 86.

<sup>12</sup> *Id.* at 87.

<sup>13</sup> *Id.*; see also Lianne Hannaway, *My Journey Along the Glass Cliff: A Black Woman’s Perspective*, THEHONESTTALK.CA (June 9, 2024), <https://www.thehonesttalk.ca/impact/my-journey-along-the-glass-cliff-a-black-womans-perspective/> (describing such precarious situations as a “double bind”).

<sup>14</sup> See Hannaway, *supra* note 13 (noting that “little consideration [is] given to the level and quality of support provided (or not provided) in these roles and environments”).

<sup>15</sup> Ryan & Haslam, *supra* note 7, at 87 (stating that, in such circumstances, “explanations of organizational outcomes (e.g. negative share performance), are likely to be couched in terms of the personalities and individual abilities of the leaders involved (e.g. their leadership style or financial competence) rather than on the situational and contextual variables surrounding the company”).

<sup>16</sup> Ryan & Haslam, *supra* note 7, at 87.

<sup>17</sup> See, e.g., Amy E. Smith, *On the Edge of a Glass Cliff: Women in Leadership in Public Organizations*, 39 PUB. ADMIN. Q. 484 (2015); Cook & Glass, *Glass Cliffs and Organizational Saviors*, *supra* note 7; Alison Cook & Christy Glass, *Above the Glass Ceiling: When Are Women and Racial/Ethnic Minorities Promoted to CEO?*, 35 STRAT. MGMT J. 1080, 1084 (2013).

<sup>18</sup> See Christy Glass & Alison Cook, *Pathways to the Glass Cliff: A Risk Tax for Women and Minority Leaders?*, 67 SOC. PROBS. 637, 638 (2019); Cook & Glass, *Glass Cliffs and Organizational Saviors*, *supra* note 7, at 168; Cook & Glass, *Above the Glass Ceiling*, *supra* note 17, at 1080–81.

companies over a fifteen-year period, the two researchers found that “occupational minorities,” which include women and people of color, were “more likely to be appointed CEO in struggling firms.”<sup>19</sup> They further found that “when firm performance declines during the tenure of occupational minority CEOs, these leaders are likely to be replaced by white men,” a phenomenon they termed the “savior effect.”<sup>20</sup> In their second study, which examined all transitions among NCAA men’s basketball head coaches over a thirty-year period, Glass and Cook specified four important findings: (1) that, due to bottom-up ascription or tendencies for organizations to work to “match subordinates and supervisors based on demographic characteristics,” minority coaches are more likely to be appointed head coach for sports programs at historically Black universities and colleges; (2) that minority coaches were more likely than their white counterparts to be named head coach for weaker teams or teams with losing records; (3) that “[m]inority coaches enjoy shorter average tenures than white coaches, and the difference is sizeable and significant”; and (4) that the savior effect applied when minority coaches could not alter the glass cliff situations in which they entered, meaning that “when minority coaches [were] unable to improve their team’s win/loss record they [were] replaced by a white coach.”<sup>21</sup>

As several scholars have emphasized, the negative consequences of glass-cliff appointments are only further intensified by the existing biases that women and people of color face when they are appointed to leadership roles.<sup>22</sup> These biases include the immediate perceptions that successful leaders are male rather than female: what Professor Virginia Schein termed the “think manager—think male” phenomenon in her foundational article, “The Relationship Between Sex Role Stereotypes and Requisite Management Characteristics,” in 1975.<sup>23</sup> As Professor Schein explicated in that article, both the male and female managers among her subjects associated men with characteristics linked to managerial success more than they did women.<sup>24</sup> Although later studies have shown that women no longer make such gendered associations about men and women managers and leaders, studies have continued to show that men have maintained the same gendered

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<sup>19</sup> Cook & Glass, *Above the Glass Ceiling*, *supra* note 17, at 1080, 1084 (defining occupational minorities as “members of an occupation that are numerical rarities”).

<sup>20</sup> *Id.* at 1080.

<sup>21</sup> Cook & Glass, *Glass Cliffs and Organizational Saviors*, *supra* note 7, at 171, 181-83.

<sup>22</sup> See Smith, *supra* note 17, at 488; see also Camille deJorna, *Deaning in a Different Voice: Not the Same Old Song*, 48 VAL. U. L. REV. 645, 652 (2014) (discussing some of the challenges faced by women law deans); Herma Hill Kay, *Women Law Deans: A Different Breed, or Just One of the Boys*, 14 YALE J.L. & FEMINISM 219, 233-34 (2002) (same); cf. generally PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA (eds. Gabriella Gutiérrez y Muh, Yolanda Flores Niemann, Carmen G. González, & Angela P. Harris) (2012) (including narratives from women of color faculty about the various ways in which they are presumed incompetent in their roles).

<sup>23</sup> Virginia Schein, Ruediger Mueller, Terri Lituchy, & Jiang Liu, *Think Manager—Think Male: A Global Phenomenon?*, 17 J. ORG. BEHAV. 33, 33-34 (1996); Virginia Schein, *The Relationship Between Sex Role Stereotypes and Requisite Management Characteristics*, 60 J. APPLIED PSYCHOL. 340, 340-41 (1975).

<sup>24</sup> See Schein, *supra* note 23, at 340-41.

associations concerning men and women leaders.<sup>25</sup> As a result of these lingering perceptions by men that “being female and being a manager [are] incongruous,” women tend “to be evaluated less favorably than men in their potential for leadership positions”<sup>26</sup> as well as in their actual leadership positions.<sup>27</sup> Additionally, women and people of color leaders face a range of other obstacles and barriers, including invisibility, hypervisibility, double standards, a pattern of microaggressions, and the presumption of incompetence.<sup>28</sup>

The negative consequences of appointments on the glass cliff can become even more complex for those who are operating at the margins of more than one traditionally underrepresented identity in leadership.<sup>29</sup> For example, Kellye Testy, the current Executive Director and CEO for the AALS, has explained the intricate burdens of gender performativity that outsider law deans must often endure at the intersection of gender and sexuality.<sup>30</sup> While noting that women law deans are forced to “do a bit of drag” by steering “between being either too feminine or not feminine enough” as well as steering away from being “too much of a guy,” Testy detailed the complex ways in which sexuality can alter these performative pressures for women law deans existing at different intersecting identities. Expanding upon this point, she asserted:

What is interesting on this point is that the social/professional penalty for a lesbian woman not “going in drag” may be harsher than it would be for a heterosexual woman, especially where that woman is visibly heterosexual (usually meaning that she has a husband or male partner in

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<sup>25</sup> Schein et al., *supra* note 23, at 34.

<sup>26</sup> Smith, *supra* note 17, at 488.

<sup>27</sup> Michelle K. Ryan, S. Alexander Haslam, Mette Hersby, & Renata Bongiorno, *Think Crisis—Think Female: The Glass Cliff and Contextual Variation in the Think Manager—Think Male Stereotype*, 96 J. APPLIED PSYCHOL. 470, 470-72 (2011) (noting that “[f]emale leaders receive less favorable evaluations compared with their male counterparts, even for identical behavior”).

<sup>28</sup> See Kathrina Robotham, *Black Women Still Face a Glass Cliff, but Fixing Workplace Systems Can Change That*, CATALYST.ORG (Aug. 15, 2024), <https://www.catalyst.org/insights/2024/black-women-glass-cliff-workplace-systems>; Nicquel Terry Ellisa, ‘Very Rarely Is It as Good as It Seems’: Black Women in Leadership Are Finding Themselves on the ‘Glass Cliff,’ CNN.COM (Dec. 17, 2022, 7:08 AM EST), <https://www.cnn.com/2022/12/17/us/black-women-glass-cliff-reaj>.

<sup>29</sup> See, e.g., Kellye Y. Testy, *Being a Dean Is a Drag . . . But Not for the Reasons You Might Expect*, 42 SW. L. REV. 765, 767 (2013); see also Frank Rudy Cooper, “Who’s The Man?”: Masculinities Studies, Terry Stops, and Police Training, 18 COLUM. J. GENDER & L. 671, 680 (2009) (articulating that intersectionality “provides the ‘insight that identities are always formed at the place where categories of identities meet.’”); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991) (explicating how group members who share one identity characteristic, such as race, may experience discrimination and subordination differently based on divergent intersecting identity categories, such as race and gender); cf. MEERA DEO, *UNEQUAL PROFESSION: RACE AND GENDER IN LEGAL ACADEMIA* 3 (2019) (detailing the intersectional biases and discrimination that women of color faculty and leaders face, including presumptions of incompetence, mansplaining, hepeating, hypercompetency, and many other barriers).

<sup>30</sup> See Testy, *supra* note 29, at 768-69; see also Ryan et al., *supra* note 27, at 471 (“[F]emale leaders are often in a “lose–lose” situation. If they conform to the female stereotype they are not seen to be a proper leader. But if they conform to the leader stereotype they are not seen to be a “proper” woman. Violation of either of these stereotypes can then lead to negative evaluations and strong sanctions.”).

tow). I have seen several examples of masculine appearing women who are accepted once it is clear that they are married or otherwise partnered with a male. On the other hand, masculinity in a woman known or suspected to be lesbian is less accepted. In both directions, in this case, sexuality trumps gender: a heterosexual woman's masculine appearance is accepted in the professional realm while a lesbian woman's masculine appearance is penalized.<sup>31</sup>

Furthermore, for some intersectional women leaders like Black women, racial and gender stereotypes like the “the strong Black woman,” which “portray Black women as uncharacteristically strong and resilient,” can operate in unfortunate ways, enabling organizations to presume that Black women can or should be able to bring organizations back from the brink of the glass cliff without “the support and resources they need to succeed.”<sup>32</sup> In addition, women of color leaders have described feeling the burden of worrying that others within their group will be judged negatively, or will never be hired into a leadership role again, if they fail in their role.<sup>33</sup> On top of these difficulties, women of color also face obstacles when inheriting “a staff team, board, funder relationships that resist and resent being led by an ED/CEO of color.”<sup>34</sup> Overall, the complex challenges facing women leaders as a result of the innumerable biases that women encounter about their perceived abilities and performances only deepen the risks and potential harms that may result from appointments on the glass cliff.

With respect to the legal academy, scholars like Professor Laura Padilla have contended that patterns of glass cliff hiring may play a role when it comes to law school decanal hiring.<sup>35</sup> In support of this contention, Padilla has pointed out that, since 2011, “running a law school has become more challenging” due to a variety of factors that have “translated into smaller classes and budgets.”<sup>36</sup> Overall,

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<sup>31</sup> Testy, *supra* note 29, at 768-69.

<sup>32</sup> See Robotham, *supra* note 28.

<sup>33</sup> See Ellisa, *supra* note 28 (quoting a Black woman who was hired as the CEO at her workplace during a time of crisis as saying “In that moment I felt more nervous because I thought that as a Black woman if I’m not able to knock this out of the park I don’t want it to be a situation where they don’t give another woman of color a chance.”); see also Hannaway, *supra* note 13 (“But if we falter, it can reinforce negative stereotypes and impact opportunities for other Black women in the future.”). Camille Nelson, the first woman and person of color to serve as Dean for Suffolk University Law School and the first woman Dean for the University of Hawaii Richardson Law, described similar fears about “how her actions might affect Black women who wished to follow.” Norwood, *supra* note 6. Nelson explained, “The sense that one possible mistake will reverberate beyond oneself and impact the ability of future generations coming up behind me to have the same opportunities weighs heavy.” Norwood, *supra* note 6.

<sup>34</sup> Aimée Laramore, *With Crisis Comes Change: Black Women and the Glass Cliff*, JOHNSONCENTER.ORG (Jan. 17, 2024), <https://johnsoncenter.org/blog/with-crisis-comes-change-black-women-and-the-glass-cliff/>.

<sup>35</sup> See Padilla, *supra* note 6, at 3-4; see also Cooper, *supra* note 1 (intimating that women law deans are growing in numbers just as major difficulties were exploding in legal education).

<sup>36</sup> Padilla, *supra* note 6, at 3-4.

she argued, the job of law dean has become “less rewarding financially and more challenging overall.”<sup>37</sup>

However, unfavorable conditions in legal education may not be the only cause for the rise of purported glass cliff hiring in legal academia. As Professor Amy E. Smith has explained, another explanation for the glass cliff phenomenon is “that women are perceived as having the skills necessary for managing under risky circumstances,” such as “creativity, intuition, and awareness of others.”<sup>38</sup> In later research, Ryan and Haslam, plus their co-authors Mette Hersby and Renata Bongiorno, termed this particular pattern in hiring “think crisis—think female.”<sup>39</sup> To the extent that skills that are typically associated with women are viewed as ideal for crises situations, it is not as surprising to see three decades of tremendous growth of women law school deans during the most tumultuous parts of that thirty-year period. Indeed, women law deans whom we interviewed remarked that it was frequently the skills that they needed to develop in order to thrive as women in a male-dominated profession or as women of color in a male- and white-dominated profession that enabled them to obtain their jobs and then prosper in their roles during crises. For instance, Danielle Conway, Dean of Penn State Dickinson Law and the first woman and person of color to serve in that role, proclaimed that “because women of color, especially Black woman, have to navigate so many obstacles and be dynamic in meeting a challenge” and because women of color “have so much practice with that . . . because that’s how we’ve had to traverse,” “we’re actually able to rise to the top” in these crises.<sup>40</sup> She explained, “It doesn’t mean that it doesn’t come at a cost, but it is real because it is who we have been refined to be by circumstance.”

Still, the fact that the number of women law school deans more than doubled (from thirty in 2006 to sixty-one in 2016) during the period of time that encompassed the height of a major drop in applications to law school; a severe, national economic downturn that crippled law school budgets; and a drop in available legal employment for law school graduates bolsters Padilla’s and others’ argument that the glass cliff theory is at least partially applicable to the proliferation of women and people of color law school deans.<sup>41</sup>

Even more recent patterns in law school dean hiring suggest that the glass cliff theory may have some pertinence to law schools. For instance, of the forty-six, currently-serving deans who began their leadership service between the spring of 2020 (right when the COVID-19 pandemic began and a few months before the

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<sup>37</sup> *Id.* at 13-14 (“With such a dramatic decline in the number of students, there was a deep cut in tuition revenues. As a result, law schools had to slash budgets, create voluntary retirement programs, and—as a last alternative—institute layoffs. Perhaps it is a coincidence that the percentage of women law deans rose during this period to approximately 32.5%: the highest percentage to date.”).

<sup>38</sup> Smith, *supra* note 17, at 501; *cf.* Virginia E. Schein, *A Global Look at Psychological Barriers to Women’s Progress in Management*, 57 J. SOC. ISSUES 675, 676 (2001) (detailing that, if a leadership role is associated with what are perceived as masculine characteristics, then all else being equal, a woman candidate is viewed as less qualified than the man candidate).

<sup>39</sup> Ryan et al., *supra* note 27.

<sup>40</sup> Interview with Danielle Conway, Dean, and Donald J. Farage, Professor of Law [over telephone] (Sept. 7, 2025).

<sup>41</sup> See Cooper, *supra* note 1; Neumann, *supra* note 1, at 423.

protests that erupted following the brutal murder of George Floyd)<sup>42</sup> and the summer of 2022 (when law schools largely returned to being fully in person), approximately 70%, or thirty-two total, of those hires are women and/or people of color, even though such groups comprise only 56% of all law school deans.<sup>43</sup> Similarly, among the same group of forty-six, currently-serving deans, approximately 54%, or twenty-five total, of those hires are women, even though women comprise only 41% of all law school deans, and Black women make up an astonishing 24%, or eleven total, of those hires, even though Black women comprise only 13% of all law school deans.<sup>44</sup>

### III. WOMEN AND PEOPLE OF COLOR LEADERS AS AGENTS FACILITATING THE CREATION OF THEIR OWN OPPORTUNITIES

Although the glass cliff theory has played a critical role in helping scholars to understand more about the circumstances under which law school faculties might be more likely to support the hiring of a woman law dean, it does not provide a full picture of the circumstances that have enabled the growth of women law deans and people of color deans over the past thirty years. True, as with other roles, law schools may have become more open to hiring women and other outsiders as law school deans right as law schools were beginning to face increasing challenges related to student enrollment, graduate job placement, rising costs, and a host of other factors, but the number of women in leadership roles in law schools has expanded in large part due to three other reasons. These reasons recognize women's agency, self-empowerment, and the unique leadership skills that many women leaders have developed precisely because they were forced to learn how to thrive within intersectionally biased workplaces as key contributors to the significant rise in the number of women and people of color who are currently serving as law deans in the academy. This Part of this Essay seeks to focus on only one of these reasons: the deliberate actions that women leaders have taken to mentor, prepare, and support other women as they have sought to transition to decanal leadership roles.

In other words, on the other side of the glass cliff are the agentic reasons that the number of woman law school deans has grown exponentially in the past three decades. The reality is that, after seeing a gap in the supports offered to women who desired to become law school deans, women faculty and leaders took

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<sup>42</sup> See Angela Onwuachi-Willig, *Moving Beyond Good Intentions and Statements in U.S. Law Schools*, 75 ALA. L. REV. 691, 692-99 (2024) (detailing the reactions, including protests, across communities, among law school deans, within the legal profession, and among corporations to the horrific murder of George Floyd by former officer Derek Chauvin in May 2020); Angela Onwuachi-Willig, *The Trauma of Awakening to Racism: Did the Tragic Killing of George Floyd Result in Cultural Trauma for Whites?*, 58 HOUS. L. REV. 817, 817, 823-24 (2021) (describing the protests that occurred during summer of 2020 following the tragic murder of George Floyd, "a forty-six-year-old, African-American father, brother, partner, and son, at the hands of the police").

<sup>43</sup> See AALS ROSENBLATT'S DEANS DATABASE, <https://www.lawdeans.com> (last visited Oct. 31, 2025).

<sup>44</sup> See *id.*

several important actions, and built several important structures, to facilitate women's advancement into decanal roles.

The first of these steps came in 1994 when Professor Laura Rothstein, then the Chair of the AALS Section on Women in Legal Education,<sup>45</sup> began to create an ad hoc list of women faculty who were interested in becoming law school deans to share with dean search committees across the country, a task that was then undertaken by her successor Section Chairs until 1997.<sup>46</sup> Thereafter, in 1997, Judith Areen, then the Dean of Georgetown University Law Center and that law school's first woman dean, and Elizabeth Hayes "Ginger" Patterson, then the school's Associate Dean, created and developed what was then called the "Women's Dean Databank,"<sup>47</sup> a formal list of women faculty and associate deans who were interested in becoming law school deans and whom could be nominated for such open roles. With a more formal pathway for learning about women decanal candidates available to search committees, the legal academy soon began to see some changes in leadership. As Padilla highlighted in her article "Women Law Deans, Gender Sidelining, and Presumptions of Incompetence," "[o]ne year after Dean Areen started the databank, the number of women law deans increased from fourteen to twenty."<sup>48</sup>

Ten years later, in 2007, women leaders built two other significant structures that have helped to fortify, replenish, and strengthen the pipeline of women into law school deanships: (1) the "Promoting Diversity in Law School Leadership Conference" ("Law School Leadership Conference") which was founded by Kellye Testy, then the Dean of Seattle University School of Law, and

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<sup>45</sup> Professor Rothstein became the second woman dean at the University of Louisville Louis D. Brandeis School of Law (Louisville Law). See Bethany Daily, *Barbara Lewis, Brandeis Law's First Female Dean, Passes Away*, UOFLNEWS.COM (Nov. 9, 2017), <https://www.uoflnews.com/post/uoftoday/barbara-lewis-brandeis-laws-first-female-dean-passes-away/> (also explaining that the first woman dean at Louisville Law was Barbara Lewis, who became Dean in 1982—one of only five women law school deans at the time); see also John Drees, *Susan Duncan to Be Interim Law Dean*, UOFLNEWS.COM (June 20, 2012), <https://news.louisville.edu/news/susan-duncan-be-interim-law-dean> (showing that the third woman dean at Louisville Law was Susan Duncan, who served as Interim Dean for five years, starting in 2012; Louisville Law may hold the record for having the highest number of women law deans in its history); *Susan Hanley Duncan Named Executive Director of the Kentucky Bar Foundation and Kentucky IOLTA Fund*, KYBARFOUNDATION.ORG (June 5, 2024), <https://kybarfoundation.org/news/susan-hanley-duncan-named-executive-director-of-the-kentucky-bar-foundation-and-kentucky-iolta-fund> (illustrating that Susan Duncan later became the first woman dean of the University of Mississippi School of Law); Juliet Gahan, *Women Are Making History in the Field of Law in the Bluegrass State*, SPECTRUMNEWS1.COM (Mar. 11, 2024, 9:30 AM ET), <https://spectrumnews1.com/ky/louisville/news/2024/03/11/women-s-history-month-> (noting that, the current Dean for Louisville Law is Melanie Jacobs and that "[f]or the first time ever, the deans of all three law schools in Kentucky are women"); *History of UCLA School of Law*, <https://law.ucla.edu/about-ucla-law/history> (detailing that UCLA School of Law has had three women, Susan Westerberg Prager (1992-1998), Rachel Moran (2010-2015), and Jennifer Mnookin (2015-2022), serve as its Dean).

<sup>46</sup> See Laura Rothstein, *Reflections from an Era of Breaking Glass—1984-1998*, 80 UMKC L. REV. 757, 764 (2012).

<sup>47</sup> See *id.*

<sup>48</sup> Padilla, *supra* note 6, at 11-12.

her colleagues;<sup>49</sup> and (2) the Lutie A. Lytle Faculty Workshop, which was founded by Angela Onwuachi-Willig, then a law professor at the University of Iowa College of Law.<sup>50</sup> Although both conferences are available and open to all faculty regardless of background, the substance of each conference centers on the experiences of outsiders in legal academia and law school leadership. Both workshops seek to demystify both search and promotion processes, like faculty and dean searches and tenure promotion processes, which are covered during their programs.

The forces that motivated the creation of the Law School Leadership Conference in 2007 help to illustrate precisely why the formation of the Workshop was so critical and why it has been so successful in helping to usher more women, people of color, LGBTQ+ individuals, and first-generation lawyers into law school dean roles. The conference emerged after Seattle University had just completed a dean search that resulted in the law school's hiring of its first female dean, Kellye Testy.<sup>51</sup> That historic dean search process had proven revelatory in several meaningful ways. Most notably, it exposed an interesting pattern of comments among community members about the women candidates during that process, comments that were not articulated in response to male candidates with similar backgrounds. Examples of the troubling statements included assertions such as:

*“She is clearly a great teacher and scholar, but she just doesn't seem decanal.”*

*“I really liked her and thought she would be a great colleague, but I don't think she is tough enough to advocate well for the law school with the university administration.”*

*“I'm not sure she can raise money like a dean needs to—she's never done it before.”*

*“She had some great ideas about legal education, but I just didn't hear that she had a vision for the school.”*

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<sup>49</sup> *Id.*

<sup>50</sup> Angela Onwuachi-Willig, *The Promise of Lutie Lytle: An Introduction to the Tenth Annual Commemorative Lutie A. Lytle Black Women Law Faculty Workshop Iowa Law Review Issue*, 101 IOWA L. REV. 1843, 1843-44 (2017) (noting the founding of the Workshop in 2007 and a few of its accomplishments upon its tenth commemorative gathering); see generally Taja-Nia Y. Henderson, *“I Shall Talk to My Own People”*: *The Intersectional Life and Times of Lutie A. Lytle*, 102 IOWA L. REV. 1983 (2017) (detailing the life history, accomplishments, and trails blazed by Lutie A. Lytle, the first woman and Black woman law professor in the nation). The Workshop has, of course, thrived because of the dedication, commitment, and work of many dedicated faculty members, both founding and newer participants.

<sup>51</sup> See AALS ROSENBLATT'S DEANS DATABASE, <https://www.lawdeans.com/schoolprofile.php?UID=96> (last visited Oct. 31, 2025) (showing that although Kellye Testy was appointed dean in 2004, her tenure began in February 2005).

Reflecting with others on both the implicit and explicit gender biases involved in her own historic dean search process, as well as in other search processes, then-Dean Kellye Testy and her colleagues created the new conference as a means of combating the structural biases facing candidates who had little to no access to powerful networks or information about how to best succeed in law school leadership searches. As Testy developed the conference, she and others who assisted her also reflected upon how difficult it had been to encourage women and faculty members of color to apply for decanal roles and how few of those candidates had actually become deans. At that point, the proverbial light bulb went off, and Testy and her collaborators realized that, just as some candidates have better access to encouragement and mentoring than others in the faculty hiring process, so, too, do some candidates in dean search processes. Testy and her collaborators also noted that, while it was common for law schools to build pathway and informational programs for students and even, in some instances, for faculty, they had not yet seen any programs that were aimed at law school leadership positions. As a result, Testy decided to launch a program that would seek explicitly to help a broader range of people succeed in the law school dean process should they decide to become candidates.

For almost two decades since 2007,<sup>52</sup> the format of the Law School Leadership Conference has followed its original “encourage and mentor” structure, with a two-day program beginning with an exploration of why one might want to become a dean, followed by an outline of the dean search process chronologically from the application process to the first-round or “airport” (now Zoom) interviews to the on-campus visit to offer negotiations.<sup>53</sup> After covering the basics of how to thrive in a decanal search process, the program then turns to offering tutorials on key areas of the job, both to help candidates succeed in interviewing and to help them in that important first year of the job. At every one of the conferences, the topics covered concern many areas that faculty members or even associate deans have not had much experience with, such as raising money and managing budgets and finance, crisis communications, university relations, and personnel. The Conference also includes sessions on the unique challenges of deaning when one is from a group underrepresented in the legal academy.<sup>54</sup>

Today, the Law School Leadership Conference has expanded its substance beyond law school deanships, seeking to encourage faculty members to consider other leadership roles, including associate deanships.<sup>55</sup> Most deans have

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<sup>52</sup> After Kellye Testy left law school deaning to become President of the Law School Admission Council (LSAC), there were a few years during the conference was not organized and hosted.

<sup>53</sup> See, e.g., *14th Annual Promoting Diversity in Law School Leadership Workshop*, SEATTLE UNIV. SCH. L., <https://events.seattleu.edu/event/14th-annual-promoting-diversity-in-law-school-leadership-workshop> (last visited Feb. 4, 2026) [hereinafter *14th Annual Diversity Workshop*]; *13th Annual Promoting Diversity in Law School Leadership Workshop 09/20-21*, VILL. UNIV. CHARLES WIDGER SCH. L., <https://www.villanova.edu/university/law/about/news-events/events/2024/0708.html> (last visited Feb. 4, 2026) [hereinafter *13th Annual Diversity Workshop*].

<sup>54</sup> See, e.g., *14th Annual Diversity Workshop*, *supra* note 53; *13th Annual Diversity Workshop*, *supra* note 53.

<sup>55</sup> One motivation for extending the invitations more broadly was to help give cover to candidates who may be concerned that their current dean would see their interest in deaning as a threat.

enthusiastically encouraged their colleagues to attend and explore decanal opportunities. Current and former deans have also been generous in serving as the faculty for the program and for continuing to offer mentoring to candidates who enter into searches.

Overall, the Conference has been well-received by candidates, many of whom believe it was a significant factor in helping them obtain a deanship and thrive once in the role. The Conference has produced many benefits. For instance, since 2007 when the Conference was first held, the number of women law deans has increased nearly threefold.<sup>56</sup> Similarly, the number of deans of color has grown more than threefold,<sup>57</sup> and women of color deans in particular have grown twelve-fold.<sup>58</sup>

While there have been many factors that have contributed to the success of the Conference, one of the most important ones is the community that it has created, not only during the Conference, but thereafter, with aspiring dean conference attendees gaining a network of experienced deans to call upon for advice and support not only during their job searches but also in their actual jobs as deans.<sup>59</sup> These networks are critical. Serving as a law school dean is a challenging job with a short average tenure, and to thrive in the role, new deans need to have support outside of their schools to assist them in coping with the pressures and rigors of a deanship.

Like the Law School Leadership Conference, the Lutie Lytle Workshop, affectionately known by its participants as “Lutie,” was founded by Angela Onwuachi-Willig to provide faculty with information and advice about how to best increase their chances for earning tenure at their institutions. A key goal of the Workshop was filling in gaps that had left women, particularly women of color, lagging behind white men on core metrics like tenure approvals. Indeed, the forces behind Lutie’s many successes in assisting aspiring faculty into teaching jobs and developing a robust group of award-winning scholars, teachers, associate deans, deans, provosts, and presidents mirror those of the Law School Leadership Conference.

Just as the Law School Leadership Conference grew out of worrisome experiences with bias during a decanal search, the creation of the Lytle Workshop grew in part out of troubling results from a 2004 study on tenure gaps by the AALS

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<sup>56</sup> See *supra* note 1 and accompanying text (noting that the number of women law deans has grown from thirty in 2006 to sixty-one in 2016 to eighty-two in 2025).

<sup>57</sup> See *supra* note 4 and accompanying text (noting that the number of law deans of color has grown from twenty in 2005 to sixty-eight law deans of color in 2025).

<sup>58</sup> See *supra* notes 5-6 and accompanying text (noting that the number of women of color deans has grown from three in 2005-2006 to thirty-six in 2025).

<sup>59</sup> A further factor in the success of the Conference is that the dialogue during the program is very candid; candidates get direct and honest advice about the good, the bad, and the ugly of being a dean and of being in searches. This candid sharing of information and advice helps to even the playing field in which some faculty members are not seen as “dean potential” due to explicit, implicit, and structural biases and in which some faculty members lack information, much less mentoring and encouragement, to thrive in law school dean searches.

Committee on the Recruitment and Retention of Minority Law Teachers.<sup>60</sup> The 2004 study's results exposed a widening tenure gap between white law professors and professors of color as compared to the nearly fully closed tenure gap between male and female professors. Onwuachi-Willig, who earned tenure the same summer that she founded the Lytle Workshop, was particularly disturbed by what the study's data suggested about the precarious position of women of color. She wondered, "If the tenure gap between men and women had closed nearly entirely, but the gap between white professors and professors of color was widening, were women of color faculty uniquely falling through the cracks?" When considered alongside anecdotal evidence about the tenure challenges faced by women faculty of color at law schools across the nation, her question became even more worrisome. As a result, she, following conversations with other Black women faculty like Professors Sacha Coupet and Ruqaiijah Yearby, worked to develop a workshop to provide rigorous, constructive criticism to junior scholars on their articles, chapters, and book projects and to offer critical counsel to such scholars on how best to earn strong teaching evaluations and avoid the heavy service trap that many women faculty, including herself, had found themselves in. With the help and support of then-Dean Carolyn Jones at the University of Iowa College of Law, she invited twenty-five individuals to a summer workshop at the University of Iowa College of Law."<sup>61</sup>

For almost two decades since 2007, the format of the Lytle Workshop has remained the same, with tweaks here and there and with a few topical substantive additions, including programs on how to obtain associate dean and dean leadership roles at law schools, along the way. The original Lytle Workshop program began with a working dinner and ended with a working brunch focused on debriefing and then planning the next annual workshop. In between those opening and closing sessions were plenary panels on scholarship, teaching, and service; rap sessions around specific issues related to teaching, publishing, and engaging in service; a concurrent paper workshop session with a paper commentator assigned to each paper (with the requirement that each commentator provide written comments for each assigned author); a brainstorming session; and opportunities to socialize in the evening.

Over time, as the Workshop has grown from just twenty-five participants (by invitation) in its inaugural year to as many as 150 participants in later years, additional substantive programs have been added to address the broader range of needs among the larger group as well as the "aging" and development of its founding and early participants. Notable among these additions have been programs on obtaining leadership positions in law schools. For example, among the twenty-seven Black women who currently serve as law school Deans, the Workshop boasts twenty-three Workshop alumni, many of whom nominated,

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<sup>60</sup> See Richard A. White, *The Promotion, Retention, and Tenuring of Law School Faculty: Comparing Faculty Hired in 1990 and 1991 to Faculty Hired in 1996 and 1997*, Ass'n of Am. Law Schs., Comm. on the Recruitment and Retention of Minority Law Teachers, Dec. 14, 2004 (copy on file with authors).

<sup>61</sup> Angela Onwuachi-Willig & Rachel Anderson, *The Making of the Lytle Workshop* (2009) (draft on file with authors).

vetted, and mock-interviewed each other and who did the same (and continued to do the same) for other decanal candidates. As critical to these Lytle deaning and associate deaning programs have been the scholarship, teaching, and service sessions that have helped a cadre of Lytle Workshop participants develop the kind of scholarly, teaching, and service records that have made, and make, them competitive for securing various leadership roles.

Not surprisingly, Lytle community members, particularly those who have become deans, highlight the Workshop as a key factor in reshaping the face of law school deans within the United States. For example, Michele Alexandre, Dean of Loyola University Chicago School of Law, proclaimed that the progress in demographic diversity among law school deans “is ‘a testament to pipelines’ and the result of Black women intentionally supporting each other through the scholarship, tenure, and leadership processes necessary to become the dean of a law school” like the Lytle Workshop.<sup>62</sup> The late Browne C. Lewis, the former Dean of North Carolina Central University School of Law, a historically Black university law school, agreed with Dean Alexandre about the importance of the Lytle Workshop, once telling journalist Candace Norwood that “she believes the growing number of Black women in dean positions is less about changing hearts and minds in academia and more of a testament to Black women encouraging and guiding others who are interested in leadership positions.” Lewis explicated, “The pioneers, the first Black women law school deans, have reached back and organized conferences to tell Black women how to become dean. . . . We have enough now to be able to reach back and pull in others.”<sup>63</sup>

In addition to these structures built over the past thirty years—from the AALS Section on Women in Legal Education’s informal list of female law dean candidates to the Women Dean’s Databank to the Law School Leadership Conference to the Lutie A. Lytle Workshop—intentional and thoughtful mentoring by individual women and people of color law deans has played a critical role in the development and maintenance of a diverse and robust pool of decanal candidates for law school leadership. As Camille Davidson, former Dean of Southern Illinois University College of Law and current President and Dean for Mitchell-Hamline School of Law asserted, “Nothing happens by accident; it is a result of action or inaction. . . . The legal academy has been deliberate and intentional about mentorship programs for women and people of color who are interested in law school leadership.”<sup>64</sup> President Davidson’s former neighboring Dean, Cassandra Hill, who serves as Dean of Northern Illinois University College of Law, highlights specific Black women decanal trailblazers who have been important mentors for a plethora of Black woman deans across the country, such as Cynthia Nance, who was the first woman and the first person of color to serve as Dean of the University

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<sup>62</sup> See Erika Harold & Julia Roundtree, *Meet the Black Women Leading Illinois Law Schools*, 2CIVILITY.ORG (Feb. 23, 2023), <https://www.2civility.org/black-women-law-deans-illinois-law-schools/>.

<sup>63</sup> Norwood, *supra* note 6.

<sup>64</sup> See Harold & Roundtree, *supra* note 62.

of Arkansas-Fayetteville School of Law,<sup>65</sup> and Camille Nelson, who was the first woman and the first person of color to serve as Dean of Suffolk University Law School and the who currently is the first woman to serve as Dean of the University of Hawaii Richardson School of Law.<sup>66</sup> As Hill proclaimed,

the Black women law deans who were the first to hold these positions, such as Cynthia E. Nance and Camille A. Nelson and others, didn't rest until there were other Black women coming through the doors and assuming leadership roles. Their intentional mentorship paved the way for us to lead.<sup>67</sup>

#### IV. CONCLUSION

The glass cliff phenomenon is an important and necessary lens for understanding the conditions under which women law school deans have been, and are, most likely to hired. Still, the glass cliff theory provides only a fraction of the story to be told about the growth of women leaders in law schools. In essence, it fails to show us what lives on the other side of the cliff.

An important aspect of our other-side-of-the-cliff story is the agency of women leaders who helped to build structures to increase the pipeline of women and people of color into law school deanships as well as the decanal women pioneers who have been intentional about mentoring more women and other outsiders into leadership roles. Law schools are certainly much better because of these important agentic acts that women leaders have made to combat the structures that have for too long constrained women's options and choices. As Jennifer Rosato Perea, the current Managing Director of the American Bar Association Section of Legal Education and Admissions to the Bar and the first Latina to serve as a law school dean, explained, women deans "broaden the range of management styles and perspectives."<sup>68</sup> Furthermore, as Nicky Boothe, Dean of the University of Illinois Chicago School of Law, highlighted: "Without [women,] Black women[,] or people of color in these decision-making positions, we might not have any progress at all."<sup>69</sup>

Still, much needs to be studied about the glass cliff theory within the legal academy. For example, the glass cliff phenomenon, meaning the greater likelihood of appointing women to leadership positions in times of crisis, is very much rooted in gender stereotypes about the qualities that women are more likely to possess.

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<sup>65</sup> *Cynthia Nance Receives the Ruth Bader Ginsburg Lifetime Achievement Award*, J. BLACKS HIGHER ED. (Jan. 6, 2023), <https://jbhe.com/2023/01/cynthia-nance-receives-the-ruth-bader-ginsburg-lifetime-achievement-award/> (noting Nance took on these firsts in 2006).

<sup>66</sup> *Leading Women: Dean Camille Nelson on Advocating for Fairness and Opportunity*, BOH.COM (Mar. 27, 2021), <https://www.boh.com/blog/leading-women-dean-camille-nelson-on-advocating-for-fairness-and-opportunity>.

<sup>67</sup> Harold & Roundtree, *supra* note 62.

<sup>68</sup> Cooper, *supra* note 1; *see also New Director Takes Over at ABA Law School Accrediting Unit*, A.B.A. (June 10, 2024), <https://www.americanbar.org/news/abanews/aba-news-archives/2024/06/new-director-law-school-accrediting/>.

<sup>69</sup> Harold & Roundtree, *supra* note 62.

As Professor Dora Kingsley Vertenen once explained, “When there’s a great deal of disruption and it focuses on issues of morale or engagement . . . and things that require intuition or social or emotional intelligence, that’s when women leaders make sense and are often selected and supported by the candidacy.”<sup>70</sup>

Among these issues for further exploration are three topics that we plan to engage in further research and exploration on: (1) the uniquely attractive attributes of glass cliff circumstances for women leaders who want to effect real and deep change and who have made strategic choices to advance their careers as executives; (2) the special qualities and skills that women, particularly women at the intersections of different marginalized identities, often need to develop as a result of the barriers and challenges they may face as law school faculty and university community members, qualities and skills that arguably provide such leaders with greater evidence about why they are particularly well-suited to guide schools in times requiring a change from the status quo; and (3) the double standards inherent in seeing women and people of color candidates as uniquely qualified to lead under challenging circumstances but not as fitting to lead in more ideal conditions.

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<sup>70</sup> Kruse, *supra* note 7; see also Smith, *supra* note 17, at 501; see also Floor Rink, Michelle K. Ryan, & Janka I. Stoker, *Influence in Times of Crisis: How Social and Financial Resources Affect Men’s and Women’s Evaluations of Glass-Cliff Positions*, 23 PSYCHOL. SCI. 1306, 1307 (2012) (“The think crisis-think female association is particularly prominent when a leader is required to manage conflicts among people, ride out a crisis, or act as a scapegoat.”).



# GLASS CLIFF OFF AN IVORY TOWER

Katharine Traylor Schaffzin & Katie Kempner\*

## I. INTRODUCTION

At the turn of the century, American law schools made substantial progress in increasing the number of women on their faculties. In the two decades between 1980 and 2000, the proportion of full-time law faculty who were women nearly tripled.<sup>1</sup> A quarter century later, in 2024, law schools have achieved gender parity in the number of full-time faculty they employ.<sup>2</sup>

Over the same period, law schools began making similar progress in increasing the number of women serving as deans, with the most significant gains occurring during and after the early 2000s. In 1981, just three women were serving as law school deans;<sup>3</sup> by 2024, almost half of law school deans were women.<sup>4</sup> These developments coincided with institutional efforts to expand gender diversity in the legal academy, outlined in Part III.A. of this Essay. It would be a mistake, however, to equate correlation with causation, especially with such a small sample population.

Without discounting the value of intentional organizational efforts to increase the number of women leading law schools, any work examining this progress must also consider the impact of other potential causal factors described in Part IV of this Essay, including the rising challenges and, arguably, decreasing rewards of leading a law school in the twenty-first century. The increase of women in these roles should be heralded, but so too should their trials be highlighted. Having broken through the ceiling, these women have been invited to walk right off a glass cliff.

Part III.A. of this Essay explains that the path to decanal appointments relies on a pool of qualified and interested faculty. Growth in the number of women faculty, however, corresponded with an increase in the number of teaching positions without tenure and with lower salaries, most of which are filled by

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<sup>1</sup> Richard H. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537, 538 (1988); ASS’N OF AM. L. SCHS., STATISTICAL REPORT ON LAW SCHOOL FACULTY & CANDIDATES FOR LAW FACULTY POSITIONS (2001-2002), <https://web.archive.org/web/20100917035746/http://aals.org/documents/statistics/20012002stats.pdf>.

<sup>2</sup> *A.B.A. Required Disclosures: Compilation – All Schools Data, 2024 Faculty Resources*, A.B.A.: LEGAL EDUC. & ADMISSION TO THE BAR, <https://abarequireddisclosures.org/requiredDisclosure> [https://perma.cc/7U64-CGRG] (last visited Nov. 4, 2025) (under “Compilation – All Schools Data” select 2024 for the year, and Faculty Resources for the section, then click Generate Report).

<sup>3</sup> Herma Hill Kay, *Women Law School Deans: A Different Breed, or Just One of the Boys?*, 14 YALE J.L. & FEMINISM 219, 232 (2002).

<sup>4</sup> *Profile of the Legal Profession 2024: Women in the Legal Profession*, A.B.A. (2024), <https://www.americanbar.org/news/profile-legal-profession/women/> (last visited Nov. 4, 2025).

women (a class of positions often referred to as “the pink ghetto”).<sup>5</sup> In other words, the number of women entering the academy increased as job security in teaching positions declined. Growth in the number of untenured and non-tenure-eligible women faculty does little to enlarge the pool of decanal candidates.<sup>6</sup>

In Part IV, this Essay explains that the number of women serving as deans at American law schools grew substantially only after a dearth of qualified law school applicants brought enrollment challenges in 2010, culminating in the collapse of bar passage in 2014, followed by the demands of educating future lawyers through a global pandemic in 2020. Leading law schools became an increasingly difficult charge just as women were stepping into the role, reflecting a phenomenon documented in other sectors as “the glass cliff.” As explained in Part II of this Essay, the glass cliff describes the circumstances under which an institution in distress—initially led by a male leader—turns to a transformational woman to lead under extremely challenging circumstances where failure is anticipated. Law schools may actually be entering the next phase of this organizational leadership paradigm, in which the organization returns to male leadership once the danger has abated (referred to as “the savior effect”).<sup>7</sup> While it is too soon to declare a trend in the opposite direction, there has been a startling decrease in the number of women being hired into law school deanships commencing in 2025.<sup>8</sup>

Identifying the glass cliff as a potential obstacle is essential to the success of women as law school deans. Documenting the phenomenon will educate women who aspire to leadership and men who seek to support them. Identifying the problem will pave the way for institutional strategies to overcome it.

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<sup>5</sup> See *infra* Part III.B. for further discussion of the pink ghetto.

<sup>6</sup> See *infra* notes 25, 55-56 and accompanying text for further discussion of the dependence of the decanal pool on available tenure-eligible faculty.

<sup>7</sup> Stella Rehbein, *The Glass Cliff Effect*, ST. ANDREW'S L. REV. ONLINE (Aug. 17, 2023), <https://www.standrewslawreview.com/post/the-glass-cliff-effect> [<https://perma.cc/T9JX-BRY6>].

<sup>8</sup> See, e.g., FAC. LOUNGE: L. SCH. DEANS, <https://www.thefacultylounge.org/law-school-deans/> (last visited July 1, 2025); CUNY: L. SCH. ADMIN., <https://www.law.cuny.edu/about-us/leadership-governing-bodies/> [<https://perma.cc/5XXG-CAZS>] (last visited July 1, 2025); *New College of Law Co-Interim Deans*, CLEV. ST. UNIV. L. NEWS & EVENTS (May 13, 2025), <https://www.law.csuohio.edu/newsevents/new-college-law-co-interim-deans> [<https://perma.cc/7XHP-9U6N>]; *Professor Joshua Teitelbaum Named Interim Dean of Georgetown Law*, GEO. L. (Apr. 14, 2025), <https://www.law.georgetown.edu/news/professor-joshua-teitelbaum-named-interim-dean-of-georgetown-law/> [<https://perma.cc/ZW26-E6FH>]; *DePaul University Names Geoffrey Rapp Dean of the College of Law*, DEPAUL UNIV. NEWSLINE (Dec. 12, 2024), <https://resources.depaul.edu/newslines/sections/campus-and-community/Pages/law-dean-rapp.aspx> [<https://perma.cc/8LP5-RVEC>]. The 2025 academic year brings a total of sixteen deanship transitions (including interim and acting deans). Of the sixteen deans leaving their positions, nine are men and seven are women. There are a total of seventeen incoming deans (including interim deans and two co-interim deans, hence the larger number of incoming vs. outgoing deans); the proportion of these incoming deans who are women is lower. Just five incoming deans are women and twelve are men. The trend is similar among the smaller group of sitting deans leaving and coming into the role. Of thirteen outgoing sitting deans, eight are men and five are women, but just three of ten new sitting deans are women. One academic year and a handful of deanship transitions are not enough to establish a trend, but the change is worth noting, and worth monitoring.

## II. THE GLASS CLIFF

The “glass cliff” was first identified by British psychologists Michelle Ryan and Alexander Haslam in 2005 in the corporate context. In reviewing an article by Elizabeth Judge that concluded that companies experience negative share valuations when women are appointed to their boards of directors,<sup>9</sup> Ryan and Haslam proved that those companies were already in decline by the time women leaders were appointed to their boards, a key variable overlooked by Judge.<sup>10</sup> In their own study, they found that companies with stable share prices were more likely to appoint men to their boards, while companies with declining share prices were more likely to appoint women. Ryan and Haslam coined the term “glass cliff” to describe the phenomenon in which corporations are more likely to appoint women over men to risky leadership positions where failure is anticipated because the organizations are already experiencing crisis. While breaking the glass ceiling, women in these precarious positions are walking onto a glass cliff, where they are susceptible to criticism and failure.<sup>11</sup>

The co-occurrence of a company’s declining performance and the appointment of a woman to the board creates confirmation bias that the presence of a woman on the board is related to the decline.<sup>12</sup> The focus often turns to the personalities and individual abilities of the leaders involved, rather than to the situational and contextual variables surrounding the company—in this way, compared to men, women who assume leadership positions may be differentially exposed to criticism and in greater danger of being apportioned blame for adverse outcomes that were set in train well before they assumed their new roles.<sup>13</sup>

Researchers have noted that leaders during institutional crises receive poor performance evaluations and are often “blamed for being ‘part of the problem.’”<sup>14</sup> This criticism can lead to women leaders “either being hounded out of office . . . or feeling that they need to ‘take a fall’ on behalf of the organization and their colleagues. This, indeed, may be one reason why women’s tenure of senior positions is observed to be very much shorter than that of men.”<sup>15</sup>

The “glass cliff” is consistent with research on the career trajectories of women in organizational leadership. Women who successfully broke the glass ceiling nonetheless left leadership positions at much higher rates than men, but not

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<sup>9</sup> Elizabeth Judge, *Women on Board: Help or Hindrance?*, TIMES (Nov. 11, 2003), <https://www.thetimes.com/business-money/companies/article/women-on-board-help-or-hindrance-2c6fnqf6fng?region=global> [<https://perma.cc/CJ4Q-YPU4>].

<sup>10</sup> Michelle K. Ryan & S. Alexander Haslam, *The Glass Cliff: Evidence that Women Are Over-Represented in Precarious Leadership Positions*, 16 BRIT. J. MGMT. 81, 87 (2005).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*; see also Michelle K. Ryan & S. Alexander Haslam, *The Glass Cliff: Exploring the Dynamics Surrounding the Appointment of Women to Precarious Leadership Positions*, 32 ACAD. MGMT. REV. 549, 559 (2007) (“Indeed, women may be regarded as more attractive candidates for such positions because they have greater potential as scapegoats who can be shouldered with blame should things go wrong.”).

<sup>14</sup> Ryan & Haslam (2007), *supra* note 13, at 553.

<sup>15</sup> *Id.* at 557.

for the reasons portrayed in the popular media. Instead, women left leadership for the same reason as men—job dissatisfaction; unfortunately, women were experiencing much higher rates of job dissatisfaction than men, likely due in some part to new, more subtle forms of gender discrimination.<sup>16</sup> “It now seems apparent that in addition to these obstacles, the leadership positions that women occupy are likely to be less promising than those of their male counterparts.”<sup>17</sup>

Further, the “glass cliff” theory is consistent with research demonstrating that organizations seek charismatic or transformational leaders—leadership attributes typically attributed to women—when companies feel the fear and unpredictability of an organizational crisis.<sup>18</sup> Additional traits associated with women leaders, including “understanding, helpful, sophisticated, aware of the feelings of others, intuitive, creative, and cheerful . . . are seen to be particularly useful in times of crisis.”<sup>19</sup> Thus, it is not surprising to learn that the data confirm that women are offered leadership roles during organizational downturns.<sup>20</sup>

The glass cliff has not been formally studied within the legal field. Researchers, however, suspect that “glass cliff positions are unlikely to be restricted to businesses and corporations but will also emerge in other spheres of social and political activity.”<sup>21</sup> Like the business world, the legal profession has at least semantically embraced gender equity as a priority for lawyers over the past few decades.<sup>22</sup> Many proposed interventions designed to increase the number of women practicing law, leading law firms, and joining the judiciary have focused on what law schools can do to increase the number of women in the pipeline.<sup>23</sup> “Women’s progress in law schools has thus been a principal driver in closing gender gaps throughout the legal academy, legal practice, private industry, and all levels and branches of government.”<sup>24</sup> Evaluating the glass cliff as a potential obstacle to the success of women leaders in law school will have repercussions for the legal field as a whole.

### III. WOMEN IN THE LEGAL ACADEMY

Law school leadership can encompass a host of faculty and staff setting institutional priorities for advancement, but for purposes of consistency across institutions in this Essay, we will further limit the definition of law school “leader” to those filling the role of dean. Because the ABA requires that law school deans

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<sup>16</sup> *Id.* at 555.

<sup>17</sup> Ryan & Haslam (2005), *supra* note 10, at 88.

<sup>18</sup> Ryan & Haslam (2007), *supra* note 13, at 560.

<sup>19</sup> *Id.* at 553.

<sup>20</sup> Ryan & Haslam (2005), *supra* note 10, at 87.

<sup>21</sup> Ryan & Haslam (2007), *supra* note 13, at 556.

<sup>22</sup> See *Statement of ABA President Mary Smith re: International Women’s Day*, A.B.A. (Mar. 8, 2024), <https://www.americanbar.org/news/abanews/aba-news-archives/2024/03/aba-president-statement-re-intl-womens-day/?login>.

<sup>23</sup> See *infra* Part III.A.

<sup>24</sup> Elizabeth D. Katz, Kyle Rozema, & Sarath Sanga, *Women in U.S. Law Schools, 1948–2021*, 15 OXFORD J. LEGAL ANALYSIS 48, 48 (2023).

be tenured members of the faculty, absent extraordinary circumstances,<sup>25</sup> trends among women faculty are informative of the pipeline for law school leaders. Further removed, but nonetheless essential to the pipeline for law school leadership, are law students, whose enrollment must also be considered in studying the development of women as law school leaders.

### A. Advancement of Women in Law Schools

In the 1970s, professional organizations and new legislation began to highlight gender discrimination in the law school setting, emphasizing the underrepresentation of women as students, faculty, and deans. “Between 1970 and 1975, the Association of American Law Schools (AALS) wrote a report on the lack of women faculty, enacted a policy that condemned sex discrimination in law schools, and adopted a resolution to increase women’s representation.”<sup>26</sup> Nonetheless, progress towards achieving gender parity in law schools moved slowly, leading up to the turn of the twenty-first century.

Growth was first noted in the number of women enrolling in law schools. “At the beginning of the 20th century, women made up 5 percent of law students and an even smaller share of law professors and deans. By the end of the century, women constituted 48 percent of all law students, 33 percent of law faculty, and 13 percent of law deans.”<sup>27</sup> Throughout this period, “whether by the self-selection of students or by a deliberate policy of administrators, certain law schools developed reputations and cultures of recruiting and retaining women.”<sup>28</sup>

In the late 1980s and through the 1990s, both AALS and the ABA began to focus on the experiences of women law faculty as more women entered the profession. In 1989, as AALS established a Special Committee on Tenure and the Tenuring Process, the AALS Section on Women in Legal Education worked to prepare comments that noted “special concerns to women faculty” and made several recommendations to the AALS Special Committee to Review the Requirements of Membership in the AALS.<sup>29</sup>

Though the AALS Executive Committee did not immediately adopt these recommendations, in 1994, the Section on Women in Legal Education circulated them, re-named “Recommended Policies and Practices for Women in Legal

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<sup>25</sup> A.B.A. STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, STANDARD 203 (2024-25).

<sup>26</sup> Katz et al., *supra* note 24, at 52 (Similarly, “the federal government scrutinized the hiring practices of more than 2,000 colleges and universities. And in 1972, the Higher Education Act prohibited sex discrimination in federally funded educational programs.”).

<sup>27</sup> *Id.* at 48.

<sup>28</sup> *Id.* at 49.

<sup>29</sup> Laura Rothstein, *Reflections from an Era of Breaking Glass—1984-1998*, 80 UMKC L. REV. 757, 762 (2012). Recommendations from the Section on Women in Legal Education included adopting “written policies on promotion, retention, and tenure; a job description upon employment; a system of ongoing peer support; yearly evaluations of teaching, scholarship, and service; avoiding too many responsibilities for junior faculty; appropriate teaching loads and committee service; adequate support for research; recognition that women and minority faculty are given additional demands; reasonable leave for disability and pregnancy; nondiscrimination on the basis of research topic; and a sexual harassment policy.” *Id.*

Education,” to all sitting law school deans.<sup>30</sup> In November 1995, the AALS Executive Committee adopted a less specific “Statement on Diversity, Equal Opportunity, and Affirmative Action,” which referenced the AALS requirements that law schools “seek to have a faculty, staff and student body which are diverse with respect to race, color, and sex,” affirmed “great progress in recent decades in respect to the number of women and members of minority groups in American law schools,” and, at the same time, underscored the “long road” legal education was facing to achieve a truly diverse professoriate.<sup>31</sup>

As the leaders and members of AALS’s Section on Women in Legal Education worked to ensure that all law school leaders were aware of best practices for increasing the numbers of women joining their faculties, work was also ongoing in identifying women qualified to serve as law school deans in the form of the Women Deans Databank. The Databank was first informally run by the Section, then administered by leaders at Georgetown Law School, and finally housed at AALS beginning in the early 2000s.<sup>32</sup> Throughout the 2000s and early 2010s, AALS maintained the Women Deans Databank by asking senior staff and faculty at member law schools to nominate women who “possess[ed] the qualifications to be considered for positions of deanship.”<sup>33</sup>

As the AALS Section on Women in Legal Education continued its work recommending best practices for women in legal education and maintaining the databank to provide a pathway to the deanship for women, the ABA Commission on Women in the Profession similarly began to highlight the experiences of women in law school, with an intense focus in the mid-1990s.<sup>34</sup> The Commission documented an environment where women faculty were underrepresented among their peers and demeaned by students in the classroom.<sup>35</sup> This study revealed troubling concerns, as well as some innovative efforts to engage women as students and faculty.<sup>36</sup>

Despite the focused attention, the Commission concluded that “gender bias and the barriers it creates to women’s full and equal participation have not disappeared as a result of the increased numbers of women students and faculty.”<sup>37</sup>

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<sup>30</sup> *Id.* at 763.

<sup>31</sup> 1996 AALS HANDBOOK [I], 93 (1996).

<sup>32</sup> See Rothstein, *supra* note 29, at 764.

<sup>33</sup> *Women and Minority Deans’ Databanks*, ASS’N AM. L. SCHS. (Sept. 22, 2008), [https://web.archive.org/web/20080922205943/http://www.aals.org/services\\_databanks.php](https://web.archive.org/web/20080922205943/http://www.aals.org/services_databanks.php) [<https://perma.cc/MG5G-66SZ>].

<sup>34</sup> See, e.g., A.B.A. COMM’N ON WOMEN IN THE PRO., UNFINISHED BUSINESS: OVERCOMING THE SISYPHUS FACTOR: A REPORT ON THE STATUS OF WOMEN IN THE LEGAL PROFESSION 6 (1995) [hereinafter A.B.A. COMM’N ON WOMEN IN THE PRO., UNFINISHED BUSINESS]; A.B.A. COMM’N ON WOMEN IN THE PRO., ELUSIVE EQUALITY: THE EXPERIENCES OF WOMEN IN LEGAL EDUCATION 1-3 (1996) [hereinafter A.B.A. COMM’N ON WOMEN IN THE PRO., ELUSIVE EQUALITY]; A.B.A. COMM’N ON WOMEN IN THE PRO., DON’T JUST HEAR IT THROUGH THE GRAPEVINE: STUDYING GENDER QUESTIONS AT YOUR LAW SCHOOL 1 (1998).

<sup>35</sup> A.B.A. COMM’N ON WOMEN IN THE PRO., UNFINISHED BUSINESS, *supra* note 34, at 7.

<sup>36</sup> *Id.* at 8. The Commission took note that some law schools were implementing innovative practices and policies to foster an environment inclusive of women students and faculty, such as monitoring the hiring and tenure of women, along with the classroom environment and course curricula. *Id.*

<sup>37</sup> A.B.A. COMM’N ON WOMEN IN THE PRO., ELUSIVE EQUALITY, *supra* note 34, at 2.

It issued numerous, specific recommendations and best practices to law faculty individually<sup>38</sup> and collectively,<sup>39</sup> students,<sup>40</sup> law school deans,<sup>41</sup> accreditors,<sup>42</sup> bar associations, and other legal organizations<sup>43</sup> to increase the number of women attending and teaching at law schools.

Perhaps because they are accredited by the ABA and evaluated by AALS, law schools have achieved striking improvements in advancing women's engagement, outpacing all other areas of the legal profession in doing so. By 2001, women reached approximate parity in incoming law students; by 2016, women outnumbered men in incoming law students.<sup>44</sup> By 2021, 55% of law students were women, 45% of law faculty were women, and 42% of law deans were women.<sup>45</sup>

Noticeably, progress in the advancement of women on the faculty or as deans has been substantial, although less impressive than the number of women enrolling in law school. As was the case with enrollment, women were largely excluded from joining the faculty ranks of American law schools until the 1960s.<sup>46</sup> By that time, the number of women who had served in tenure-track positions at any American law school was approximately thirty and included many law librarians.<sup>47</sup> In the following decade, nearly every law school had at least one woman serving on its faculty.<sup>48</sup> Interestingly, “[h]igher-ranked schools . . . lagged

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<sup>38</sup> *Id.* at 37-41. For example, individual faculty were advised to: examine broad coverage of content in class and in textbooks; respect diverse viewpoints; employ a variety of teaching methods and graded assessments; and avoid long take-home exams that disadvantage caregivers. *Id.* at 41.

<sup>39</sup> *Id.* at 53-56. The Commission suggested that law faculty take a number of actions including: adopt gender neutral admissions criteria; draft inclusive recruitment materials; consider admissions data by gender; establish a career services mentoring program for women; collect information from employers on family leave, flex-time, family benefits, sexual harassment, and discrimination policies; and review sexual harassment policies and offer education on sexual harassment. *Id.*

<sup>40</sup> *Id.* at 41. The Commission suggested that law students call out inappropriate classroom behavior and support each other. *Id.*

<sup>41</sup> *Id.* at 42-43. The Commission narrowed many of its recommendations for deans, suggesting they: make elimination of gender bias a focus; consider gender equality in committee assignments and faculty support; address salary inequity; consider how to attract diverse faculty; review the student evaluation process for bias; assess classroom dynamics for instances where faculty treat women students differently or where students treat female faculty differently; assess climate and student life, student groups, and student events; offer written and specific family leave policies; schedule core classes between 10:00 and 3:00 to accommodate student caregivers; offer on-campus day care or provide information on local daycare. *Id.*

<sup>42</sup> *Id.* at 58-61. The Commission made the following recommendations to accreditation and national legal organizations: collect and publicly report data on the number of women faculty and ranks, participation on committees, promotions, allocation of chairs and awards, women admitted, enrolled, and in student leadership positions, performance and satisfaction; conduct and sponsor research into gender, performance, and the law school experience; publish what factors make schools more or less hospitable to women and minorities; offer educational programs and model policies. *Id.*

<sup>43</sup> A.B.A. COMM'N ON WOMEN IN THE PRO., *ELUSIVE EQUALITY*, *supra* note 34, at 56-58.

<sup>44</sup> Sheryl L. Axelrod, *The Underrepresentation of Women at the Highest Levels of the Legal Profession*, LAW PRAC. TODAY (Oct. 5, 2022), <https://www.lawpracticetoday.org/article/despite-all-the-profession-has-to-gain-from-our-greater-inclusion-the-under-representation-of-women-at-the-highest-levels-of-the-legal-profession/0>.

<sup>45</sup> Katz et al., *supra* note 24, at 48.

<sup>46</sup> *Id.* at 49.

<sup>47</sup> *Id.* at 52.

<sup>48</sup> *Id.* at 48.

in women's representation in faculty. The gap between Tier 1 versus the rest existed throughout the entire period [studied] and increased in magnitude during the 1980s and 1990s."<sup>49</sup>

Over time, "[a]s the number of women students grew, they demanded a more welcoming environment, which included advocating for hiring more women faculty."<sup>50</sup> In the fifteen years between Fall 2011 and Fall 2024, the percentage of full-time faculty who were women grew from 40.2%<sup>51</sup> to 49.8%, reaching near-parity but still not reflecting the gender distribution of law students.<sup>52</sup> Unfortunately, as has been thoroughly documented by other scholars, "[o]n average, women in legal education are being hired at lower academic ranks than men."<sup>53</sup> Although law schools had increased the number of women faculty overall by 2000, only 20% of full professors at American law schools were women at that time.<sup>54</sup>

### B. Dig Deeper: There Are Fewer Women in the Pipeline

ABA Standard 203(b) requires that all deans, absent extraordinary circumstances, hold a faculty appointment with tenure.<sup>55</sup> Many women faculty hold appointments without tenure or the opportunity for tenure.<sup>56</sup> As such, the number of women faculty eligible for appointment as dean is much smaller than the overall representation of women on a law faculty. Thus, typical data reporting on gender diversity on law faculties masks the reality that women do not constitute as sizable a pipeline to deanship as men do.

Much of the growth of women on law faculties has been in full-time faculty positions in areas dominated by female faculty: legal research and writing, clinical teaching, academic success, and bar preparation.<sup>57</sup> "In the 1970s and 1980s, women and men were roughly equally likely to occupy non-tenure track and non-research positions. Since the 1990s, however, women faculty have been

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<sup>49</sup> *Id.* at 61.

<sup>50</sup> *Id.* at 52.

<sup>51</sup> A.B.A. *Required Disclosures: Compilation – All Schools Data, 2024 Faculty Resources*, 2011 Faculty & Administrators, *supra* note 2 (under "Compilation – All Schools Data" select 2011 for the year, and Faculty & Administrators for the section, then click Generate Report).

<sup>52</sup> *Id.* at 2024 Faculty Resources, *supra* note 2 (under "Compilation – All Schools Data" select 2024 for the year, and Faculty Resources for the section, then click Generate Report).

<sup>53</sup> Renee Nicole Allen et al., *The "Pink Ghetto" Pipeline: Challenges and Opportunities for Women in Legal Education*, 96 U. DET. MERCY L. REV. 525, 534 (2019).

<sup>54</sup> DEBORAH L. RHODE, A.B.A. COMM'N ON WOMEN IN THE PRO., *THE UNFINISHED AGENDA: A REPORT ON THE STATUS OF WOMEN IN THE LEGAL PROFESSION* 27 (2001).

<sup>55</sup> A.B.A. STANDARDS & RULES, *supra* note 25, at STANDARD 203.

<sup>56</sup> See, e.g., Allen et al., *supra* note 53, at 526-7; Katz et al., *supra* note 24, at 68-70.

<sup>57</sup> See Allen et al., *supra* note 53, at 527, 535 ("Law schools have bolstered their overall faculty diversity by hiring women for non-tenure track clinical and legal writing faculty positions."). Law librarians are another class of law professors dominated by women faculty that, collectively, do not enjoy the same status or salaries as their tenured and tenure-track colleagues. Jamie J. Baker, *The Intersectionality of Law Librarianship & Gender*, 65 VILL. L. REV. 1011, 1016 (2020). The number of law librarians, however, did not generally increase over the same period. Laura J. Ax-Fultz, *Why Academic Law Librarians Quit: Results of the Law Librarian Exit Survey*, 117 LAW LIBR. J. 86, 96-7 (2025).

[two to three] times more likely than men faculty to occupy non-tenure track and non-research positions.”<sup>58</sup> These “pink-collar” positions are not equal to tenure and tenure-track appointments in many significant ways and are frequently described as lacking “status.”<sup>59</sup> Faculty in these positions, which are dominated by women, are compensated at considerably lower salaries than tenured and tenure-track faculty.<sup>60</sup> Despite increases in the number of law schools where clinical, legal writing, and bar preparation faculty are eligible for tenure, in 2023, just 44% of law schools reported that clinical faculty were tenure-eligible, and 26% reported the same for legal writing faculty.<sup>61</sup> Although women appear to have achieved gender parity in the number of full-time faculty positions, those without tenure or tenure-eligibility are unlikely to meet the ABA’s standard requiring that deans be appointed with tenure.

Scholars have documented the gender disparities in status among full-time law school faculty positions, describing the socioeconomic status of these jobs as a “pink ghetto.”<sup>62</sup> “The legal academy has an explicit and de jure two-track system for its lawyers: a high-status, high-pay, professional track made up overwhelmingly of men, and a low-status, low-pay ‘instructor’ track made up overwhelmingly of women.”<sup>63</sup>

Not only are untenured, non-tenure-track faculty generally ineligible for appointment as dean, but their participation in the dean selection process may also often be expressly and impliedly limited. In matters of faculty governance, non-tenure-track faculty have substantially limited voting rights.<sup>64</sup> While tenure-track faculty enjoy the expectation of contract renewal culminating in tenure within a definitive three-to-six-year period, non-tenure-track faculty lack the expectation of contract renewal and are not eligible for tenure,<sup>65</sup> which may functionally limit their freedom of expression. The ability of these faculty to openly participate in the process may, thus, be hindered by the limitations of their status.

While the rise in the number of women serving full-time on law faculties has been a necessary precursor for the increase in the number of women law deans, a similarly disparate pattern has emerged “for deans but is delayed by roughly a decade. Since the 2000s, women deans have been more than [two] times as likely as men deans to occupy that position on an interim basis.”<sup>66</sup> Although reported data demonstrates tremendous growth in the number of women law faculty

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<sup>58</sup> Katz et al., *supra* note 24, at 70.

<sup>59</sup> Allen et al., *supra* note 53, at 527; Baker, *supra* note 57, at 1012; Katz et al., *supra* note 24, at 68-69. This phenomenon was not limited to legal education; the American professoriate in general saw a steep decline in the “proportion of all faculty on tenured and tenure-eligible appointments” between the 1980s and 2010s, falling from 29% in 1979 to just 17% in 2013. MARTIN J. FINKELSTEIN ET AL., *THE FACULTY FACTOR: REASSESSING THE AMERICAN ACADEMY IN A TURBULENT ERA* 58 (2016). At the same time, the overall number of women faculty was growing—by 109% between 1993 and 2013. *Id.* at 67.

<sup>60</sup> Allen et al., *supra* note 53, at 527; Baker, *supra* note 57, at 1012.

<sup>61</sup> ASS’N OF AM. L. SCHS., *AMERICAN LAW SCHOOL FACULTY STUDY* 52 (2024).

<sup>62</sup> Allen et al., *supra* note 53, at 526; Baker, *supra* note 57, at 1012.

<sup>63</sup> Allen et al., *supra* note 53, at 526.

<sup>64</sup> *See id.* at 527; Katz et al., *supra* note 24, at 68-70.

<sup>65</sup> *See* Allen et al., *supra* note 53, at 527; Katz et al., *supra* note 24, at 68-70.

<sup>66</sup> Katz et al., *supra* note 24, at 70.

supporting a robust pipeline for women law deans, a closer look reveals that the advancements are more limited than they appear. Men still dominate the pool from which law school leaders are chosen.

#### IV. THE GLASS CLIFF IN THE LEGAL ACADEMY

##### A. Crisis Gave Rise to Women Deans

Although progress was slow, the number of women deans has grown and is closer to parity than ever before.<sup>67</sup>

Throughout the 1940s, 1950s, and early 1960s, only a few law schools were led by women deans and only about one in twenty law schools had ever had a woman dean. At the turn of the century, only one in ten law schools were led by women deans and only about one-third of law schools had ever had a woman dean.<sup>68</sup>

Even into the twenty-first century, gender disparities persisted. “For example, as of 2020, one in five law schools had never had a woman dean.”<sup>69</sup> And gender equity in deanship was delayed among schools with better rankings. “Tier 1, which moves around quite a bit because it consists of only [fourteen] law schools, historically lagged behind all others. In the 1970s, Tiers 2 and 3 [female] deanships increased, followed by Tier 1 in the 1980s.”<sup>70</sup>

From 2000 to 2024, the percentage of law deans who were women rose from 10.4%<sup>71</sup> to 46%<sup>72</sup> with much of that increase concentrated in five years from 2010-2015, when the percentage of law deans who were women increased from 23% to 31%.<sup>73</sup> This period of growth represents a historically remarkable pace of advancement.

The trend toward more women assuming deanships at American law schools in the twenty-first century also includes tremendous growth in the number of women of color serving as deans.<sup>74</sup> From 2005 to 2020, the number of women of color serving as law school deans increased by more than eightfold, growing from three in 2005 to twenty-eight in 2020.<sup>75</sup> The most significant period of growth

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<sup>67</sup> *Id.* at 48.

<sup>68</sup> *Id.* at 49; *see, e.g.*, RHODE, *supra* note 54, at 27; Allen et al., *supra* note 53, at 529-30 (“Currently, 30% of deans at ABA accredited schools are female. This number represents an increase of 50% since 2006, and 75% since 1997. In early 2019, the number of minority female deans or interim deans rose to [nineteen], representing 10% of ABA accredited law schools.”).

<sup>69</sup> Katz et al., *supra* note 24, at 49.

<sup>70</sup> *Id.* at 61.

<sup>71</sup> Laura M. Padilla, *A Gendered Update on Women Law Deans: Who, Where, Why, and Why Not?*, 15 AM. U. J. GENDER, SOC. POL’Y & L. 443, 464 (2007).

<sup>72</sup> *Profile of the Legal Professional 2024: Women in the Legal Profession*, *supra* note 4.

<sup>73</sup> JEFF ALLUM, KATIE KEMPNER & JUDITH AREEN, ASS’N OF AM. L. SCHS., AMERICAN LAW SCHOOL DEAN STUDY 22 (2022), [https://www.aals.org/app/uploads/2024/10/AALS-Report\\_American-Law-School-Dean-Study\\_FINAL\\_508-compressed.pdf](https://www.aals.org/app/uploads/2024/10/AALS-Report_American-Law-School-Dean-Study_FINAL_508-compressed.pdf).

<sup>74</sup> *Id.* at 23.

<sup>75</sup> *Id.*

for women of color serving as law deans occurred from 2015 to 2020, when the number of deans identifying as women of color increased from nine to twenty-eight.<sup>76</sup> By 2020, Black women held twenty of those twenty-eight positions.<sup>77</sup> As they constitute a substantial number of modern women law deans, women of color are significantly impacted by the glass cliff phenomenon.<sup>78</sup>

There may be myriad explanations for the exponential increase in the number of women leading law schools in the first quarter of the twenty-first century; the growth is likely attributable to multiple, overlapping factors beyond the scope of this Essay. Had law schools finally effectively implemented the suggestions of the AALS Section on Women in Legal Education and the ABA's Commission on Women in the Profession?<sup>79</sup> Had university leaders and faculty begun to recognize and address gender bias through effective diversity training? Had feminism finally won the day? The rise in the number of women deans is likely attributable, in part, to progress in each of these areas.

Of significant importance to advancing women into law school deanships were the efforts of the AALS Section on Women in Legal Education and the ABA Commission on Women in the Profession to draw attention to the underrepresentation of women across the legal academy, including deanships. Naming discrimination is essential to addressing it. These organizations went beyond documenting underrepresentation and made numerous and evolving recommendations to mitigate the disparate treatment of women in law schools.<sup>80</sup> Suggestions included transparent recruitment practices, diversifying search committees, professional development, mentoring, and championing of prospective women leaders.<sup>81</sup> It is difficult to individually measure the impact of these efforts as institutional responses varied dramatically.

Nonetheless, some combination of these efforts likely contributed to the rise in the number of women assuming deanships at law schools in the twenty-first century by both expanding the pipeline of interested and qualified women to the deanship and by opening more opportunities for women in the deanship. As more opportunities for women to gain executive and management experience grew, so too did the number of women ascending to leadership positions. Eighty-four percent of women deans assumed their positions from within the legal academy.<sup>82</sup> More law deans (34%) came to their current position from an associate deanship than from any other role.<sup>83</sup> Twenty-one percent of law school deans served as interim or sitting deans before assuming their current positions.<sup>84</sup>

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> See Angela Onwunachi-Willig & Kellye Testy, *The Other Side of the Glass Cliff*, 94 UMKC L. REV. 651 (2026), for a detailed discussion of the glass cliff and intersectionality.

<sup>79</sup> See, e.g., *supra* notes 29-43 and accompanying text for a discussion of the recommended strategies offered by AALS Section on Women in Leadership and ABA Commission on Women in the Profession.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> ALLUM ET AL., *supra* note 73, at 33.

<sup>83</sup> *Id.* at 34.

<sup>84</sup> *Id.*

It is also possible that the enrollment and bar passage crises that plagued law schools from 2010 through 2019 presented women with the opportunity to walk onto a glass cliff, where transformational change was demanded and failure was expected. More brilliant, talented, and experienced women were presented with real opportunities to lead than ever before. The catch was that the job had arguably become more complicated and difficult than that faced by their male predecessors.

## B. Enrollment Challenges

The 2008 financial crisis was a temporary boon for law school admissions, as it is not uncommon for law school applications to rise when the national market for white-collar employment contracts.<sup>85</sup> From 2007 to 2010, the number of applicants increased by 5%, culminating in a peak of over 87,900 applicants to ABA-approved law schools in 2010 (see Figure 1).<sup>86</sup> As law schools graduated larger numbers of students following their application bump, the legal industry (suffering from its own contraction in the wake of a recession) was unable to absorb and employ them all.<sup>87</sup> Once graduate employment rates began to decline, law school applications followed suit, declining precipitously—by 2015, applicant numbers had fallen 38% from 2010, representing the lowest point in the last fifteen years.<sup>88</sup> Since then, applicant numbers have recovered to around 65,000 in 2024, which still represents a 26% decrease from 2010.<sup>89</sup>

This downturn occurred as the number of women deans continued to rise. From 2010 to 2015, the percentage of deans who were women increased by eight percentage points from 23% to 31%.<sup>90</sup>

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<sup>85</sup> Jesus Mesa, *What the Surge in Law School Applications Says About the Economy*, NEWSWEEK (Mar. 18, 2025), <https://www.newsweek.com/what-surge-law-school-applications-says-about-economy-2046146> [<https://perma.cc/WHB5-5F3Y>].

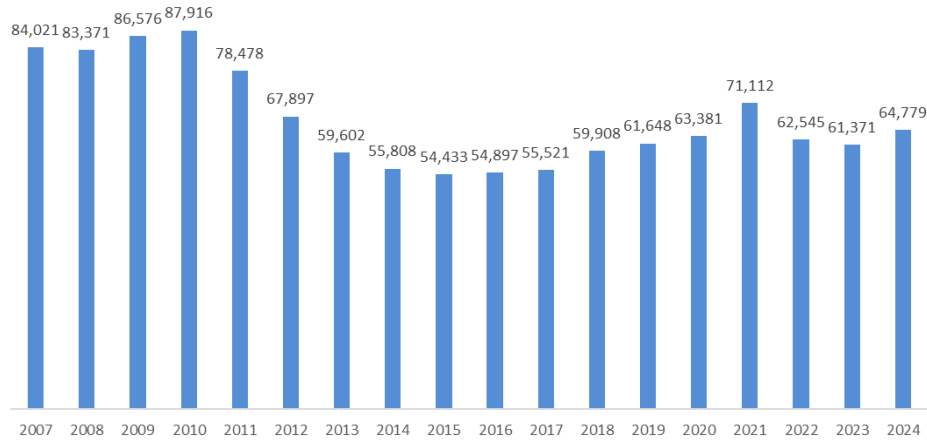
<sup>86</sup> *Archive: 2000-2015 ABA End-of-Year Summaries—Applicants, Admitted Applicants & Applications*, LAW SCH. ADMISSION COUNCIL, <https://www.lsac.org/archive-2000-2015-aba-end-year-summaries-applicants-admitted-applicants-applications> [<https://perma.cc/WHB5-5F3Y>] (last visited Nov. 5, 2025).

<sup>87</sup> See *Class of 2010 Graduates Faced Worst Job Market Since Mid-1990s: Longstanding Employment Patterns Interrupted*, NAT'L ASS'N OF L. PLACEMENT (June 1, 2011), <https://www.nalp.org/page.cfm?name=2010selectedfindingsrelease&print=Y>.

<sup>88</sup> *Archive: 2000-2015 ABA End-of-Year Summaries—Applicants, Admitted Applicants & Applications*, *supra* note 86.

<sup>89</sup> *Admissions Trends: Applicants, Admitted Applicants, Matriculants & Applications*, LAW SCH. ADMISSION COUNCIL, <https://report.lsac.org/View.aspx?Report=AdmissionTrendsApplicantsAdmitApps> [<https://perma.cc/FKV2-K49C>] (last visited Nov. 4, 2025); *Archive: 2005-2019 End-of-Year Summaries, Applicants, Admitted Applicants, Applications & Matriculants*, LAW SCH. ADMISSION COUNCIL, <https://report.lsac.org/View.aspx?Report=AdmissionTrendsApplicantsAdmitApps> [<https://perma.cc/8BXG-DKUX>] (last visited Nov. 4, 2025) (select “Historical Data” in the left hand column).

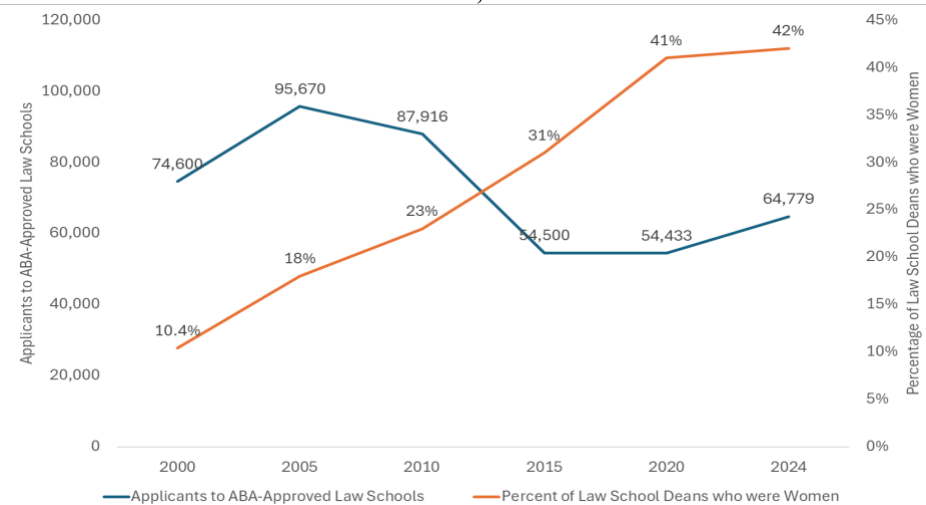
<sup>90</sup> ALLUM ET AL., *supra* note 73, at 22.

**Figure 1: Applicants to ABA-Accredited Law Schools, 2007-2024<sup>91</sup>**

As law school applications began to spiral downward, law schools started hiring women leaders, in many cases for the first time. Law schools in crisis may have sought transformational leadership, as their corporate counterparts had done. Because the roots of the decline in law school applicant numbers were beyond the control of any particular law school or leader (a national economic meltdown affecting all sectors), failure was not unexpected. Talented women whose leadership opportunities had been previously limited welcomed the challenge and stepped onto the glass cliff.

<sup>91</sup> *Archive: 2005-2019 End-of-Year Summaries, Applicants, Admitted Applicants, Applications & Matriculants, supra note 89 (select “Historical Data” in the left hand column); Admissions Trends: Applicants, Admitted Applicants, Matriculants & Applications, supra note 89.*

**Figure 2: Applicants to ABA-Accredited Law Schools and Percent of Deans Who Were Women, 2000-2024<sup>92</sup>**



While the glass cliff theory cautions against confirmation bias that might lead one to attribute the decrease in law school applications to the increase in the number of women leading law schools, it would similarly not support the conclusion that women deans are responsible for the relative recovery and stabilization of application rates that followed. Law school applications are influenced by many external factors, such as the economy, employment rates, and even elections.<sup>93</sup> What is undeniable, however, is that the challenge of leading law schools through an enrollment crisis increased substantially just as more women were left to the job.

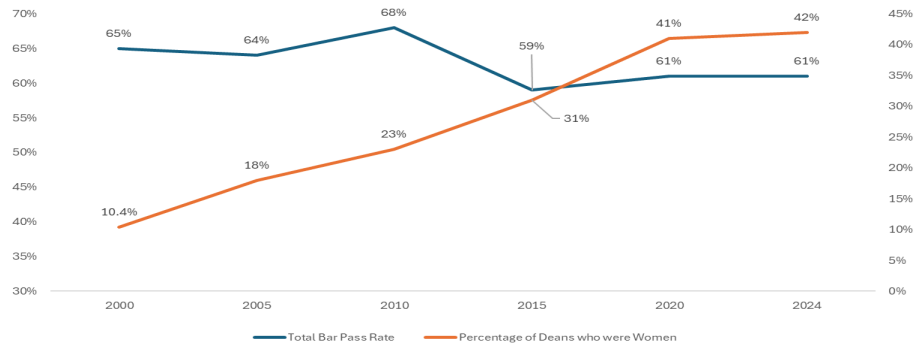
### C. Bar Passage Crisis

The decrease in law school applications was not the only calamity to confront law school leaders in the first quarter of the twenty-first century. In July 2014, the percentage of test-takers passing bar exams nationwide crashed, falling by nine percentage points from 2010 to 2015 (see Figure 3). Since 2015, total bar pass rates have remained in the low 60s, compared to the mid-to-upper 60s rates of 2010 and earlier.

<sup>92</sup> *Archive: 2000-2015 ABA End-of-Year Summaries—Applicants, Admitted Applicants & Applications*, *supra* note 86 (2000–2015 Applicant Data); *Admissions Trends: Applicants, Admitted Applicants, Matriculants & Applications*, *supra* note 89 (2020-2024 Applicant Data); Padilla, *supra* note 71, at 464 (2000 Women Law Deans); ALLUM ET AL., *supra* note 73, at 22 (2005-2020 Women Law Deans); *Profile of the Legal Profession 2024: Women in the Legal Profession*, *supra* note 4 (2024 Women Law Deans).

<sup>93</sup> See Mesa, *supra* note 85.

**Figure 3. Bar Pass Rates and Percent of Law School Deans Who Were Women, 2000-2024<sup>94</sup>**



Scholars have debated numerous hypotheses seeking to explain the sudden decrease in bar pass rates, and discussion of these hypotheses exceeds the scope of this Essay.<sup>95</sup> The drop in passage and the slow recovery, however, are not debatable. These presented a dramatic challenge for law schools, as they sought to recruit potential law students to reverse declining enrollment trends; although bar passage is not the singular determinant for law school selection, it is a substantial consideration for most applicants.<sup>96</sup> Additionally, the percentage of graduates who pass the bar exam has become an increasingly significant factor in the methodology U.S. News & World Reports employs to rank law schools, jumping from a weight of 2.25% in the formula in 2022 to 18% in 2025.<sup>97</sup> Moreover, in

<sup>94</sup> Nat'l Council of Bar Exam'rs, *2000 Statistics*, BAR EXAMINER 3 (May 2001); Nat'l Council of Bar Exam'rs, *2005 Statistics*, BAR EXAMINER 24 (May 2006); Nat'l Council of Bar Exam'rs, *2010 Statistics*, BAR EXAMINER 9 (Mar. 2011); Nat'l Council of Bar Exam'rs, *2015 Statistics*, BAR EXAMINER 17 (Mar. 2016), <https://thebarexaminer.ncbex.org/wp-content/uploads/PDFs/2015-StatisticsCorrected030917B.pdf> [<https://perma.cc/SL4V-E4GZ>]; Nat'l Council of Bar Exam'rs, *2020 Statistics Snapshot*, BAR EXAMINER, <https://thebarexaminer.ncbex.org/2020-statistics/2020-statistics-snapshot/> [<https://perma.cc/JDS6-PM58>] (last visited Nov. 4, 2025); Nat'l Council of Bar Exam'rs, *2024 Statistics Snapshot*, BAR EXAMINER, <https://thebarexaminer.ncbex.org/2024-statistics/2024-statistics-snapshot/> [<https://perma.cc/6L7Y-R8MS>] (last visited Nov. 4, 2025); see also Padilla, *supra* note 71, at 464 (2000 Women Law Deans); ALLUM ET AL., *supra* note 73, at 22 (2005-2020 Women Law Deans); *Profile of the Legal Professional 2024: Women in the Legal Profession*, *supra* note 4 (2024 Women Law Deans).

<sup>95</sup> See Karen Sloan, *The Big Fail: Why Bar Pass Rates Have Sunk to Record Lows*, LAW.COM (Apr. 14, 2019), <https://www.law.com/2019/04/14/the-big-fail-why-bar-pass-rates-have-sunk-to-record-lows/> [<https://perma.cc/LP8J-WB7A>]; Derek T. Muller, *Why Are Law School Graduates Still Failing the Bar Exam at a High Rate?*, EXCESS DEMOCRACY (Jan. 7, 2019), <https://excessofdemocracy.com/blog/2019/1/why-are-law-school-graduates-still-failing-the-bar-exam-at-a-high-rate> [<https://perma.cc/L3DA-NFUY>].

<sup>96</sup> See Derek T. Muller & Christopher J. Ryan Jr., *The Secret Sauce: Examining Law Schools That Overperform on the Bar Exam*, 75 FLA. L. REV. 65, 67 (2023).

<sup>97</sup> 2023 U.S. News Law School Rankings Methodology, SPIVEYCONSULTING: BLOG (Mar. 15, 2022), <https://www.spiveyconsulting.com/blog-post/2023-us-news-law-school-rankings-methodology/>. [<https://perma.cc/Z25D-PD3Q>]; Eric Brooks et al., *Methodology: 2025 Best Law Schools*, U.S. NEWS & WORLD REPORT (Apr. 7, 2025), <https://www.usnews.com/education/best-graduate-schools/articles/law-schools-methodology>; Muller & Ryan, *supra* note 96, at 68, n.4.

2019, the ABA set a new standard requiring that 75% of a law school's graduates pass the bar examination within two years of graduation for that school to remain in good standing.<sup>98</sup> A law school's stake in its students' bar exam performance has increased in recent years as success rates have fallen.<sup>99</sup> The pressure to improve bar passage rates, therefore, multiplied just as more women began assuming authority at American law schools.

## V. ADDRESSING THE GLASS CLIFF

Women leading law schools today face many of the same challenges to the advancement of women leaders across sectors. Mitigation strategies will not surprisingly mimic those employed successfully in other arenas.<sup>100</sup> Collecting and publishing data on the experiences of women leaders can help dispel the false assumption that gender equity has been achieved, thereby equipping future leaders with greater knowledge. Expanding faculty and dean search committees to include full-time, non-tenure-track faculty may yield greater leadership opportunities for women, and including full-time, non-tenure-track faculty in faculty decision-making, including the selection of faculty and deans, may open even more leadership positions to women faculty.

A starting point for addressing the glass cliff in the legal academy is to collect and publish data on the experiences of women leaders. This information can inform not only those women aspiring to leadership but also the men and women who may support them. Research suggests that, while in a leadership role, women are reluctant to publicly acknowledge gender specific challenges, which may be weaponized to suggest personal weakness, rather than the bias and discrimination of those targeting women leaders.<sup>101</sup>

One clear problem with this strategy is that downplaying the significance of the real (and unfair) obstacles women face on breaking through the glass ceiling may impede the future progress by concealing the need for policy reform and playing into the hands of those who oppose gender equality in the workplace.<sup>102</sup>

Publishing data on gender inequity also helps prepare aspiring women for future leadership by allowing them to appropriately anticipate the real challenges they may face. It is incumbent upon those who appreciate the positive impact of gender

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<sup>98</sup> A.B.A. STANDARDS AND RULES, *supra* note 25, at STANDARD 316.

<sup>99</sup> Muller & Ryan, *supra* note 96, at 71-72.

<sup>100</sup> See *supra* text accompanying notes 29-43 for a description of many strategies for achieving gender equality in law school leadership. Any combination of the strategies may be responsible for increasing the number of women leading law schools and could offer effective solutions for similarly resolving the glass cliff phenomenon. The authors anticipate that many of the suggestions implemented to address gender inequality over the past thirty years may face novel legal challenges if implemented today, which are beyond the scope of this Essay. To that end, the authors limit potential solutions here to a few readily achievable actions, largely within the control of law school faculties and university leaders.

<sup>101</sup> Ryan & Haslam (2007), *supra* note 13, at 561.

<sup>102</sup> *Id.*

equity on institutional success to collect and publicize this information without exposing those women in leadership positions to unfair criticism.

Another obvious tool to address the glass cliff in the legal academy is to include more women on search committees for both deans and tenure-track faculty positions that build the pipeline to deanships. As Justice Ruth Bader Ginsburg pronounced, “women belong in all places where decisions are being made.”<sup>103</sup> Although many law schools restrict service on hiring committees to tenured or tenure-track faculty, this arbitrary limitation often either leaves women underrepresented on selection committees or forces tenured and tenure-track women faculty into greater service at the expense of their research and teaching. This committee service can be more evenly distributed by tapping into the pool of overwhelmingly female faculty serving in non-tenure-track positions. Such a gender-neutral action would offer broader perspectives on hiring.

Relatedly, many faculties arbitrarily restrict the voting rights of non-tenure-track faculty. Expanding voting rights in dean and faculty selection decisions to non-tenure-track faculty would broaden opportunities and expectations for all law school leaders. Eliminating arbitrary limitations on the voting rights of non-tenure-track, full-time faculty may open faculty and decanal hiring discussions and decisions to novel approaches and outcomes.

## VI. CONCLUSION

The advancement of women into law school leadership positions should be celebrated, but within the context that substantial obstacles to gender equality in law school leadership remain. A closer assessment of available data reveals that, although the number of full-time women holding faculty appointments has grown substantially, much of that growth has been among those without status. The number of tenured and tenure-track women on faculty—constituting the pool from which women law school deans are selected—has progressed at a slower pace. To read the published data without this context creates a false sense that the goals of gender equity have been achieved.

A sizable proportion of those women who have successfully navigated the path to tenure and into leadership positions have done so at a time when the role of dean has become more difficult. The doors of many law schools were opened to women aspiring to become law deans, just as law school applications, graduate employment, and bar passage rates all contracted. This phenomenon—called the “glass cliff”—predicts failure for women taking the helm and exposes them to personal scrutiny and blame for inheriting a crisis.

Fortunately, so many women law school deans have accepted the difficulties of leading modern law schools amid decreased applications, low bar passage rates, and even a global pandemic, and have overcome them. But to ignore the obstacles imposed on them by others because of their gender dishonors the

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<sup>103</sup> Joan Biskupic, *Ginsburg: The Court Needs Another Woman*, USA TODAY (May 5, 2009), [https://usatoday30.usatoday.com/news/washington/judicial/2009-05-05-ruthginsburg\\_N.htm](https://usatoday30.usatoday.com/news/washington/judicial/2009-05-05-ruthginsburg_N.htm) [<https://perma.cc/LDG5-AXM3>].

depth of their talents. “[G]lass cliffs only increase the factor by which women’s competence needs to exceed men’s in order for them to succeed.”<sup>104</sup> To prepare for their own success, future leaders must also be made aware of the gendered challenges that lie ahead.

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<sup>104</sup> Ryan & Haslam (2007), *supra* note 13, at 556.

# THE INDIAN LAW AUNTIES

Torey Dolan\*

## I. INTRODUCTION

In 2020, the Center for Women in Law and the National Association for Law Placement published a study entitled “Women of Color: A Study of Law School Experiences.”<sup>1</sup> The study was a mix of qualitative and quantitative data and was intended to “document the experiences of women of color in law school and identify gaps in access to student resources,” given the underrepresentation of women of color in legal organizations.<sup>2</sup> The report states that “not all women of color in law school share the same experience during law school.”<sup>3</sup> Portions of the report break down and compare quantitative data, whereby the experiences of women of color are compared to the responses from white women and white men. Many of these sections further break down data within the categories of Black/African-American women, Hispanic/Latina women, and Asian/Pacific Islander women. The report is rich in data ranging from experiences in law school classrooms to career services, professional networking opportunities, and workloads. It includes perceptions of race relations and discrimination, experiences in study groups, the financial burdens of law school, interactions with faculty, and questions of satisfaction. The range of topics gives a very vivid picture of what many women of color are experiencing. The study defines “woman of color” as “American Indian/Native American, Asian/Pacific Islander, Black/African-American, Hispanic/Latina, and multi-racial women,” though, despite this definition, American Indian/Native American women were the only named racial group not to receive a distinct analysis.<sup>4</sup>

Approximately a week after its release, the National Native American Bar Association (“NNABA”) under Thomasina Real Bird’s (Yankton Sioux Tribe) presidency reached out to the report authors because Native American women were not meaningfully included.<sup>5</sup> The letter was signed by several Native Women and Law Professors, requesting that the study be withdrawn so Native American women could be included or, in the alternative, that an apology be issued to Native American women law students.<sup>6</sup> In a meeting between the study organizers and Native women signatories, the signatories asked that the study be withdrawn until Native women could be included—they offered to circulate the survey through

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<sup>1</sup> NALP FOUND. L. CAREER RSCH. & EDUC. & CTR. WOMEN L., WOMEN OF COLOR: A STUDY OF LAW SCHOOL EXPERIENCES (2020), <https://www.acc.com/sites/default/files/resources/upload/WomenofColor-AStudyofLawSchoolExperiencesReport.pdf>.

<sup>2</sup> *Id.* at 15.

<sup>3</sup> *Id.* at 17.

<sup>4</sup> *Id.* at 157-58.

<sup>5</sup> See Letter from the National Native American Bar Association to the Center for Women in Law and the NALP Foundation (June 26, 2020), <https://www.nativeamericanbar.org/wp-content/uploads/2020/11/NNABA-Letter-Excluding-Natives-from-WOC-Study-Final.pdf>.

<sup>6</sup> *Id.*

various Native American Law Students Association chapters and Federal Indian Law programs.<sup>7</sup> The organizers offered to add language on the “statistically low number of Native women law student responses” to clarify why American Indian did not appear in the substantive body of the report.<sup>8</sup> The Center for Women in the Law (“CWL”) and the National Association for Law Placement (“NALP”) both declined to retract the study or apologize to Native Women, defending the decision on the grounds that Native Women respondents were 1% of total respondents which—although too small to merit their own analysis—“mirror[ed] their representation at participating law schools.”<sup>9</sup> (The report does not identify which law schools were represented in the study, so it is unclear if any schools with a dedicated Federal Indian law program participated). So, while American Indian women are considered in the “aggregate” data, their unique experiences as American Indian women are unaccounted for in the study.

American Indians and Alaskan Natives have been described as the “asterisk nation” because of how frequently data collection, data reports, and analysis do not represent them when reporting racial and ethnic data.<sup>10</sup> Some of these instances are due to small sample sizes, large margins of error, other statistical issues, or methodology shortcomings.<sup>11</sup> Whether the reason be benign or malicious, underrepresentation of Native people has consequences ranging from annoyance to depriving Native people of critical resources or substantive rights in private and public sectors.<sup>12</sup> That is why data equity has been such an essential issue for the Native community. Crystal Echo Hawk (Pawnee Nation), an activist for American Indian visibility in media, has remarked, “[I]f we are not collecting data on Native Americans and being very intentional, we become invisible.”<sup>13</sup> Thus, the underrepresentation of Native women in the study was painful, but it was not surprising.

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<sup>7</sup> Angeliqe EagleWoman, *Native Women Law Students Excluded from So-Called “Women of Color in Law Schools” Study*, ICT NEWS (June 26, 2020), <https://ictnews.org/opinion/native-women-law-students-excluded-from-so-called-women-of-color-in-law-schools-study/>.

<sup>8</sup> *Id.*

<sup>9</sup> The study included survey responses from 46 law schools and several law school affinity groups. In total, there were 4,084 survey responses, 2,682 of those from women, and 773 from women of color. The report does not identify which of the 46 law schools participated. There is nothing in the report’s methodology to suggest that the report authors sought out the participation of schools with dedicated Indian law or Indigenous law programs as the invitation was sent to all American Bar Association law school deans. See NALP FOUND., *supra* note 1; Letter from the Center for Women in Law to the National Native American Bar Association (July 1, 2020), <https://utexas.app.box.com/s/kqltrecige54wci9mloovgbrtbsfv6j>.

<sup>10</sup> NAT’L CONG. AM. INDIANS, POL’Y RSCH. CTR: DATA DISAGGREGATION, <https://archive.ncai.org/policy-research-center/research-data/data> (last visited Sept. 13, 2025).

<sup>11</sup> *Id.*

<sup>12</sup> See *id.*; Torey Dolan, *Voting in Our Voices: The American Community Survey, Indigenous Languages, and the Right to Vote in Arizona*, ARIZ. ATTY. MAG. (July-Aug. 2020), <https://www.azattorneymag-digital.com/azattorneymag/20200708/MobilePagedReplica.action?pm=2&folio=36#pg39>.

<sup>13</sup> Drew Lindsay, *The Native American Activist Taking on Hollywood — and Winning*, CHRON. PHILANTHROPY: COMMONS (Oct. 9, 2024), <https://www.philanthropy.com/commons/crystal-hawk-echo-native-american-advocacy>.

Angelique EagleWoman (Sisseton Dakota) in an op-ed commented, “To say that Native American women are marginalized, invisible, and regularly excluded is not an overgeneralization, but the reality we face on a daily basis.”<sup>14</sup> The NNABA and the National Native American Law Students Association co-signed a final statement: “Rather than take any of the actions requested, the study organizers responded in defense of their product and took no responsibility for the harm leveled on Native American women law students and Native American Women in the legal field generally.”<sup>15</sup> The NNABA went on to collaborate with the American Bar Association (“ABA”) Commission on Women in the Profession to produce a report, “Excluded & Alone: Examining the Experiences of Native American Women in the Law and Path Towards Equity.”<sup>16</sup> Women of the Native American bar community took up the labor of representing Native women law students where others did not.

Settler colonialism, as a system, is dependent on the othering and/or invisibility of Indigenous people. Within the United States, those people are often legally categorized as “Indian.”<sup>17</sup> Law and legal education play a role in creating this invisibility and maintaining this system. As Professor EagleWoman puts it, “[T]he law school experience is often devastating in the lack of attention to Native American legal issues. . . . We often experience isolation and depression in dealing with the lack of understanding, course offerings or representation of our peoples and legal issues in law school curricula.”<sup>18</sup> It is not one study that is the culprit. Rather, it is the compounding effect of multiple studies, data sets, and curricula, on top of a broader culture that hardly mentions Native people. When the Native women organized with their allies to conduct a study on the experiences of Native women, it was a powerful instance of refusal to disappear. Dr. Dian Million (Tanana Athabascan) has written about the power of Native women’s personal narratives as a point of analysis of the racialized, gendered, and sexual dimensions of colonization.<sup>19</sup> By incorporating the personal and communal narratives of Native women, this study adds to “emerging conversations on indigenous feminisms, to speak to ourselves, to inform ourselves and our generations, to counter and intervene in a constantly morphing colonial system.”<sup>20</sup>

American Indian women in the legal academy have stepped in to fight this persistent othering and invisibility in the law: through service, scholarship, and

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<sup>14</sup> EagleWoman, *supra* note 7.

<sup>15</sup> *NNABA and NNALSA’s Final Statement on the Women of Color Study*, NAT’L NATIVE AM. BAR ASS’N (July 2020), <https://www.nativeamericanbar.org/invisibility-in-the-legal-profession/> (select “NNABA and NNALSA’s Final Statement on the Women of Color Study” box).

<sup>16</sup> AM. BAR ASS’N COMM’N ON WOMEN IN THE PRO. & NAT’L NATIVE AM. BAR ASS’N, *EXCLUDED & ALONE: EXAMINING THE EXPERIENCES OF NATIVE AMERICAN WOMEN IN THE LAW AND A PATH TOWARDS EQUITY* (2023), <https://www.americanbar.org/content/dam/aba/administrative/women/2023/native-women-report-2023.pdf> [hereinafter *EXCLUDED & ALONE*].

<sup>17</sup> *See generally* *Yellen v. Confederated Tribes of Chehalis Rsr.*, 594 U.S. 338 (2021).

<sup>18</sup> EagleWoman, *supra* note 7.

<sup>19</sup> *See* Dian Million, *Felt Theory: An Indigenous Feminist Approach to Affect and History*, 24 *WICAZO SA REV.* 53, 53-54 (Fall 2004).

<sup>20</sup> *Id.* at 55.

tenacious advocacy. In doing so, they have created Indigenous feminist spaces whereby Native people can resist intellectual and social assimilation to varying degrees. Sarah Deer (Muscogee Nation) argued prophetically in 2019, “to cultivate future feminist interventions in Indian law, I contend we must do more to recruit and support Native women law students, and, ultimately, more Native women law professors.”<sup>21</sup> In Native communities, “auntie” is a term of endearment for Indigenous women, often women who take positions of leadership: cultural, social, professional, or otherwise.<sup>22</sup> The term encompasses blood relatives but also extends beyond them to accommodate expansive Indigenous philosophies of kinship and community care. As Laurel Goodluck (Tsimshian Tribe) describes her children’s book “Fierce Aunties,” aunties come in a variety of shapes, sizes, experiences, and backgrounds, but what these fierce aunties share is “[they] see you, they know you, and they love all of you, always.”<sup>23</sup> Aunties are who you go to for guidance, advice, support, and courage. Native women entering the legal academy today are heirs to a generation of Native aunties who have toiled to build communities and infrastructures to support Native students and Indian law education. I call them the “Indian law aunties.” Native women in the legal academy (the “Indian law aunties”) resist invisibility through labor, advocacy, and institution-building for the Native women coming into law behind them. They have paved the way for future generations of Native women scholars through their unapologetically indigenous feminist interventions. This Essay seeks to name the othering and disappearing of Native women within U.S. settler colonialism, contextualize the invisibility of Native women in the academy, honor the interventions of the Indian law aunties, and advocate for a more equitable future where the labor is not theirs alone.

## II. CONTEXTUALIZING THE OTHERING AND INVISIBILITY OF NATIVE WOMEN IN LIFE AND LAW

The Land O’Lakes butter company once had a logo with a stereotypical Indian woman (named “Mia”) kneeling on a bed of grass, next to a lake, and holding a box of butter.<sup>24</sup> In 2020, during a nationwide movement against racism, the company decided to remove Mia from its packaging.<sup>25</sup> Overall, this was a positive development given the psychological harm racial caricatures and mascots cause Native children and communities.<sup>26</sup> Yet, in classic Native humor fashion, a common joke emerged about the change: “Of course, they got rid of the Indian and kept her land!” A potent yet subtle quip that Native people recognize as

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<sup>21</sup> Sarah Deer, *(En)Gendering Indian Law: Indigenous Feminist Legal Theory in the United States*, 31 YALE J.L. & FEMINISM 1, 32 (2019).

<sup>22</sup> See Christian Allaire, *My Indigenous Aunties Taught Me to Champion Our Culture Through Style*, VOGUE (Mar. 21, 2022), <https://www.vogue.com/article/indigenous-aunties-traditional-style>.

<sup>23</sup> LAUREL GOODLUCK, FIERCE AUNTIES! 28 (2025).

<sup>24</sup> Katherine J. Wu, *Land O’Lakes Drops the Iconic Logo of an Indigenous Woman from Its Branding*, SMITHSONIAN MAG. (Apr. 28, 2020), <https://www.smithsonianmag.com/smart-news/mia-land-olakes-iconic-indigenous-woman-departs-packaging-mixed-reactions-180974760/>.

<sup>25</sup> See *id.*

<sup>26</sup> *Id.*

commenting on the history of gendered violence against Native women and its relationship to land dispossession.

American settler colonialism has always utilized law to define and maintain settler/Indigenous relations, often pursuing dispossession, assimilation, or annihilation. Under American law, “Indian” is a legal status that others Indigenous people and subjects them to a distinct legal system under the U.S. Constitution.<sup>27</sup> There are 575 federally recognized Tribes in the United States.<sup>28</sup> Congress’s authority over Indians and Indian Affairs is broad and undefined, reaching Indian Tribes and individual Indians inside and outside of Indian Country.<sup>29</sup> “Indian” citizens are othered from “non-Indians” as a matter of law. Who constitutes an “Indian” and what group constitutes an “Indian tribe” are political questions, but it is within the power of the courts to invalidate arbitrary extensions of that label by determining “what is distinctly Indian.”<sup>30</sup> Thus, Congress maintains the bounds of “Indian” and “Indian Tribe” and legislates these categories according to its plenary authority.<sup>31</sup> American law has created Indian status and maintains its definition under federal law. For many Indigenous people, this legal ordering is internalized and enmeshed with personal and professional identities.

Settler colonialism, as a system, like that of the United States, is a structure that “destroys to replace.”<sup>32</sup> Destruction need not be exclusively physical but can include a whole gamut of efforts to assimilate Indigenous people to the point of being indistinguishable from settlers, a form of destruction through absorption.<sup>33</sup> Within this dynamic, the Indian remains set apart until destruction, either literal or by assimilation.<sup>34</sup> This system ultimately “undermines the effort to understand Indigenous people’s politics and settler colonialism in the U.S. context but also stalls the effort to advance conversations around race itself.”<sup>35</sup> By virtue of this disappearance, conversations of white supremacy in popular discourse are rarely framed as conversations about settlers within a structure of settler colonialism predicated on Indigenous dispossession and disappearance. Nonetheless, law is integral to this process of othering and disappearing.

This social and political disappearing is—and always has been—heavily gendered and intertwined with land dispossession.<sup>36</sup> Take the experiences of Choctaw women. Early settlers paid little attention to Choctaw women, despite

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<sup>27</sup> See *Morton v. Mancari*, 417 U.S. 535, 548 (1974); *Haaland v. Brackeen*, 599 U.S. 255, 310 (2023).

<sup>28</sup> MAINON A. SCHWARTZ, CONG. RSCH. SERV., R47414, THE 574 FEDERALLY RECOGNIZED INDIAN TRIBES IN THE UNITED STATES 1 (2024).

<sup>29</sup> See *Haaland*, 599 U.S. at 327.

<sup>30</sup> *Baker v. Carr*, 369 U.S. 186, 216-17 (1962).

<sup>31</sup> See *id.*

<sup>32</sup> Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RES. 387, 388 (2006).

<sup>33</sup> KEVIN BRUYNEEL, *SETTLER MEMORY: THE DISAVOWAL OF INDIGENEITY AND THE POLITICS OF RACE IN THE UNITED STATES* 2 (2021).

<sup>34</sup> See *id.*

<sup>35</sup> *Id.* at 2–3.

<sup>36</sup> See AUDRA SIMPSON, *MOHAWK INTERRUPTUS: POLITICAL LIFE ACROSS THE BORDERS OF SETTLER STATES* 155-56 (2014).

their presence at political meetings between Choctaws and Europeans.<sup>37</sup> In Choctaw culture, women held significant legal and political power because their society was matrilineal and matriarchal.<sup>38</sup> European men rarely respected Choctaw women, and by ignoring Choctaw women to deal with Choctaw men, they denied these women their legal stature.<sup>39</sup> This disappeared the legal and political significance of Choctaw women within their matrilineal sociolegal society, shifting political power away from Choctaw women within Choctaw society overall.<sup>40</sup> This facilitated the effort to dispossess Choctaw people of land by imposing European conceptions of gender and property on Choctaw lands through negotiations with Choctaw men, thereby dispossessing Choctaw women. Choctaw women, once integral, were now a legal other. In the 1830s, the Choctaw Nation was removed under the Indian Removal Act to Indian Territory with the treaty guarantee that “no part of the land granted them shall ever be embraced in any territory or state.”<sup>41</sup> When that promise was broken, and Indian Territory was merged with Oklahoma Territory to become the state of Oklahoma, the statehood inauguration ceremony celebrated with a “symbolic wedding,” a Euro-American wedding ceremony in which a white man dressed as a cowboy married a young Indian woman.<sup>42</sup> To Indians, the bride symbolized land, sovereignty, and a self-determined future, and her marital union represented loss and Treaty violations. Had she been Choctaw, her wedding and subjugated legal position to her “husband” (the State) would be utterly foreign to her Choctaw foremothers. Had the wedding been between two actual people, her Choctaw foremothers would be shocked at her subjugated position to a man in a patriarchal household.

The disappearing of Native women also relies on the social and cultural disappearing of Native people and Native culture. American law has used education to disrupt family bonds and promote Indian assimilation alongside land dispossession.<sup>43</sup> After 1871, Congress enacted a law to compel Indian parents to send their children to school and authorized the Secretary of the Interior to coerce attendance by withholding aid (money, food, and other rations) from Indian families that refused to send their children to boarding school.<sup>44</sup> Some parents were

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<sup>37</sup> MICHELENE E. PESANTUBBEE, CHOCTAW WOMEN IN A CHAOTIC WORLD: THE CLASH OF CULTURES IN THE COLONIAL SOUTHEAST 2–3 (2005).

<sup>38</sup> *Id.* at 25.

<sup>39</sup> *Id.* at 38.

<sup>40</sup> *See id.* at 54–55.

<sup>41</sup> Treaty of Dancing Rabbit Creek art. IV, Choctaw Nation-U.S., Sept. 27, 1830, 7 Stat. 333; *see also* Indian Removal Act of 1830, 21 Cong. Ch. 148, 4 Stat. 411 (1830).

<sup>42</sup> *See* Amanda Cobb-Greetham, *Foreword* to ANGIE DEBO, AND STILL THE WATERS RUN: THE BETRAYAL OF THE FIVE CIVILIZED TRIBES xvii (Princeton Univ. Press ed. 2022) (1940).

<sup>43</sup> *See* BRYAN TODD NEWLAND, FEDERAL INDIAN BOARDING SCHOOL INITIATIVE INVESTIGATIVE REPORT 21, 42 (May 2022).

<sup>44</sup> Regulations for Withholding Rations for Nonattendance at Schools, 25 U.S.C. § 283 (repealed 2022); *see, e.g.*, U.S. DEP’T OF THE INTERIOR, INDIAN AFFAIRS: REPORT OF THE COMMISSIONER AND APPENDIXES 402 (1906) (“This good record has been possible thru the granting of authority by the Secretary of the Interior to withhold annuities from parents who refused to place their children in some school.”).

imprisoned for refusing to send their children to boarding schools.<sup>45</sup> Through boarding schools, the United States sought to assimilate Indian children.<sup>46</sup> These schools were funded largely by the sales of ceded Indian lands.<sup>47</sup> Any remnant of Indianness (their “otherness”) was not tolerated. Children were forbidden from speaking their Indigenous languages, given English names, forced to wear Euro-American clothes, and forced into American gender roles; refusal resulted in physical abuse.<sup>48</sup> The children’s education was focused on making them into manual laborers (for boys) and domestic laborers (for girls).<sup>49</sup> The children were forced into performing day labor that enriched the schools.<sup>50</sup> The abuse that Indian children endured in Indian boarding schools continues to have harmful effects on Tribal societies and survivors.<sup>51</sup> Thus, the laws facilitated Indian land dispossession and the profits from such dispossession subsidized the cultural, linguistic, and social disappearing of Indian identity. By facilitating the physical removal of children away from their communities, the law sought to destroy Indian familial and tribal bonds, harming both the Indian children and the broader Tribal communities. The gendered colonial violence of American law is not merely a past phenomenon; it continues today. Indian women were subjected to a coercive sterilization program through the federally run Indian Health Services (“IHS”).<sup>52</sup> Indian women have lost access to abortion well before *Dobbs v. Jackson Women’s Health Organization* because of the Hyde Amendment.<sup>53</sup> IHS continues to be chronically underfunded, and reproductive services, maternal health, fetal health, and fertility services are severely lacking, if not entirely absent, in some Tribal communities.<sup>54</sup> Here, the history of federal Indian law that keeps Native people under Congress’s plenary power dictates their reproductive freedom.

American law has thus been a tool of land dispossession and has targeted the reproductive autonomy of Indian women in relation to their bodies and in raising their children. The longstanding harms of the law on Indian lives have created a system that is profoundly and personally disruptive. The law has dictated the conditions of Indian authenticity, identity, family systems, and reproductive rights and futures. It is because of the complex and personal nature of Indian law and its institutions that the experiences of American Indian women cannot be represented in the aggregate of “women of color” because that aggregate cannot represent “Indian” political and legal status.

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<sup>45</sup> See Wendy Holliday, *Hopi Prisoners on the Rock*, U.S. NAT’L PARK SERV., <https://www.nps.gov/articles/hopi-prisoners-on-the-rock.htm> (last updated Jan. 18, 2024).

<sup>46</sup> NEWLAND, *supra* note 43, at 7.

<sup>47</sup> *See id.*

<sup>48</sup> *Id.* at 7, 53, 74.

<sup>49</sup> *See id.* at 60-62.

<sup>50</sup> *See id.* at 63.

<sup>51</sup> *See id.* at 93-94.

<sup>52</sup> Ashleigh Lussenden, *Blood Quantum and the Ever-Tightening Chokehold on Tribal Citizenship: The Reproductive Justice Implications of Blood Quantum Requirements*, 111 CALIF. L. REV. 287, 311 (2023).

<sup>53</sup> See Lauren van Schilfgaarde et al., *Tribal Nations and Abortion Access: A Path Forward*, 46 HARV. J.L. & GENDER 1, 22 (2023).

<sup>54</sup> Lussenden, *supra* note 52, at 313.

### III. OTHERING AND INVISIBILITY IN THE LEGAL ACADEMY TODAY

In 1983, Duncan Kennedy critiqued legal education in America as instilling an ideology about the rule of law and the inherent value of its institutions.<sup>55</sup> He critiqued legal education's reproduction of legal hierarchies as well as the fundamentally assimilative culture of law schools that favor behaviors that skew white, male, and middle-class.<sup>56</sup> Although these features of legal education have waxed and waned, Kennedy's critiques continue to beg the question of what remains. What about these things fundamentally impacts the experiences of Native American women? What does legal education in America say about colonialism? Does legal education—if uncritical of colonization—replicate an ideology that justifies it?

Many of these questions are interwoven with the subject of Federal Indian law, an area of law that pertains to the relationship between the United States, Indians, and Indian Tribes, and is infused into the U.S. Constitution and core aspects of American law. While Tribal law is the study of separate Tribal sovereigns, Indian law is fundamentally about studying the United States, its structure, and Congress. Many are shocked to learn how far the core principles of Indian law deviate from those commonly taught in 1L courses—such as a “race-blind Constitution,” principles of federalism, the ability to alienate property, the right to the maximum value of individual property, ideas of restitution, justice, and so on. Maggie Blackhawk (Fond du Lac Band of Lake Superior Ojibwe) has argued, Indigenous people and their experiences “appear episodically” but are regularly “pushed aside to preserve our simple myths of individual liberty, rights, and freedom without any real sense of what colonization has done under the cover of these myths and ideals.”<sup>57</sup> Incorporating Tribal law into American law would add further philosophical complexity, as Indigenous legal traditions diverge from American law.<sup>58</sup>

Through erasure or marginalized presence, American legal education can contribute to a professional culture where many lawyers, law professors, and law students do not have to contend with colonization or settler colonialism. Core 1L classes seek to make all law students and lawyers minimally competent in the areas of property law, constitutional law, contracts, torts, criminal law, and civil procedure, but how often do these subjects address the legal significance of Indians and Indian Tribes? This invisibility in the classroom and curriculum has consequences. Whereas the visibility of other minority groups raises questions of equality, belonging, and the legitimacy of the United States as a multiracial democracy, the presence of American Indians and Indian Tribes raises questions

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<sup>55</sup> See DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY* 47 (1983).

<sup>56</sup> See *id.* at 38.

<sup>57</sup> Maggie Blackhawk, *How 'Killers of the Flower Moon' Presses Up Against the Limits of Empathy*, N.Y. TIMES (Jan. 25, 2024), <https://www.nytimes.com/2024/01/25/opinion/killers-flower-moon-scorsese-empathy.html>.

<sup>58</sup> Christina Zuni Cruz, *Toward a Pedagogy and Ethic of Law/Lawyering for Indigenous Peoples*, 82 N.D. L. REV. 863, 878 (2006).

of sovereignty, jurisdiction, citizenship, property right, and self-determination “that are always already entrenched within the legal terms and conditions of Indigenous relations” to the United States as a colonial power.<sup>59</sup> How can legal education reflect the experiences of Indian Tribes and colonized people within American law, without reducing the complexity of the plurality of Indian Tribes? Because, while efforts to increase awareness of racism and bias are helpful, they leave Native people wanting. As Sandy Grande (Quechua) has observed, the position of American Indians navigating a politicized colonial existence while navigating a postmodern world “conscripts American Indians to a gravely dangerous and precarious space but also points to the gross insufficiency of models that treat American Indians as simply another ethnic minority.”<sup>60</sup> Approaching the two-hundred-year anniversary of the Indian Removal Act, these questions are worthy of the academy’s attention.

Navigating an othering or marginalizing educational and professional environment can be emotionally damaging for Native women. The NNABA/ABA study reflected that Native women regularly felt this invisibility within the profession. One participant stated, “I feel like Native American lawyers are relegated to footnotes, like a constant reminder that we are invisible. It’s exhausting wanting to see yourself represented in studies about lawyers and only seeing that there aren’t enough of you to count.”<sup>61</sup> Participants also reported persistent feelings of isolation and exhaustion in law school.<sup>62</sup> This isolation was exacerbated by few Indian law courses, the lack of American Indian faculty, career services being ill-equipped to advise students on careers in Indian law, and persistent instances of in-class bias and harassment with little to no intervention.<sup>63</sup> One woman in the NNABA/ABA study stated:

There isn’t anyone explicitly doing anything, but you are constantly being othered in a way that you notice. Other Native students get it, but I didn’t have other Native students in my law school. I tried to connect with other racial minorities, but even with them, I had to work too hard to explain Native American issues. I think they tried to understand, but I don’t think they did. I felt very isolated and alone.<sup>64</sup>

The availability of Indian law classes at ABA-accredited law schools—and data on such classes—is sparse. A 2021 study by NNABA found that no federal Indian law classes were offered at any law schools in the states of Alabama, Delaware, Kentucky, Maryland, Mississippi, New Hampshire, New Jersey, North

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<sup>59</sup> JOANNE BARKER, CRITICALLY SOVEREIGN: INDIGENOUS GENDER, SEXUALITY, AND FEMINIST STUDIES 1, 10 (2017).

<sup>60</sup> SANDY GRANDE, RED PEDAGOGY: NATIVE AMERICAN SOCIAL AND POLITICAL THOUGHT 99 (Rowman & Littlefield eds., 2004) (1964).

<sup>61</sup> EXCLUDED & ALONE, *supra* note 16, at 20.

<sup>62</sup> *Id.* at 23.

<sup>63</sup> *See id.* at 23-25.

<sup>64</sup> *Id.* at 23.

Carolina, Ohio, South Carolina, Texas, Virginia, or West Virginia.<sup>65</sup> Of these states, there are federally recognized Indian Tribes and reservations within Alabama, Mississippi, North Carolina, Texas, and Virginia.<sup>66</sup> In many states, only a minority of law schools offered federal Indian law classes (more recent data is hard to come by, given that the Native American bar community self-produced this study).<sup>67</sup> Omission—intentional or not—reifies a narrative that, in American law, Indians are a thing of the past and a legal narrative of America as a state committed to equality with no “other” among its citizenry, despite legal distinctions between Indians and non-Indians. What is the “ideology” instilled within an American legal education if colonization is never named? How do law schools—knowingly or unknowingly—contribute to the modern iterations of settler colonialism through disappearing?

Unlike other areas of higher education, legal education is closely linked with legal institutions and institutional influence. Law students mostly go on to become legal practitioners, and legal scholarship has the ability to influence each branch of government.<sup>68</sup> Taking Duncan Kennedy’s critiques of legal education as reinforcing hierarchy and institutionalism, the invisibility or marginalization of Native people and Native Nations in legal education bleeds into the profession and the rule of law more broadly. Thus, Indigenous feminist interventions in legal education have the potential, through downstream effects, to serve as interventions in the broader legal system and profession.

#### IV. INDIAN LAW AUNTIES AND THEIR INTERVENTIONS

The Indian law aunties are those Native women who have intervened. In the institutional and social enclaves that these aunties have created, Native women can unburden themselves from the weight of assimilatory cultural pressures and rigid hierarchies of law. Within these spaces, Indigenous cultural norms and epistemologies are valued alongside institutional and academic forms of knowledge. But Native women in the legal academy are few, such that the Indian law aunties have undertaken a large amount of labor across a small population.

According to a 2022 study, only 0.5% of active lawyers nationwide were Native American.<sup>69</sup> Meera Deo, in her book *Unequal Profession: Race and Gender in Legal Academia*, identified that there were 21 American Indian or Alaskan Native law faculty members identified by the Association of American Law Schools and 29 American Indians recognized by the ABA.<sup>70</sup> Despite this small

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<sup>65</sup> NAT’L NATIVE AM. BAR ASS’N, THE STATE OF INDIAN LAW AT ABA-ACCREDITED LAW SCHOOLS 2, 11, 21, 24, 28, 33–34, 38, 40, 45, 48, 51 (2021).

<sup>66</sup> See Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 89 Fed. Reg. 944 (Jan. 8, 2024).

<sup>67</sup> See NAT’L NATIVE AM. BAR ASS’N, *supra* note 65, at 4–10, 12–20, 22–23, 25–27, 29–32, 35–37, 39, 41–44, 46–47, 49–50, 51–52, 54–56.

<sup>68</sup> See Robin West, *The Ethics of Normative Legal Scholarship*, 101 MARQ. L. REV. 981, 981 (2018).

<sup>69</sup> Amber Reano, *It Is Time to Recognize Native American Lawyers*, A.B.A. C.R. & SOC. JUST. SECTION (Jan. 22, 2024), <https://www.americanbar.org/groups/crsj/resources/human-rights/2024-january/it-time-recognize-native-american-lawyers/>.

<sup>70</sup> MEERA E. DEO, *UNEQUAL PROFESSION: RACE AND GENDER IN LEGAL ACADEMIA* 4 (2019).

number, there are strong Indian law institutions—primarily led by Native women and non-Native women allies—that create the necessary space. The Indian law aunties have created the educational, cultural, social, and career spaces that sustain and promote Native women in the law. This is not to say that men have not contributed to federal Indian law education, they certainly have. Rather this is intended to recognize the unique and salient contribution that these women have made in creating institutional spaces for Indian law education.

Among the schools that the American Indian Law Center has identified as having a dedicated Indian law program, certificate, or classes, many are led and staffed by Native women as directors, professors, and clinicians.<sup>71</sup> These include pre-law programs and institutional programs within law schools. These programs build upon the work of the first generation of federal Indian law scholars who introduced the field, the casebooks, and the subject matter by building the institutions of learning and scholarship to sustain them. In running these programs, they often take on the additional labor of securing funding, recruiting students, and hosting events alongside their teaching, practicing, service, and research obligations. Proportional to their representation in the academy overall, Native women are heavily involved in Indian law programs at ABA-accredited law schools. These programs have become desirable for Native students because they know that there are course offerings in Indian law alongside a sustaining professional community. According to the ABA 509 disclosure data, American Indian JD enrollment was highest at Arizona State University and Mitchell Hamline School of Law, with each school enrolling more American Indian women than men.<sup>72</sup> (This comes with the caveat that it is hard to know from these data sets how many of those who identify as American Indian are citizens or descendants of Tribal Nations.)<sup>73</sup> They run Indian law clinics that work in Tribal communities and Tribal courts. They engage in direct service projects to Tribal communities. They serve as administrators and forge formal relationships with local Tribal leaders. Finding a law school with Indigenous peers and Indian law course offerings can be attractive to many Native students and Native women who anticipate hardship in pursuing a juris doctor degree. So, while Native students are a small share of J.D. students nationwide, they are well represented at schools with dedicated Indian law programs to serve them.

In scholarship, the Indian law aunties contribute to the visibility of Native women and communities. Christina Zuni Cruz (Isleta Pueblo), the first tenured

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<sup>71</sup> See NAT'L NATIVE AM. BAR ASS'N, *supra* note 65 (Noting that of the ABA-accredited law schools that have dedicated Indian law programs and centers, women and Native women are heavily involved. These dedicated programs make up the foundation of Indian law education within the United States. These schools include: Arizona State University, University of Arizona, University of California Los Angeles, University of Colorado Law School, Michigan State University, Mitchell Hamline School of Law, University of Wisconsin Law School, Seattle School of Law, and more).

<sup>72</sup> *ABA Required Disclosures: Compilation – All Schools Data*, A.B.A.: LEGAL EDUC. & ADMISSION TO THE BAR, <https://www.abarequreddisclosures.org/requiredDisclosure> [https://perma.cc/7U64-CGRG] (last visited Nov. 6, 2025) (under “Compilation – All Schools Data” select 2024 for the year, and JD Enrollment and Ethnicity for the section, then click Generate Report).

<sup>73</sup> See Angelique EagleWoman, *Trailblazing and Living a Purposeful Life in the Law: A Dakota Woman's Reflections as a Law Professor*, 51 SW. L. REV. 227, 232 (2022).

Pueblo professor at the University of New Mexico law school, reflecting on legal education, wrote, “It is significant that ‘indigenous’ justice and ‘indigenous’ law have emerged in legal academia. In my opinion, this is due largely to the influence of indigenous people in the legal profession and in academia generally.”<sup>74</sup> Within this realm of scholarship, there have been critical contributions to understanding the lives of Native women in areas of domestic violence and criminal law,<sup>75</sup> issues of reproductive justice for Native American women,<sup>76</sup> contributed immensely to the understanding of the Indian Child Welfare Act,<sup>77</sup> and the understanding of Native women’s legal histories.<sup>78</sup> Outside of contributing to the academy’s understanding of Native women, the Indian law aunties contribute to the academy’s understanding of Indigenous issues and refuse invisibility in their respective areas.

Then, there are the contributions that are harder to cite, but no less critical. For one, the sharing of stories about what it means to be a Native woman in the law. Some of these stories have bravely been made public, while others have been shared privately. By sharing their stories—good and bad—these Indian law aunties give their younger women a roadmap for navigating the law and the world ahead. Mari Matsuda has written about the utility of personal identity and narratives as a framework of legal analysis; she states:

Who I am in relation to the historical forces that constrain my choices and options is critical to my understanding of law and justice. . . . I look to my experience and the experience of others like me to understand the world and decide how to move in it.<sup>79</sup>

She similarly recognizes that the “ground-up knowledge” Native people have of colonization has educational value and utility.<sup>80</sup> Native aunties in the law have a similar wealth of ground-up knowledge of what it means to be a Native woman within the law, and know how legal hierarchies and professional cultures intersect with colonization to create an oppressive experience. Through stories, they pass on an informal Native-woman’s survival guide that instructs on how to survive in law, and they teach strategies on when and how to push back on colonial and gender discrimination. They have contributed with time and labor to mentoring Native women in their legal careers. While this includes passing along advice, it also includes opening their networks to younger women, hosting mock job interviews, and looking over application materials. In many instances, it offers a

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<sup>74</sup> Cruz, *supra* note 58, at 883.

<sup>75</sup> See SARAH DEER, *THE BEGINNING AND END OF RAPE: CONFRONTING SEXUAL VIOLENCE IN NATIVE AMERICA* (2015).

<sup>76</sup> See van Schilfgaarde et al., *supra* note 53.

<sup>77</sup> See Matthew L. Fletcher & Wenona T. Singel, *Lawyering the Indian Child Welfare Act*, 120 MICH. L. REV. 1755 (2022); 25 U.S.C. § 1901 (Commonly known as the Indian Child Welfare Act of 1978).

<sup>78</sup> See Stacy L. Leeds & Elizabeth Mashie Gunsaulis, *Resistance, Resilience, and Reconciliation: Reflections on Native American Women and the Law*, 34 THOMAS JEFFERSON L. REV. 303 (2012).

<sup>79</sup> MARI J. MATSUDA, *WHERE IS YOUR BODY? AND OTHER ESSAYS ON RACE, GENDER, AND THE LAW* 11 (1996).

<sup>80</sup> *Id.* at 68.

voice to counter a woman's imposter syndrome, which says she is not good enough. They coach moot court, hire interns in their offices, operate as informal career services, and serve as sympathetic ears. They advocate for Native people inside and outside of institutions and bring their expertise to Indian Country directly. They leverage institutional power on behalf of Native students, Native alumni, and future generations of Native lawyers. I am an heir to the labor of these women. When I was told that I could not become a law professor because I went to the wrong law school, engaged in the wrong extracurriculars, and took the wrong job post-grad, it was Native women who intervened. It was the Native women who sat me down and rejected that narrative for me before it could metastasize into a false truth. They gave me the roadmap. They checked in on each leg of my journey.

In these ways, the Indian law aunties have refused to accept the invisibility of Native women and the disappearing of Native Nations implicit within settler colonialism. They have built foundational educational and community spaces to contribute to the practice and evolution of federal Indian law. Their work has had an immediate impact on the lives of Tribal Nations and Indian people. In doing so, they have been dedicating their careers to making critical feminist interventions in legal education.

## V. MORE CAN BE DONE

While the Indian law aunties have made immense contributions, Native people continue to lag within the legal academy and the legal profession more broadly. The Indian law aunties and the Native community alone cannot correct these deficits. The legal academy must recognize the barriers that Native lawyers face and take steps to confront the role that legal education plays in American settler colonialism.

To advance, we must name the deficits. Native American law graduates are less likely to secure jobs in private practice.<sup>81</sup> Less than 12% of Native American graduates receive judicial clerkships, according to the most recent data compared to legal graduates as a whole.<sup>82</sup> Native Americans make up only 0.174% of attorneys in big law firms and only 0.179% of firm partners.<sup>83</sup> Tobi Merritt Edwards (Chickasaw Nation) was the first Native American judicial clerk to the U.S. Supreme Court, where she clerked for Justice Gorsuch in 2018.<sup>84</sup> If the profession is going to advance, then every graduating law student should have some familiarity with the Indian Commerce Clause, Indian Tribes, Tribal sovereignty, Chapter 25 of the United States Code, and the federal apparatus of Indian Affairs. Expanding Indian law offerings across all ABA-accredited law schools can help ensure that Native students can attend any law school in the

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<sup>81</sup> *Native American and Alaska Native Law Students and Lawyers*, NALP (Dec. 2023), <https://www.nalp.org/1223research>.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Aebra Coe, *Gorsuch Taps 1st Ever Native American Supreme Court Clerk*, LAW360 (Apr. 16, 2018), <https://www.law360.com/articles/1033744/gorsuch-taps-1st-ever-native-american-supreme-court-clerk>.

country and can see their legal reality reflected in the curriculum. This is important because law is an incredibly elitist profession in which credentials, such as law school rank, clerkships, law review, etc., have a substantial effect on one's career trajectory.<sup>85</sup> It is an act of sustained systemic bias that many Indians, each admission cycle, are forced to choose: a "high-ranked" law school with fewer Indian law offerings—to maximize career opportunities—or a lower-ranked school with more Indian law offerings and a Native community.<sup>86</sup> Many graduates of these highly ranked law schools go on to become decision-makers for the Nation.

As Maggie Blackhawk pointed out, "law students at Harvard and Yale are rarely taught the moral and constitutional issues raised by colonialism," and "Harvard Law School has failed to fill an endowed chair in federal Indian Law. Yale Law School has never tenured a faculty member who specializes in federal Indian law."<sup>87</sup> This carries societal consequences, given that eight of the nine justices on the U.S. Supreme Court attended Harvard or Yale law school.<sup>88</sup> This also impacts the ability of Native people to secure a clerkship if they attend a lower-ranked law school with an Indian law program, given that 44% of clerkships go to graduates of just fifteen law schools.<sup>89</sup> Many lawyers appointed to the federal bench check the box for having attended an elite law school and having had a prestigious clerkship. On the bench, 48% of federal judges went to twenty law schools.<sup>90</sup> We also know that credentials impact the likelihood of getting a tenure-track job as a law professor.<sup>91</sup> More than 94% of tenure-track professors at the top ten law schools also attended a top ten law school.<sup>92</sup> When isolating the data for American Indian law professors, half graduated from law schools outside the top fourteen, but also from law schools close (geographically or academically) to Indian Country.<sup>93</sup>

Duncan Kennedy wrote, "The problem is not whether hierarchy is there, but how to understand it, and what its implications are for political action."<sup>94</sup> To that end, allies across the legal academy can contribute to the efforts the Indian law aunties have made. Professors can incorporate a case involving Indian law into their course materials—especially in 1L courses—and encourage their colleagues to do the same. Indeed, areas like constitutional law, criminal law, administrative

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<sup>85</sup> See Rory D. Bahadur, *Law School Rankings and the Impossibility of Anti-Racism*, 53 ST. MARY'S L.J. 991, 996 (2022).

<sup>86</sup> See *id.* at 994–96, 999.

<sup>87</sup> Blackhawk, *supra* note 57.

<sup>88</sup> *Id.*

<sup>89</sup> Jack Crittenden, *How Elitism Is Killing Us: Elitism Part 3—Why Do So Many Federal Clerks Come from the Top Schools?*, NAT'L JURIST (Sept. 14, 2023), <https://nationaljurist.com/elitism-part-3-why-do-so-many-federal-clerks-come-from-the-top-schools-2>.

<sup>90</sup> Danielle Root, Jake Faleschini & Grace Oyenubi, *Building a More Inclusive Federal Judiciary*, CTR. AM. PROGRESS (Oct. 3, 2019), <https://www.americanprogress.org/article/building-inclusive-federal-judiciary/>.

<sup>91</sup> DEO, *supra* note 70, at 13.

<sup>92</sup> Matthew L. M. Fletcher, *On Becoming an American Indian Law Professor: 2021 Update*, at 2 (2021), (SSRN Working Paper), <https://ssrn.com/abstract=3930158>.

<sup>93</sup> *Id.* at 4.

<sup>94</sup> KENNEDY, *supra* note 55, at 93.

law, and torts can introduce students to the existence of Indian Tribes, tribal courts, and the unique jurisdictional issues within Indian lands. Even though we talk about law to our students, we can be more inclusive by identifying the United States as a pluralistic legal society across states, Indian reservations, and territories. We can identify the variety of legal traditions within our society from Indian Tribes, Alaskan Native communities, the Kingdom of Hawaii, and the federal territories. We can analyze federalism through questions of Indigenous sovereignty. Law faculty can work to recruit Native women and Native scholars into the academy. Law faculty can highlight the work of Native women scholars currently in the legal academy to their students and consider inviting Indian law scholars to speak at their campus. Law school administrators can build relationships with local Tribes and Native organizations to deepen understanding of Tribal and Indian law and career opportunities in these fields. At the macro level, those with power in the profession can consider what can be changed in admissions, hiring, summer internships, and scholarships to promote the admission, matriculation, and success of Native students. In short, to be an ally to Native people working in the law, and Native women, it must be more than just the Indian law aunties working against the invisibility of Native people. If anyone aspires to a post-colonial future in which Native people thrive, legal education is one key place to start.

Despite these immense contributions by Indian law aunties, there is still more to be done to build a more equitable legal academy. Stacy Leeds (Cherokee Nation), the first American Indian woman to serve as a law school dean, and Elizabeth Mashie Gunsaulis, in an essay reflecting on the contributions of American Indian women to the field of law, closed their piece thusly:

Let us be successful and unapologetic in all that we do, regardless of what role we play. But if the role we play is that of a Native American woman in the law, then let us emphasize our role as Native American women first, and our role in the law second. The law will eventually catch up.<sup>95</sup>

The experiences of American Indian women under law, within law, and within the legal academy are rich. A more equitable legal academy must contend with the history of colonization, the law's role in colonization, and the contemporary place of Indian people within our society. To that end, we can learn from the Indian law aunties and their fight for future generations coming into the law behind them, to inform our work in building a more equitable feminist legal academy for generations to come.

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<sup>95</sup> Leeds & Gunsaulis, *supra* note 78, at 324.



# SOME THOUGHTS ON OUTSIDERS WITHIN THE LEGAL ACADEMY

Jamelia N. Morgan\*

## I. INTRODUCTION

Recent actions taken at the federal level reflect a coordinated campaign against academic freedom, higher education institutions, and diversity initiatives. Universities such as Harvard, Columbia, Cornell, and Northwestern have faced funding freezes, signaling a broader effort to assert unprecedented control over institutions that are perceived as fostering progressive or so-called radical ideas.<sup>1</sup> These financial pressures are compounded by direct political interference in academic governance and research priorities.<sup>2</sup> For example, the settlement with Columbia goes so far as to create a new Senior Vice Provost position tasked with advising on the Middle East, South Asian, and African Studies departments and overseeing broader program reviews, signaling a significant level of institutional restructuring.<sup>3</sup> At the same time, the agreement also imposes sweeping restrictions—including limits on campus protests, a ban on diversity, equity, and inclusion initiatives, and even new rules on mask use—that collectively raise concerns about academic freedom and student expression.<sup>4</sup>

The Administration has also issued Executive Orders targeting what is broadly labeled as “gender ideology” and efforts associated with diversity, equity, and inclusion (DEI).<sup>5</sup> These directives not only restrict institutional autonomy but

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<sup>1</sup> See Collin Binkley, *Harvard and the Trump Administration Are Nearing a Settlement Including a \$500 Million Payment*, ASSOCIATED PRESS (Aug. 13, 2025, 12:14 PM), <https://apnews.com/article/harvard-trump-agreement-antisemitism-ivy-a84b88a8136a852aa305e508d012afb6>; Michael C. Bender & Sherly Gay Stolberg, *Trump Administration Freezes \$1 Billion for Cornell and \$790 Million of Northwestern, Officials Say*, N.Y. TIMES (Apr. 8, 2025), <https://www.nytimes.com/2025/04/08/us/politics/cornell-northwestern-university-funds-trump.html>; Troy Closson, *Why the Trump Ultimatum to Columbia Could Upend Higher Education*, N.Y. TIMES (Mar. 20, 2025), <https://www.nytimes.com/2025/03/20/us/columbia-university-receivership-trump.html>.

<sup>2</sup> See, e.g., Spencer Davis et al., *Columbia to Acquiesce to Trump Administration’s Demands Amid Federal Funding Threats*, COLUMBIA SPECTATOR (Mar. 21, 2025, 4:23 PM), <https://www.columbiaspectator.com/news/2025/03/21/columbia-to-acquiesce-to-trump-administrations-demands-amid-federal-funding-threats/>.

<sup>3</sup> See Josh Moody, *What Columbia’s Settlement Stipulates*, INSIDE HIGHER ED (July 24, 2025), <https://www.insidehighered.com/news/governance/executive-leadership/2025/07/24/breaking-down-columbia-us-settlement-trump-admin>.

<sup>4</sup> *Id.*

<sup>5</sup> See Exec. Order No. 14168, 90 Fed. Reg. 8615 (Jan. 20, 2025), <https://www.federalregister.gov/documents/2025/01/30/2025-02090/defending-women-from-gender-ideology-extremism-and-restoring-biological-truth-to-the-federal>; Exec. Order No. 14151, 90 Fed. Reg. 8339 (Jan. 20, 2025), <https://www.federalregister.gov/documents/2025/01/29/2025-01953/ending-radical-and-wasteful-government-dei-programs-and-preferencing>; Exec. Order No. 14173, 90 Fed. Reg. 8633 (Jan. 21, 2025), <https://www.federalregister.gov/documents/2025/01/31/2025-02097/ending-illegal-discrimination-and-restoring-merit-based-opportunity>.

also aim to delegitimize research and educational efforts that focus on marginalized communities.<sup>6</sup> The rhetoric behind these orders portrays DEI as ideological indoctrination rather than a framework for ensuring equal opportunity and representation in education and research. In a significant policy shift, the federal government has also terminated National Institutes of Health (NIH) grants that focus on DEI.<sup>7</sup> These grants were crucial for supporting research on health disparities and fostering inclusive scientific environments. By withdrawing support for these initiatives, the government is undermining both public health objectives and the principle of merit-based research funding, especially for underrepresented groups.<sup>8</sup>

Together, these developments represent an aggressive rollback of the norms governing academic freedom and have heightened the politicization of education policy. They threaten to chill open inquiry, stifle critical thinking, and reverse decades of progress toward equity in higher education. These efforts should be examined as part of a long-standing conservative movement to dismantle civil rights protections and the legal regimes that uphold these protections.<sup>9</sup> From the backlash to civil rights following the *Brown* era, to the more recent attacks on voting rights, reproductive rights, and affirmative action, it is no understatement to say that the present is the period of retrenchment that so often follows an era of radical social change.<sup>10</sup> The recent attacks (both private and orchestrated by the second Trump administration) have upended DEI programs and specifically targeted faculty and students who were engaged in advocacy for Palestinians, undermining free speech and academic freedom norms on campus.<sup>11</sup>

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<sup>6</sup> See, e.g., Roni Caryn Rabin & Irena Hwang, *Trump Administration Scraps Research into Health Disparities*, N.Y. TIMES (Aug. 13, 2025), <https://www.nytimes.com/2025/08/13/health/nih-grant-cancellations-dei.html>.

<sup>7</sup> Zach Montague, *Trump's Cuts to N.I.H. Grants Focused on Minority Groups Are Illegal Judge Rules*, N.Y. TIMES (June 16, 2025), <https://www.nytimes.com/2025/06/16/us/politics/trump-nih-grants-cut.html>.

<sup>8</sup> See, e.g., David M. Culter & Edward Glaeser, *Cutting the NIH—The \$8 Trillion Health Care Catastrophe*, 6 JAMA HEALTH FORUM (May 29, 2025), <https://jamanetwork.com/journals/jama-health-forum/fullarticle/2834949>.

<sup>9</sup> See generally Jack M. Balkin, *Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time*, 98 TEX. L. REV. 215 (2019) (examining the fall of the New Deal/Civil Rights regime and the rise of the Reagan regime).

<sup>10</sup> Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

<sup>11</sup> See, e.g., Jessica Blake, *Federal District Judge Rules Against Trump's Anti-DEI Orders*, INSIDE HIGHER ED (Aug. 18, 2025), <https://www.insidehighered.com/news/quick-takes/2025/08/18/federal-district-judge-rules-against-trumps-anti-dei-orders>; Jonaki Mehta, *Education Dept. Warns Schools: Eliminate DEI Programs or Lose Funding*, NPR (Apr. 3, 2025, 2:23 PM), <https://www.npr.org/2025/04/03/nx-s1-5350978/trump-administration-warns-schools-about-dei-programs>; Alaa Elassar, Priscilla Alvarez, Gloria Pazmino, & Michelle Watson, *Judge Temporarily Blocks Effort to Deport Palestinian Activist Who Helped Lead Columbia Student Protests*, CNN (Mar. 11, 2025, 12:17 PM), <https://www.cnn.com/2025/03/10/us/mahmoud-khalil-columbia-university-israel-hnk>.

In this period of rights retrenchment and the weakening of the rule of law norms,<sup>12</sup> what role is there for legal scholars to play? I focus on legal scholars in part because of my own positionality and because when there are attacks on and efforts to undermine the rule of law, lawyers are often the bulwark against the erosion. In this moment, what does it mean to adopt an Outsider Within approach to legal scholarship? “Outsider Within” approaches to legal scholarship reckon with responding to erasures, invisibility, and distortions within legal institutions, law, and doctrine.

This Article argues that the current assault on academic freedom and diversity initiatives should be understood as part of a broader period of civil rights retrenchment, and that this moment demands an “Outsider Within” response from legal scholars. Part I situates contemporary attacks on higher education and DEI within a longer history of backlash against equality-seeking movements and frames the central question of scholarly responsibility in times of democratic erosion. Part II defines the “Outsider Within” framework, drawing on Patricia Hill Collins and Critical Race Theory to show how marginality within elite institutions generates distinct epistemologies and strategic possibilities rather than merely individual identity claims. Part III develops the Outsider Within as a methodological and political stance, illustrating how it reshapes legal scholarship, institutional practice, and public engagement in an era of retrenchment. Part IV argues that Outsider Within approaches are essential to reclaiming the nomos itself, enabling the production of a plural, insurgent normative universe in which law is grounded in marginalized narratives and oriented toward transformative justice.

## II. DEFINING OUTSIDERS WITHIN

Patricia Hill Collins’s concept of Outsiders Within offers a specific framework for how legal scholars and teachers might elect to respond to the current moment.<sup>13</sup> The administration’s attacks on marginalized groups offer Outsiders Within an entry point for engaging and resisting threats to diversity, equity, and inclusion. In particular, the moment presents outsiders with the opportunity to defend these core values and rearticulate the importance of meaningful inclusion in legal institutions—from law schools to law firms.

Being an “outsider within” the legal academy often begins with a profound sense of existing in two worlds at once: formally included, yet perpetually on the

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<sup>12</sup> See, e.g., Nikole Hannah-Jones, *How Trump Upended 60 Years of Civil Rights in Two Months*, N.Y. TIMES (June 27, 2025), <https://www.nytimes.com/2025/06/27/magazine/trump-civil-rights-law-discrimination.html>; *State Dept. Begins Firing Nearly 1,400 Workers*, N.Y. TIMES (July 11, 2025), <https://www.nytimes.com/live/2025/07/11/us/trump-texas-news>; J. Michael Luttig, *The End of Rule of Law in America*, ATLANTIC (May 14, 2025), <https://www.theatlantic.com/ideas/archive/2025/05/law-america-trump-constitution/682793/>.

<sup>13</sup> Patricia Hill Collins is a groundbreaking sociologist and one of the founders of Black Feminist Theory. See, e.g., PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* (Hiedi Freund ed., 2d ed. 2008); PATRICIA HILL COLLINS, *INTERSECTIONALITY AS CRITICAL SOCIAL THEORY* (2019).

margins.<sup>14</sup> To begin with, the frame recognizes that even after formal equality and inclusion, law schools and the legal profession remain exclusive spaces. For example, legal scholars Bennett Capers and Swethaa Balakrishnen have argued that law school functions as a “white space” and “straight space,” respectively.<sup>15</sup> Despite holding appointments, publishing scholarship, and teaching courses, faculty from marginalized backgrounds frequently encounter subtle and overt signals that they do not fully belong.<sup>16</sup> These messages can range from exclusionary committee assignments to questions about their scholarly credibility. Such experiences echo the broader rollback of diversity initiatives in higher education, where challenges to DEI efforts only deepen the feeling of precarious belonging.

This duality is captured in Patricia Hill Collins’s distinction between “insiders” and “outsiders.” As Hill Collins explains, “Outsiders Within” refers to those scholars cast as outsiders on account of their placement in spaces “occupied by groups of unequal power.”<sup>17</sup> While insiders share common histories, cultural reference points, and unspoken norms—what she calls “thinking as usual”—outsiders may gain institutional access but find themselves unable to assimilate fully.<sup>18</sup> They remain alert to anomalies in the system that insiders often overlook, their differences serving as both a burden and a lens for critical insight. This persistent outsider status can generate a unique standpoint for examining the academy’s underlying assumptions and power dynamics.

Indeed, there is generative power in this marginal position. Hill Collins observed that for Afro-American female intellectuals, “‘marginality’ has been an excitement to creativity,” providing a “special standpoint on self, family, and society” that can spur innovative scholarship.<sup>19</sup> By embracing their Outsider Within status, scholars can challenge entrenched norms, propose alternative frameworks, and reshape the “common ground” of legal discourse. In an era when DEI itself is under assault, this creative tension becomes not only a source of resilience but also a force for transforming the academy into a truly inclusive intellectual community.

I know firsthand the power that Outsiders Within bring to institutions. When I was a first-year law student, I read the works of Critical Race Theorists and read about their experiences as outsiders within their respective institutions. I read Lani Guinier’s *Becoming Gentleman* and pictured what it must have been like

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<sup>14</sup> See, e.g., ELWOOD D. WATSON, *OUTSIDERS WITHIN: BLACK WOMEN IN THE LEGAL ACADEMY AFTER BROWN V. BOARD 123* (2008).

<sup>15</sup> Swethaa S. Ballakrishnen, *Law School as Straight Space*, 91 *FORDHAM L. REV.* 1113, 1117 (2023); Bennett Capers, *The Law School as a White Space*, 106 *MINN. L. REV.* 7 (2021).

<sup>16</sup> See, e.g., Courtney A. Griffin, *Stories of Those Untold: Identifying and Overcoming Obstacles of Black Women Pursuing Legal Education*, 102 *U. DET. MERCY L. REV.* 29, 43 (2024); Tammy L. Henderson et al., *Outsiders Within the Academy: Strategies for Resistance and Mentoring African American Women*, 14 *MICH. FAM. REV.* 1, 6 (2010); Mari Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 *WOMEN’S RTS. L. REP.* 297 (1989).

<sup>17</sup> Patricia Hill Collins, *Reflections on the Outsider Within*, 26 *J. CAREER DEV.* 85, 86 (1999).

<sup>18</sup> Patricia Hill Collins, *Learning from the Outsider Within: The Sociological Significance of Black Feminist Thought*, 33 *SOC. PROBS.* S14, S17 (1986).

<sup>19</sup> *Id.* at S14-S15.

for her to sit in her contracts class in Room 127—Yale Law’s large lecture hall—as a Black woman.<sup>20</sup> I read Margaret Montoya’s *Mascaras, Trenzas, y Greñas* and grappled with the masks I wore to fit into an environment that required me to shed so much of my own critique to “think like a lawyer.” I read Mari Matsuda’s *Looking to the Bottom*, which illuminated how communities with histories of oppression used their own unique perspectives and positionalities to advocate for legal and social change.<sup>21</sup> And I read Kimberlé Crenshaw, whose articulations of “intersectionality” gave me language for the complexities of my experiences as a Black woman.<sup>22</sup>

Their work helped me grapple with feeling like an “outsider” within one of the most prestigious law schools in the country. Their work didn’t necessarily make me feel like less of an outsider. Rather, it made me think differently about how to deploy my outsider status within an elite space. They taught me that my background and experiences mattered and that there was a place for me in law.

Later on, a few years into law teaching, I came across Patricia Hill Collins’s *Outsiders Within* essay. Her essay recast my experience as an Outsider as a strategy—a strategy for teaching, scholarship, and survival within the academy. Patricia Hill Collins put a name to what these early writings in Critical Race Theory described. She would have called this group of authors “outsiders” and aimed to recognize their collective social location as “within intersecting relations of race, gender, and social class.”<sup>23</sup> Over a decade after her essay was published, Hill Collins critiqued efforts to cast “the term outsider within as a personal identity category,” which risked “redirect[ing] attention away from the social hierarchies of race, class, and gender that create outsider-within social locations in the first place.”<sup>24</sup> Hill Collins warned that “[t]aking this decontextualization of the term *outsider within* to its logical conclusion means that *everyone* can now claim ‘outsider within’ identity. In this situation where universalization begets trivialization, we can now all become equals.”<sup>25</sup> Clarifying her original definition, Hill Collins explained her new articulation of Outsiders Within:

I now use the term outsider-within to describe social locations or border spaces occupied by groups of unequal power. Individuals claim identities as “outsiders within” by their placement in these social locations. Thus, outsider-within identities are situational identities that are attached to specific histories of social injustice—they are not a decontextualized identity category divorced from historical social inequalities that can be assumed by anyone at will. What I aim to do with this shift is refocus attention back on the unequal power relations of race, class, and gender

<sup>20</sup> See Lani Guinier, *Of Gentlemen and Role Models*, 6 BERKELEY WOMEN’S L.J. 93, 93 n.2 (1990-91).

<sup>21</sup> Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

<sup>22</sup> Crenshaw, *supra* note 10, at 1335.

<sup>23</sup> Hill Collins, *supra* note 17, at 85.

<sup>24</sup> *Id.* at 85-86.

<sup>25</sup> *Id.* at 86.

that produce social locations characterized by injustice. While questions of how individuals experience social inequality are an important topic for investigation, it is important not to lose sight of the social structures that generate these locations.<sup>26</sup>

As Hill Collins' work suggests, Outsiders Within have a distinct epistemology or way of knowing that can enhance the work of institutions. At the same time, these epistemologies are actively suppressed by the conventions of the discipline, the canon, and the politics of tenure and, in states where tenure is under attack, job security. But the unique perspectives, experiences, and accounts of Outsiders Within matter in this moment when what is needed is not just a defense of DEI. Instead, what is needed are new ways of thinking about diversity and its relationship to power. As Hill Collins reminds, the Outsiders Within approach is not just an identity that one can simply claim; it is a particular social location. Moreover, Outsiders Within are not merely tokens or spokespersons who claim an outsider status only to engage in the same practices that maintain the status quo. The Outsider Within approach offers something different: It offers a stance for resistance. Outsiders Within can leverage their experiences with marginality to surface new insights into how power moves within institutions and the modalities through which it operates to marginalize, disadvantage, exclude, or demean. In sufficient numbers, Outsiders Within can produce meaningful change, but here the aggregate power of that group vis-à-vis inside actors will matter much more.

Of course, as Hill Collins notes, "Black women are not the only outsiders within sociology."<sup>27</sup> She explains that:

a variety of individuals can learn from Black women's experiences as outsiders within: Black men, working-class individuals, white women . . . people of color, religious and sexual minorities, and all individuals who, while from social strata that provided them with the benefits of white male insiderism, have never felt comfortable with its taken-for-granted assumptions.<sup>28</sup>

Leaning into one's Outsider Within status, or adopting that specific approach in scholarship, is a choice that every scholar must make. Undoubtedly, choosing not to speak pursuant to a politics of refusal remains an option.<sup>29</sup> As Hill Collins herself notes regarding the field of sociology, "[s]ome outsiders within try to resolve the tension generated by their new status by leaving sociology and remaining sociological outsiders. Others choose to suppress their difference by striving to become bona fide 'thinking as usual' sociological insiders."<sup>30</sup> As to these two stances, Hill Collins notes that "[b]oth choices rob sociology of their diversity and

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<sup>26</sup> *Id.*

<sup>27</sup> Hill Collins, *supra* note 18, at S29.

<sup>28</sup> *Id.*

<sup>29</sup> See generally Axelle Karera, *Black Feminist Philosophy and the Politics of Refusal*, in *THE OXFORD HANDBOOK OF FEMINIST PHILOSOPHY* 109 (Kim Q. Hall & Ásta eds., 2021).

<sup>30</sup> Hill Collins, *supra* note 18, at S29.

ultimately weaken the discipline.”<sup>31</sup> It is not always easy to occupy the role of an Outsider Within. Outsiders Within reflect a position of comparative disadvantage. As Hill Collins explains, “[p]ermanently claiming an ‘outsider within’; identity rarely results in real power because the category, by definition, requires marginality.”<sup>32</sup>

Nevertheless, the Outsider Within occupies a position of critical importance in academic discourse. While it may not confer traditional forms of power or institutional privilege, it offers a distinct analytical perspective that challenges dominant paradigms and reveals overlooked dimensions of knowledge. As Hill Collins suggests, choosing to speak from this position—rather than withdrawing or conforming—can serve as a powerful intellectual and political act. Far from weakening the discipline, embracing the Outsider Within enriches it, pushing the boundaries of scholarship and expanding the scope of what is considered valid and valuable knowledge.

### III. OUTSIDERS WITHIN APPROACHES FOR A NEW ERA OF RETRENCHMENT IN THE LEGAL ACADEMY

The “Outsider Within” framework offers a generative way of thinking about legal scholarship, institutional practice, and public advocacy. Rooted in Patricia Hill Collins’s insight that marginality can fuel creativity, this approach insists that scholars draw from their own positionality to critique entrenched structures and to reframe the boundaries of law. It speaks not only to how we produce knowledge within the academy, but also to how we organize within our institutions and engage the broader public. By centering erased experiences and foregrounding interlocking systems of oppression, the Outsider Within stance pushes us to reimagine law’s role in society and to pursue more inclusive, transformative possibilities.

#### A. Legal Scholarship

Leaning into the Outsider Within standpoint can generate innovative, critical scholarship that both illuminates and challenges entrenched legal norms and practices. Speaking of “Afro-American female intellectuals,” Hill Collins observes that “marginality has been an excitement to creativity.”<sup>33</sup> In particular, Hill Collins observed that “[t]his ‘outsider within’ status has provided a special standpoint on self, family, and society for Afro-American women.”<sup>34</sup> Furthermore, because Outsider Within is an approach to legal scholarship rooted in one’s own positionality, this approach to legal scholarship often adopts a critical posture based on efforts to reframe legal issues, debates, remedies, and proposals around issues of critical importance to marginalized groups. An Outsider Within approach can also be made part of an effort to re-define and re-evaluate identity and statuses

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<sup>31</sup> *Id.*

<sup>32</sup> Hill Collins, *supra* note 17, at 88.

<sup>33</sup> Hill Collins, *supra* note 18, at S15.

<sup>34</sup> *Id.* at S14.

in law and policy, while remaining attuned to what Hill Collins refers to as the “interlocking nature of race, class, and gender oppression.”<sup>35</sup> More specifically, by centering our own positionalities—and the interlocking nature of race, class, and gender oppression—we can expose erasures and distortions in doctrine and propose alternative frameworks for understanding law’s role in society. This means consciously reframing research questions, methodologies, and narratives to reflect marginalized experiences, and crafting arguments that reshape the “common ground” of legal discourse into a more inclusive normative universe.

For the past several years my writing has been grounded in a project of uncovering doctrinal cover-ups and drawing in between the lines of liberal erasure.<sup>36</sup> By doctrinal cover-ups, I mean aspects of legal codes, doctrines, and interpretation that render forms of pain, experience, and existence legally illegible. By drawing in between the lines of liberal erasure, I mean rendering pains, experiences, and bodies legally cognizable to legal actors and institutions through methods of critique that challenge conventional forms of legal interpretation. For example, in recognizing the certain bodies that are rational, reasonable, and “perspectiveless,”<sup>37</sup> legal doctrine privileges certain conditions of existence and being. My scholarship has been part of naming the erasure—which pains, experiences, and bodies—are ignored through a legal analysis that privileges not just uniformity and standardization across cases but universality and linearity.

## B. Within Our Institutions

Within our law schools, it is imperative that we organize as “outsiders within” to transform institutional structures from the inside out. Senior scholars should continue to mentor junior scholars from underrepresented backgrounds, advocate for equitable committee assignments and transparent promotion criteria, and work to institutionalize outsider-within ways of seeing—such as maintaining hiring practices that continue to promote diversity and inclusion despite the lawless attacks by the administration. In light of the ongoing attacks on DEI, this moment calls for courage, not playing it safe.

In the classroom, the Outsider Within stance compels us to redesign curricula so that casebooks reflect the complexity of intersecting oppressions rather than, for example, a monolithic “reasonable person.” An Outsider Within strategy means foregrounding scholarship by scholars of color, queer theorists, and disability activists in our seminars, and modeling how to interrogate canonical texts through multiple lenses. Outsiders Within should move away from assessment practices that rely on purely black letter exams to other, more diverse and practical assessments, like collaborative projects and reflective journals that

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<sup>35</sup> *Id.* at S19.

<sup>36</sup> See generally Jamelia Morgan, *Disability’s Fourth Amendment*, 122 COLUM. L. REV. 489, 502-03 (2022) (describing the erasure of disability as category of legal analysis in Fourth Amendment doctrine).

<sup>37</sup> Kimberlé W. Crenshaw, *Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT’L BLACK L.J. 1 (1988).

give students tools to recognize and challenge the erasures—omissions, mischaracterizations, and distortions of experiences, encoded in legal reasoning.

Embracing an Outsider Within approach also means acknowledging the emotional labor and vulnerability inherent in speaking truth to power within our own institutions. To cultivate a culture that embraces Outsiders Within, scholars should build and fund networks of mutual support—peer writing groups, affinity caucuses, and mentorship circles—that sustain intellectual risk-taking and safeguard well-being.

### C. Advocacy to the Broader Public

For those adopting an Outsider Within approach, it is incumbent upon scholars to render their critical insights into accessible modalities of public engagement that both safeguard the rule of law and affirm the enduring constitutional and normative commitments to diversity, equity, and inclusion. This work necessitates a multifaceted approach, including the publication of op-eds, participation in media interviews, contributions to community forums, and collaborations with grassroots organizations, all of which serve to bridge the divide between academic discourse and public understanding.<sup>38</sup> By undertaking such efforts, scholars are uniquely positioned to elucidate how contemporary assaults on DEI initiatives function not merely as policy disputes but as structural incursions that imperil academic freedom, destabilize public health, and erode the constitutional principles upon which democratic governance rests. Legal scholars have a unique responsibility—and credibility—to counter misinformation, contextualize dramatic policy shifts, and mobilize broader support for an inclusive vision of justice.

## IV. RECLAIMING THE NOMOS

Much of the work of legal scholarship is about creating new common grounds. Common or shared beliefs that can be likened to a “shared resource that participants in a conversation use to build and perform social interaction.”<sup>39</sup> Common grounds are similar to what Robert Cover called *nomos*, or normative universe.<sup>40</sup>

In this normative world, law and narrative are inseparably related. Every prescription is insistent in its demand to be located in discourse—to be supplied with history and destiny, beginning and end, explanation and purpose. And every narrative is insistent in its demand for its prescriptive

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<sup>38</sup> See, e.g., Anthony Michael Kreis, Evan D. Bernick & Paul A. Gowder, *Birthright Citizenship and the Dunning School of Unoriginal Meanings*, 111 CORNELL L. REV. ONLINE 101 (2025); Kate Andrias et al., *A Title VI Demand Letter That Itself Violates Title VI (and the Constitution)*, BALKINIZATION BLOG (Mar. 15, 2025), <https://balkin.blogspot.com/2025/03/a-title-vi-demand-letter-that-itself.html>.

<sup>39</sup> OLÚFÉMI O. TÁÍWÒ, *ELITE CAPTURE: HOW THE POWERFUL TOOK OVER IDENTITY POLITICS (AND EVERYTHING ELSE)* 40 (2022) (citing Robert Stalnaker’s work).

<sup>40</sup> Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983) (“We inhabit a *nomos*—a normative universe.”).

point, its moral. History and literature cannot escape their location in a normative universe, nor can prescription, even when embodied in a legal text, escape its origin and its end in experience, in the narratives that are the trajectories plotted upon material reality by our imaginations.<sup>41</sup>

Creating a *nomos* in a pluralistic society is not merely an intellectual project—it is a political, cultural, and narrative challenge. As Robert Cover argues, law does not exist apart from the stories we tell about ourselves, our origins, our struggles, and our collective futures. In a diverse society, there is no single, uncontested narrative that gives rise to legal meaning. Instead, we are confronted with overlapping and sometimes conflicting normative worlds. The task, then, is not to erase differences in pursuit of uniformity, but to find mechanisms through which disparate communities can coexist, contribute to, and contest the shape of the *nomos*.

This begins by acknowledging that all law is situated in narrative. Prescriptive texts—constitutions, statutes, judicial opinions—do not carry meaning on their own. They acquire meaning only in relation to the stories communities tell about justice, injustice, struggle, and redemption. As Cover puts it, “every prescription is insistent in its demand to be located in discourse.”<sup>42</sup> In a diverse society, these discourses are multiple. There is no singular tradition to appeal to, no universal mythos that binds all communities. Instead, legal meaning emerges through the friction and fusion of many narratives—some dominant, others marginalized or insurgent.

Here, the Outsider Within approach plays a crucial role. By foregrounding narratives that have historically been excluded from the dominant *nomos*, it complicates the idea of a monolithic legal order. Rather than seeking premature consensus, the Outsider Within insists on a polyphonic jurisprudence—one that respects the tensions between multiple normative universes and treats that tension as productive. Instead of striving for harmony at the cost of silencing dissent, this approach embraces discord as a source of jurisgenesis: the birth of new legal meanings.

Adopting an Outsider Within approach requires legal scholars to venture beyond traditional doctrinal analysis and draw upon interdisciplinary methods—oral history, ethnography, narrative theory, and critical race studies—to surface voices long muted by the prevailing *nomos*.<sup>43</sup> This epistemic openness enables us to locate law within the lived experience of marginalized communities, revealing how legal texts both shape and are shaped by social movements, cultural imaginaries, and collective memory. Such scholarship does more than critique; it reconstructs our understanding of precedent and policy by integrating alternative

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<sup>41</sup> *Id.* at 5.

<sup>42</sup> *Id.*

<sup>43</sup> See, e.g., THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR (Cherríe Moraga & Gloria Anzaldúa eds., 40th Anniversary ed. 2021); ALL OF THE WOMEN ARE WHITE, ALL OF THE MEN ARE BLACK, BUT SOME OF US ARE BRAVE: BLACK WOMEN'S STUDIES PAPERBACK (Akasha Gloria T. Hull et al. eds., 2d ed. 2016); Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485 (1994); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990).

archives and media, from community oral testimonies to digital storytelling platforms.

Ultimately, the Outsider Within approach charts a course toward a non-normative legal academy—one in which disciplines collaborate across difference, curricula evolve in dialogue with social justice movements, and scholarship oscillates dynamically between critique and reconstruction. By valuing positionality as a method, we dissolve the false dichotomy between objectivity and advocacy, forging a legal discourse that is both rigorously analytical and unapologetically committed to liberation. In doing so, we not only enrich our normative universe but also ensure that legal knowledge serves as a catalyst for transformative change.

## V. CONCLUSION

Hill Collins reminds us that outsider-within status extends beyond Black women to include anyone marginalized by dominant narratives—Black men, working-class individuals, religious minorities, and more. Scholars face a choice: suppress difference to conform or leverage outsider positionality for transformative insight. Silencing this standpoint weakens disciplines and squanders the creative brilliance borne from marginality. Legal academia must embrace outsider-within voices to build a truly inclusive normative universe where law and narrative coalesce to promote justice for all.



# RESISTING OVERCOMPLIANCE

Meera E. Deo\*

## I. INTRODUCTION

Since early 2025, the federal government has sought to eliminate diversity, equity, and inclusion (DEI) across virtually all realms of education.<sup>1</sup> Yet, the statutory and regulatory legal interpretations underpinning these efforts do not fully match the hyperbolic political statements announcing these changes. While university officials focus on *whether* to comply with political directives, the more nuanced question is *at what level* to comply, if at all. For every decision, there is a responsive spectrum ranging from resistance to overcompliance, with a balance of potential costs and benefits accompanying each level.

This Essay assesses compliance with federal anti-DEI directives by introducing *resisting overcompliance* as a guiding framework. While others have warned against “obey[ing] in advance,” this Essay provides a detailed framework that specifies the need to first determine what the law requires; then, consider whether to comply with relevant directives, or resist (especially when facing extralegal mandates); and, finally, if choosing to comply, determine what level of compliance is appropriate.<sup>2</sup> *Resisting overcompliance* describes the choice to comply rather than resist, but only to the extent minimally required by existing law, rather than excessively. The framework also provides guidance on actions that remain permissible within the current legal and political landscape.

As a baseline, this Essay unapologetically takes sides: defending democracy, academic freedom, and freedom of speech. It rejects both the extralegal content and processes that characterize current government directives. Substantively, these mandates are extralegal because they demand more than what is legally required. Procedurally, they are extralegal because they thwart established legal processes to issue threats circumventing method.

Advising decisionmakers is a particularly fraught endeavor given shifting demands from the government, ongoing litigation, varying institutional priorities and constituencies, and apprehension about which initiatives or campuses may be targeted next. However, this uncertainty is precisely why administrators need a

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<sup>1</sup> See Meera E. Deo, *The End of Affirmative Action*, 100 N.C. L. REV. 237, 275-77 (2021) (For purposes of this Essay, *diversity* relates to numeric representation of students from different backgrounds, *equity* refers to fair (not necessarily equal) treatment, and *inclusion* means creating opportunities for meaningful participation); *Trump’s Executive Orders on Diversity, Equity, and Inclusion, Explained*, LEADERSHIP CONF. ON CIV. & HUM. RTS. (Feb. 12, 2025), <https://civilrights.org/resource/anti-deia-eos/>.

<sup>2</sup> TIMOTHY SNYDER, ON TYRANNY 8-9 (2021) (The book similarly warns decisionmakers of the dangers of “anticipatory obedience”; though no framework is provided, the book shares twenty lessons to guide resistance).

clear normative and legal framework to guide decision-making regarding compliance. Part II puts the current anti-DEI demands in the current political and educational context. Part III then compares and contrasts resistance versus overcompliance, reviewing the risks and perceived benefits of both. Finally, Part IV details the resisting overcompliance framework. Applying the resisting overcompliance framework in the higher education context clarifies when certain priorities should continue or when new policies should be initiated to further campus goals without running afoul of the law. Activities that remain permissible even within the bounds of current mandates are also detailed in this Part. While the resisting overcompliance framework is applied in this Essay to federal anti-DEI directives in schools, it can be used more broadly, whether evaluating immigration-related employer mandates, executive orders targeting law firms, or other ordeals. This Essay aims to help pro-democracy decisionmakers—including administrators, general counsel, and other leaders—grappling with compliance, particularly to highlight the importance of resisting overcompliance.<sup>3</sup>

## II. ANTI-DEI DEMANDS IN THE CURRENT CONTEXT

Anti-DEI directives must be placed in relevant context, including place (the university) and time (the current moment). This section also examines the lawfulness of current anti-DEI mandates under current governing statutes and constitutional interpretations.

### A. The “Dear Colleague” Letter Is Not Law

On February 14, 2025, the U.S. Department of Education issued a “Dear Colleague” letter warning pre-kindergarten through post-baccalaureate schools that they risked losing federal funding if they did not immediately eliminate all “race-based” programs, including DEI initiatives.<sup>4</sup> Crucially, the Dear Colleague letter draws authority from *Students for Fair Admission v. Harvard (SFFA)*,<sup>5</sup> erroneously asserting that the opinion empowers their directives.<sup>6</sup> *SFFA* did upend Harvard University’s affirmative action policy, concluding that educational diversity was too amorphous to be a compelling state interest and their program was not sufficiently narrowly tailored to withstand strict scrutiny.<sup>7</sup> In limiting opportunities for including race as a factor in university admissions, the decision

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<sup>3</sup> Following a structured process, as outlined in this Essay, will also help administrators communicate responses to the public and other stakeholders during any post-decision or implementation challenges.

<sup>4</sup> Letter from Craig Trainor, Acting Assistant Sec’y Civ. Rts, U.S. Dep’t of Educ., to Colleague (Feb. 14, 2025), <https://www.ed.gov/media/document/dear-colleague-letter-sffa-v-harvard-109506.pdf> [hereinafter Dear Colleague Letter].

<sup>5</sup> See *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181 (2023) [hereinafter *SFFA*].

<sup>6</sup> Dear Colleague Letter, *supra* note 4, at 2.

<sup>7</sup> *SFFA*, 600 U.S. at 214-24.

has diminished diversity in higher education nationwide.<sup>8</sup> However, *SFFA* imposed no mandates or prohibitions on programming related to diversity, equity, inclusion, or a range of related concepts the Dear Colleague letter erroneously claims it proscribed.<sup>9</sup>

As others have noted, “A Dear Colleague Letter is not law and cannot by itself be an enforcement mechanism.”<sup>10</sup> At most, it should assert a department’s current interpretation of existing law, but cannot promulgate new requirements.<sup>11</sup> Instead, this Dear Colleague letter embodies a blatant attempt by the federal government to demand adherence to its anti-DEI vision by pretending broad restrictions are compulsory, although they exceed the legal requirements of *SFFA*.<sup>12</sup> The compliance dilemma is amplified by the high stakes of federal funding loss threatened in the letter.<sup>13</sup> Nevertheless, any demands in the letter that go beyond the scope of existing settled law can legally be ignored.

Two federal district courts have said as much. One issued a preliminary injunction noting that the Dear Colleague letter improperly attempts to impose new obligations on educational institutions, though it should only interpret existing law.<sup>14</sup> The other court similarly “rejected the notion that the Letter merely restates existing law,” even quoting prior guidance that *SFFA* did not prevent schools from “continuing to seek the admissions and graduation of diverse student bodies,”

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<sup>8</sup> See, e.g., Anemona Hartocollis & Stephanie Saul, *At 2 Elite Colleges, Shifts in Racial Makeup After Affirmative Action Ban*, N.Y. TIMES (Aug. 30, 2024), <https://www.nytimes.com/2024/08/30/us/black-enrollment-affirmative-action-amherst-tufts-uva.html>.

<sup>9</sup> See Vinay Harpalani, *Roberts Rules of (Dis)Order: Doctrinal Doublespeak on Affirmative Action and Stare Decisis*, 77 SMU L. REV. 61, 84 (2024); Peter N. Salib & Guha Krishnamurthi, *The Goose and the Gander: How Conservative Precedents Will Save Campus Affirmative Action*, 102 TEX. L. REV. 123, 148 (2023).

<sup>10</sup> Letter from Tony Thurmond, State Superintendent of Pub. Instruction, Cal. Dep’t of Educ., to Cnty. & Dist. Superintendents, Charter Sch. Admins., Sch. Principals, & Early Educ. Dirs., *Clarification Regarding the February 14th “Dear Colleague Letter” from the United States Department of Education* (Feb. 21, 2025), <https://www.cde.ca.gov/nr/el/le/yr25ltr0221.asp#:~:text=A%20Dear%20Colleague%20Letter%20is,new%20laws%20enacted%20by%20Congress>.

<sup>11</sup> See Dear Colleague Letter, *supra* note 4, at 1, n. 3 (The Dear Colleague letter itself notes, “This guidance does not have the force and effect of law and does not bind the public or create new legal standards.”); U.S. Dep’t of Educ.: Off. Civ. Rts., *Frequently Asked Questions About Racial Preferences and Stereotypes Under Title VI of the Civil Rights Act*, <https://www.ed.gov/media/document/frequently-asked-questions-about-racial-preferences-and-stereotypes-under-title-vi-of-civil-rights-act-109530.pdf> (Similarly, the FAQs issued after the Dear Colleague letter notes they “do not have the force and effect of law and do not bind the public or impose new legal requirements.”).

<sup>12</sup> The pretense argument is bolstered by the fact that no court has thus far required that institutions follow Dear Colleague letter directives.

<sup>13</sup> Dear Colleague Letter, *supra* note 4, at 3 (The Dear Colleague letter threatens resisters with the “potential loss of federal funding.”).

<sup>14</sup> Preliminary Injunction Order, *Nat’l Educ. Ass’n v. U.S. Dep’t of Educ.*, 779 F. Supp. 3d 149, 178 (D.N.H. Apr. 24, 2025) (noting, “The obligations imposed by the 2025 Letter are new,” and “Defendants’ argument that the 2025 Letter merely interprets Title VI obligations announced in the *Students for Fair Admissions* case is not persuasive.”).

including through “race-neutral efforts to promote diversity and increase opportunity,” ultimately ruling against the government on summary judgment.<sup>15</sup>

In determining an appropriate response to the Dear Colleague letter, decisionmakers must first ask themselves what the law requires. The two lawsuits mentioned above clearly signify an unwillingness to comply, whether due to legal loyalism or outright resistance.

Some universities also have resisted. When Harvard University initiated a lawsuit alleging that a government mandated funding freeze was “flatly unlawful,”<sup>16</sup> dozens of universities joined the fray on their behalf.<sup>17</sup> Others have fully complied with the Dear Colleague letter, despite it going well beyond existing law.<sup>18</sup> Yet, there is a middle ground. Even among those choosing to yield, there are gradients along the spectrum from minimal compliance to overcompliance, with individual constituencies and circumstances guiding each institution. Every university is thus faced with the daunting task of deciding not only whether to resist or comply, but also potentially *how much* to comply.

### B. Situating Anti-DEI Directives in Context

The risks of resistance and dangers of overcompliance are particularly salient in higher education. The Supreme Court considers education “the very foundation of good citizenship,”<sup>19</sup> while “universities occupy a special niche in our constitutional tradition.”<sup>20</sup> Institutions of higher learning can teach adults to think critically, engage in civic responsibility, and consider how the power and privilege of an academic degree can help achieve individual and collective goals.<sup>21</sup> Because universities are themselves “opinionated” (rather than disinterested or neutral),<sup>22</sup>

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<sup>15</sup> Am. Fed. Teachers v. Dep’t of Educ., No. SAG-25-628, at 36 (D. Md. Apr. 24, 2025) (memorandum opinion), <https://storage.courtlistener.com/recap/gov.uscourts.mdd.577437/gov.uscourts.mdd.577437.60.0.pdf>; Am. Fed. Teachers v. Dep’t of Educ., No. SAG-25-628, at 48 (D. Md. Aug. 14, 2025), [https://www.aft.org/sites/default/files/media/documents/2025/DCL\\_MSJ\\_opinion.pdf](https://www.aft.org/sites/default/files/media/documents/2025/DCL_MSJ_opinion.pdf).

<sup>16</sup> Alvin Powell, *Harvard Files Lawsuit Against Trump Administration*, HARV. GAZETTE (Apr. 21, 2025), <https://news.harvard.edu/gazette/story/2025/04/harvard-files-lawsuit-against-trump-administration/> (While Harvard may ultimately settle, it’s unwillingness to immediately capitulate still signals resistance).

<sup>17</sup> See Dhruv T. Patel & Grace E. Yoon, *Who Is Supporting Harvard in Its Lawsuit to Keep Federal Research Funding?*, HARV. CRIMSON (June 11, 2025), <https://www.thecrimson.com/article/2025/6/11/harvard-funding-amici>.

<sup>18</sup> See, e.g., Sarah Wood, *Dear Colleague Letter: DEI Bans at Colleges and What to Know*, U.S. NEWS (Feb. 20, 2025, 3:27 PM), <https://www.usnews.com/education/best-colleges/articles/dei-bans-at-colleges-what-students-should-know> (The U.S. Military Academy at West Point went so far into overcompliance that it “axed clubs centered around gender, race, ethnicity and sexuality, such as the Asian-Pacific Forum Club, the National Society of Black Engineers, and the Society of Women Engineers.”).

<sup>19</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

<sup>20</sup> *Gutter v. Bollinger*, 539 U.S. 306, 329 (2003).

<sup>21</sup> See ROBERT J. THOMPSON JR., *BEYOND REASON AND TOLERANCE: THE PURPOSE AND PRACTICE OF HIGHER EDUCATION* (2014).

<sup>22</sup> See BRIAN SOUCEK, *THE OPINIONATED UNIVERSITY ACADEMIC FREEDOM, DIVERSITY, AND THE MYTH OF NEUTRALITY IN HIGHER EDUCATION* (2026).

administrators should lead by example—critically engaging not only with theory but also with the law by using civic responsibility and the power of their positions to reject unreasonable and extralegal demands. The Supreme Court has made clear that university officials maintain their rights to speech and expression.<sup>23</sup> There is no better time to use them.

Resisting overcompliance is particularly salient now, when some universities and their leaders face external assaults from federal, state, and local government, as well as internal pressures.<sup>24</sup> Many confrontations involve targeted efforts to remove “illegal DEI” from institutions of higher education, despite constitutional and other protections for them.<sup>25</sup> Besides nationwide anti-DEI efforts, individual institutions also have been targeted.<sup>26</sup> Given the legal and political landscape, some institutions elect to overcomply, even exceeding directives from the Dear Colleague letter, whether this means banning the campus Asian-Pacific Forum Club<sup>27</sup> or voluntarily surrendering non-citizen student data.<sup>28</sup>

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<sup>23</sup> See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

<sup>24</sup> In addition to federal attacks, many universities are also navigating state-specific anti-DEI legislation and regulations, including in Ohio (see, e.g., Julie Carr Smyth, *Governor Signs Ban on DEI in Ohio Public Colleges Despite Opposition by Students and Teachers*, ASSOCIATED PRESS (Mar. 28, 2025, 4:31 PM), <https://apnews.com/article/higher-education-ohio-dei-restrictions-faculty-strikes-8b0ab7db08eb712e3350bb241b610f70>), Florida (*State Board of Education Passes Rule to Permanently Prohibit DEI in the Florida College System*, FLA. DEP’T OF EDUC. (Jan. 17, 2024), <https://www.fldoe.org/newsroom/latest-news/state-board-of-education-passes-rule-to-permanently-prohibit-dei-in-the-florida-college-system.shtml>), and Texas (Kiara Alfonseca, *When DEI Is Gone: A Look at the Fallout at One Texas University*, ABC NEWS (Oct. 13, 2024, 5:03 AM), <https://abcnews.go.com/US/dei-fallout-texas-university/story?id=114470961>). Board members have also wreaked havoc (Michael S. Schmidt & Michael C. Bender, *University of Virginia President Resigns Under Pressure from Trump Administration*, N.Y. TIMES (June 27, 2025), <https://www.nytimes.com/2025/06/27/us/politics/uva-president-resigns-jim-ryan-trump.html>).

<sup>25</sup> Many directives outlawing DEI fail to specify how they define or recognize prohibited DEI initiatives. Improper directives have also led to “malicious compliance,” which is formal compliance with the letter of a mandate while thwarting its intended policy or furthering a deeper purpose. See, e.g., Emma Whitford, *Plato Censored as Texas A&M Carries Out Course Review*, INSIDE HIGHER ED (Jan. 7, 2026), <https://www.insidehighered.com/news/faculty-issues/academic-freedom/2026/01/07/plato-censored-texas-am-carries-out-course-review> (discussing a Texas A&M philosophy professor who when forced to remove sections of Plato from his syllabus replaced them with “lectures on free speech and academic freedom.”).

<sup>26</sup> See Alan Blinder, *Trump Has Targeted These Universities. Why?*, N.Y. TIMES (Apr. 9, 2025), <https://www.nytimes.com/article/trump-university-college.html>. Some anti-DEI attacks, including freezing research funds at UCLA, pretend to combat antisemitism (Lindsey Holden & Eric He, *Trump Bruins a Good Time at UCLA*, POLITICO (Aug. 12, 2025, 6:46 PM), <https://www.politico.com/newsletters/california-playbook-pm/2025/08/12/ucla-trump-settlement-00506019> (“Trump says the settlement is about antisemitism. California Jewish leaders disagree.”). While antisemitism remains a campus scourge, tying it to anti-DEI regulations rings hollow, especially given Jewish students’ support for and from DEI programming. Laura Meckler et al., *Inside the Powerful Task Force Spearheading Trump’s Assault on Colleges, DEI*, WASH. POST (July 24, 2025), <https://www.washingtonpost.com/education/2025/07/18/antisemitism-task-force-dei-universities-trump/>.

<sup>27</sup> See Wood, *supra* note 18.

<sup>28</sup> The Center for Democracy and Technology reports that teachers in urban areas, where a majority of immigrants live, are more likely to report student data to ICE. Kristin Woelfel & Elizabeth Laird, *Education Leaders’ Guide to Complying with Existing Student Privacy and Civil Rights Laws Amidst*

Overcompliance also may have devastating unanticipated results—as in the case of Columbia University, which immediately acquiesced to government demands only to be met with further demands that led to greater setbacks and ultimately the interim President’s resignation.<sup>29</sup>

In the wake of ongoing attacks, administrators must contemplate internal processes for responding, especially determinations about resistance and compliance. Charting a course of action is particularly challenging when demands are not only unjust or unreasonable, but also substantively extralegal, as the Dear Colleague letter mandates go beyond what legal requirements. The process is extralegal too, as a Dear Colleague letter is not the proper forum to create new law, overstate what is settled constitutional doctrine, or threaten financial ruin for noncompliers. Current federal guidance represents a fantasy world of what some officials in the present administration wish the law to be, rather than accurately characterizing existing law or following established processes to change it. Yet, the stakes of non-compliance remain very real. Furthermore, campus leaders cannot reliably depend on the Supreme Court to uphold the law, as some Justices have instead demonstrated primary allegiance to political priorities.<sup>30</sup> Thus, a framework for navigating the mismatch between anti-DEI decrees and legal requirements is particularly helpful.

### III. RESISTANCE VS. COMPLIANCE

Some compliance determinations are straightforward. When appropriately served with a judicial warrant to search a student’s private physical space in a traditional criminal context, most university officials will comply.<sup>31</sup> However, when Immigration and Customs Enforcement (ICE) officials appear on campus without an administrative warrant, administrators may comply or choose to resist and deny access.<sup>32</sup> While these are relatively straightforward examples, most

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*an Evolving Immigration Landscape*, CTR. DEMOCRACY & TECH. (Jan. 2025), <https://cdt.org/wp-content/uploads/2025/01/2025-02-03-Civic-Tech-Education-Leaders-Guide-Evolving-Immigration-Landscape-Issue-Brief-updated.pdf>.

<sup>29</sup> See Max Matza, *Columbia University President Resigns Amid Trump Crackdown*, BBC NEWS (Mar. 28, 2025), <https://www.bbc.com/news/articles/cvgwg1w3409o>.

<sup>30</sup> See *Dep’t of Homeland Sec. v. D.V.D.*, 145 S. Ct. 2627, 2633 (2025) (Sotomayor, J., dissenting) (“Other litigants must follow the rules, but the [Trump] administration has the Supreme Court on speed dial.”).

<sup>31</sup> School administrators will likely comply with a valid and enforceable warrant. Outright resistance could mean escorting students off campus to avoid ICE, though administrators (like the Milwaukee judge who escorted one subject of ICE enforcement out of her courtroom) could face consequences for helping individuals evade government attention. See generally Alanna Durkin Richer et al., *FBI Arrests a Milwaukee Judge Accused of Helping a Man Evade Immigration Agents*, PBS WIS. (Apr. 25, 2025, 5:52 PM), <https://pbswisconsin.org/news-item/fbi-arrests-a-milwaukee-judge-accused-of-helping-a-man-evade-immigration-agents/>.

<sup>32</sup> Some K-12 school districts have policies regarding ICE on campus. College administrators could follow this precedent. See Los Angeles Unified Sch. Dist. Bd. of Educ., Res. 093-16/17 (May 9, 2017), <https://www.lausd.org/cms/lib/CA01000043/Centricity/domain/818/pdfs/resolutions/Reaffirming%>

situations are more complex. Overcompliance may negatively affect not only institutions, but also individuals, including campus decisionmakers (i.e., deans, administrative leadership, and faculty) as well as staff members and the very students that universities are meant to serve.

### A. The Risks of Resistance

Many resistance threats are structural. Universities that fight government demands are vulnerable to legal challenges, whether the government or private actors initiate suit.<sup>33</sup> Additionally, defiant universities recognize the government could deliver on articulated threats, including the loss of funding specified in the Dear Colleague letter.<sup>34</sup> There also are potential reputational risks that go beyond the law to the court of public opinion; when social movements demand action (one way or another) universities that oppose them often incur public disparagement.<sup>35</sup>

Resistance also carries individual risks. Officials who make decisions that are unpopular with large swaths of constituents or particularly powerful players may suffer personal attacks and even the loss of their leadership positions.<sup>36</sup> There are also grave risks to students when universities resist. The government could take away funding for Pell Grants, scholarships, or other funds that students need to survive. Additionally, immigrant students may be prevented from returning to campus or banned from the United States altogether.<sup>37</sup>

### B. The Dangers of Overcompliance

Whereas the risks of resistance are clear, overcompliance can be dangerous too. Economists note “overcompliance occurs when [an individual] takes more than the socially cost-justified level of precautions,” acting “out of fear of possible liability [to undertake] some precaution where the burden of doing so .

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20Safe%20Zones%20Resolution.pdf. Many are more likely to resist self-proclaimed government agents in full face masks, without uniforms or proper identification, potentially kidnapping people rather than lawfully executing a judicial warrant. See Victoria Clayton, *Why Did Angelenos Swiftly Resist ICE Raids? Look to LA's Deep Immigrant Roots*, GUARDIAN (June 12, 2025, 6:00 AM), <https://www.theguardian.com/us-news/2025/jun/12/los-angeles-ice-protests-immigration>.

<sup>33</sup> See, e.g., *Portz v. St. Cloud State Univ.*, 16 F.4th 577 (8th Cir. 2021) (describing Title IX lawsuit).

<sup>34</sup> See Dear Colleague Letter, *supra* note 4.

<sup>35</sup> See RODERICK A. FERGUSON, *WE DEMAND: THE UNIVERSITY AND STUDENT PROTESTS* (Lisa Duggan & Curtis Marez eds., Univ. of Cal. Press 2017).

<sup>36</sup> The Presidents of Columbia University, the University of Pennsylvania, and Harvard University resigned after “fierce national scrutiny” for their handling of campus protests and direct attacks by conservative congressional leaders. See Sarah Huddleston & Shea Vance, *Columbia President Minouche Shafik Resigns Amid Campus Turmoil over War in Gaza*, COLUM. SPECTATOR (Aug. 15, 2024, 11:16 AM), <https://www.columbiaspectator.com/news/2024/08/14/shafik-resigns-from-presidency/>. While the University of Virginia President resigned under pressure from the federal government and the university board of trustees. See Schmidt & Bender, *supra* note 24.

<sup>37</sup> See Kimmy Yam, *Student Visa Terminations Have Quickly Hit over Half of All States. What's Behind It*, NBC NEWS (Apr. 10, 2025, 9:16 AM), <https://www.nbcnews.com/news/asian-america/international-students-revoked-visas-reasons-why-rcna200313>.

. . . exceeds the benefit.”<sup>38</sup> Others emphasize those who “cede power voluntarily” are doing so based on “reasonable arguments,” protecting themselves or others.<sup>39</sup>

Overcompliance can feel strategic. Some leaders follow the “precautionary principle,”<sup>40</sup> being “risk averse” and “excessively cautious” in an attempt to avoid harm.<sup>41</sup> When the regulatory line is blurry, “uncertainty can lead to over-compliance,”<sup>42</sup> especially when doing extra costs little, while undercomplying may have expensive repercussions.<sup>43</sup> Thus, a university may dismantle identity-based campus residential communities when DEI is attacked, not because they believe it is legally required but to avoid scrutiny from an unreasonable government.<sup>44</sup> Overcompliance is sometimes easier than parsing through regulations to determine what is required;<sup>45</sup> thus, institutions may dismantle all access-oriented programming rather than sift through mandates to identify palatable actions.<sup>46</sup> The potential for reputational harm can drive overcompliance when officials fear backlash from constituents who demand more than the law requires.<sup>47</sup> Other administrators appreciate the “cover” provided by extralegal regulations to end programs they already disfavor.<sup>48</sup> Government actors may also “threaten[] to exact overcompliance through intimidation.”<sup>49</sup> This is where university officials and other leaders find themselves today.

Despite these motives to overcomply, doing so promotes myriad dangers. Acquiescence with extralegal directives legitimates government overreach, suggesting agreement or tacit support.<sup>50</sup> Thus, Columbia University’s quick

<sup>38</sup> Bruce Chapman, *Corporate Tort Liability and the Problem of Overcompliance*, 69 S. CAL. L. REV. 1679, 1683 (1996).

<sup>39</sup> M. Gessen, *The Chilling Consequences of Going Along with Trump*, N.Y. TIMES (Feb. 8, 2025), <https://www.nytimes.com/2025/02/08/opinion/trump-power-surrender.html>.

<sup>40</sup> See Richard L. Revesz, *The Law and Economics of Federalism: The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535, 558 (1997).

<sup>41</sup> Christine Abely, *Review of Sanctions: What Everyone Needs to Know*, 57 NEW ENG. L. REV. 9, 14 (2022).

<sup>42</sup> Robert J. Rhee, *A Legal Theory of Shareholder Primacy*, 102 MINN. L. REV. 1951, 2015 (2018); see also Collin Brinkley, *DEI Rollbacks Hit Campus Support Systems for Students of Color*, ASSOCIATED PRESS (Apr. 22, 2025, 1:54 PM), <https://apnews.com/article/dei-diversity-equity-inclusion-college-bbe09c081d8a47fcb5616c8fa3b23cee>.

<sup>43</sup> Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523 (1984).

<sup>44</sup> Dahn Shaulis, *Universities Eliminate DEI Programs Amid Political and Financial Pressures*, HIGHER EDUC. INQUIRER (Mar. 27, 2025), <https://www.highereducationinquirer.org/2025/03/universities-eliminate-dei-programs.html>.

<sup>45</sup> BRUCE JENTLESON, *SANCTIONS: WHAT EVERYONE NEEDS TO KNOW* 95 (2022) (discussing how complicated rules relating to sanctions force some corporations to abandon international efforts altogether).

<sup>46</sup> Erin Gretzinger et al., *Tracking Higher Ed’s Dismantling of DEI*, CHRON. HIGHER EDUC. (Nov. 10, 2025), <https://www.chronicle.com/article/tracking-higher-eds-dismantling-of-dei>.

<sup>47</sup> Abely, *supra* note 41, at 12.

<sup>48</sup> See, e.g., Brinkley, *supra* note 42 (Virginia Governor, Glen Youngkin, “celebrated when the University of Virginia’s governing board voted to end DEI programs in March.”).

<sup>49</sup> Deborah A. Widiss, *Uneasy Labeling*, 107 YALE L.J. 1529, 1534 (1998).

<sup>50</sup> Note that the converse does not necessarily hold true; for instance, when California enforces stricter emissions standards than what the federal government requires, it is technically “going beyond” what federal law mandates but not for the purpose of demonstrating overcompliance; instead, their actions

capitulation indicated a willingness to drop DEI.<sup>51</sup> When mandates are unjust or substantively extralegal and repercussions of non-compliance disruptive societally, those who overcomply also promote fear-based inaction—suggesting the precautionary principle is “literally paralyzing” rather than constructive.<sup>52</sup>

Conversely, taking action can be contagious and advantageous. For instance, law firms that settled with the government for fear of losing business initially encouraged others to act similarly.<sup>53</sup> However, once firms began fighting back, others followed suit and their clients backed them up.<sup>54</sup> Overcompliance also cedes rights beyond those already being trampled, inviting bad actors to compound their unreasonable demands. It results in “the chilling of socially desirable behavior,” particularly when the law is unclear or the stakes especially high.<sup>55</sup>

Thus, the government asserting DEI initiatives are unlawful (unclear) and funds will be withheld from institutions that persist (high stakes) will cause some to abandon DEI, despite it being socially valuable, lawful, and even financially beneficial. This played out in the marketplace where Costco stock soared after the company reaffirmed its commitment to DEI,<sup>56</sup> whereas Target’s earnings dropped so low after abandoning DEI that the CEO was forced out.<sup>57</sup> Overcompliance may even cause broad societal harms such as lessening inclusion, impeding access, and thwarting progress that has already been achieved.<sup>58</sup> Current anti-DEI assaults can thus signal backlash against affirmative action, racial justice, and antiracism

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(more stringent regulations) are based on their own higher priorities to protect air quality, not in demonstrating compliance.

<sup>51</sup> See Troy Closson, *Columbia Agrees to Trump’s Demands After Federal Funds Are Stripped*, N.Y. TIMES (Mar. 21, 2025), <https://www.nytimes.com/2025/03/21/nyregion/columbia-response-trump-demands.html>.

<sup>52</sup> Cass R. Sunstein, *New Perspectives and Legal Implications: Beyond the Precautionary Principle*, 151 U. PA. L. REV. 1003, 1004 (2003).

<sup>53</sup> See Eric Tucker, *Trump Reaches Deals with 5 Law Firms, Allowing Them to Avoid Prospect of Punishing Executive Orders*, ASSOCIATED PRESS (Apr. 11, 2025, 7:55 PM), <https://apnews.com/article/trump-law-firms-executive-order-fe8f38a61cf77c5bb6add1315f5f96f1>.

<sup>54</sup> Steve Benen, *Law Firms that Appeased Trump Confront the Consequences of their Misjudgment*, MSNBC (June 2, 2025, 12:53 PM), <https://www.msnbc.com/rachel-maddow-show/maddowblog/law-firms-appeased-trump-confront-consequences-misjudgment-rcna210449>;

Ben Protes, *More Than 500 Law Firms Back Perkins Coie in Fight with Trump*, N.Y. TIMES (Apr. 4, 2025), <https://www.nytimes.com/2025/04/04/business/law-firms-perkins-coie-trump.html>. Note also the ABA lawsuit “to halt government intimidation of lawyers and law firms.” *ABA Files Suit to Halt Government Intimidation of Lawyers and Law Firms*, A.B.A. (June 16, 2025), <https://www.americanbar.org/news/abanews/aba-news-archives/2025/06/aba-files-suit-to-halt-govt-intimidation>.

<sup>55</sup> Christina Parajon Skinner, *Cybercrime in the Securities Market: Is U.C.C. Article 8 Prepared?*, 90 N.C. L. REV. ADDENDUM 132, 154 (2011).

<sup>56</sup> Nancy Marshall-Genzer, *Costco Doubles Down on DEI — and Benefits*, MARKETPLACE (May 22, 2025), <https://www.marketplace.org/story/2025/05/22/costco-doubles-down-on-dei-and-benefits>.

<sup>57</sup> Nathaniel Meyersohn, *Target’s CEO Is Stepping Down as Customers Turn Away*, CNN (Aug. 20, 2025),

<https://www.cnn.com/2025/08/20/business/target-stock-ceo-cornell>.

<sup>58</sup> Abely, *supra* note 41, at 14-15.

gains.<sup>59</sup> This counterattack has real consequences for individuals, including students harmed by lost opportunities, scholarships, programming, and support.<sup>60</sup> Overcompliance even provides a roadmap for further eroding civil rights, suggesting future extralegal demands.<sup>61</sup> For instance, canceling MLK Day celebrations in the wake of anti-DEI attacks could embolden government efforts to revoke holidays honoring Black Americans.<sup>62</sup>

#### IV. A FRAMEWORK FOR RESISTING OVERCOMPLIANCE

When faced with a complex decision about resisting or complying, administrators should not blindly follow demands or “adapt instinctively, without reflecting.”<sup>63</sup> Compliance does not mean “simply yielding to power without agency.”<sup>64</sup> Administrators should wield their power to determine both *whether* and *how much* compliance is appropriate.<sup>65</sup> In determining their response to new laws, regulations, or directives, administrators should adhere to the resisting overcompliance framework by asking the following questions:

1. What does the law require, at its minimum?
2. Given competing priorities, should the institution resist or comply? If complying, what would demonstrate minimal compliance? If complying, how much (over)compliance, if any, should the institution demonstrate? If complying, which permissible actions should the institution continue?

Together, these questions provide a framework for reasoned deliberation and decision-making while helping campus officials avoid overcompliance and associated dangers. While each institution juggles myriad factors to determine whether to resist, this framework can help determine the appropriate level of compliance for those institutions that cannot or do not resist entirely. The next

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<sup>59</sup> See generally Meera E. Deo, *Progress and Backlash in Our Unequal Profession*, 51 SW. L. REV. 310 (2022) (discussing anti-CRT, anti-science, and anti-women rhetoric following evidence of progress).

<sup>60</sup> Students of color and other non-traditional students are the ones most affected by the closure of campus centers and programs that have provided support for decades. See Erin Gretzinger & Maggie Hicks, *The Chaos of Compliance*, CHRON. HIGHER EDUC. (Mar. 22, 2024), <https://www.chronicle.com/article/the-chaos-of-compliance>.

<sup>61</sup> A related danger is that compliance with extralegal demands may conflict with actual legal requirements, such as complying with a demand to eliminate workplace accommodations in violation of the Americans with Disabilities Act. See Mia Ives-Rublee & Casey Doherty, *The Trump Administration's War on Disability*, CTR. AM. PROGRESS (2025), <https://www.americanprogress.org/article/the-trump-administrations-war-on-disability/>.

<sup>62</sup> See generally, e.g., Tara Copp, *Pentagon Agency Pauses Celebrations for Martin Luther King Jr. Day, Black History Month, and More*, ASSOCIATED PRESS (Jan. 29, 2025, 4:50 PM), <https://apnews.com/article/trump-holiday-mlk-day-pride-black-hispanic-dei-047bbdbfc12ea6e9a9731f5861d84e70>.

<sup>63</sup> SNYDER, *supra* note 2, at 20.

<sup>64</sup> Kim Sojin & Christian Huber, *Compliance and Resistance: How Performance Measures Make and Unmake Universities*, 30 ORG. 1130 (2023).

<sup>65</sup> Thus, even minimal compliance can signal resistance.

section revisits the Dear Colleague letter, applying the resisting overcompliance framework.

### A. Resisting Overcompliance in the Anti-DEI Context

As overcompliance carries significant risk that must be part of the calculus of any decisionmaker, administrators should follow the resisting overcompliance framework to appropriately respond to unjust or extralegal mandates. The first step is to determine what the law requires. According to textual analysis of the Dear Colleague letter, as well as determinations from two district courts, the letter improperly exceeds the legal dictates of *SFFA*. As detailed above, *SFFA* may end or at least complicate a university's ability to rely on race as a factor in admissions, but it includes no prohibitions on population-specific graduation ceremonies, housing, or campus gathering spaces—all initiatives singled out for termination in the Dear Colleague letter.<sup>66</sup> Succinctly, the law requires compliance with *SFFA*, but nothing more.

The second step requires universities to determine whether to resist entirely or comply even minimally with the Dear Colleague letter. If complying, administrators must consider three additional questions. Each institution should engage in a case-specific decision-making process considering all constituents and priorities to determine their answers. Because the Dear Colleague letter cannot mandate obligations beyond the scope of existing law, minimal compliance would require simply that institutions adhere to the legal requirements set forth in *SFFA*. Most institutions, even those that disliked the ruling, immediately complied with *SFFA* because it signaled Supreme Court interpretation of existing constitutional law, which is squarely within their authority.<sup>67</sup> Put differently, universities fully complied because the opinion was neither substantively nor procedurally extralegal—though the Dear Colleague letter is both. Thus, when leaders ask, “What would demonstrate minimal compliance” with the Dear Colleague letter, the answer is simply: adherence to *SFFA*.

This step also asks whether to do more: “How much (over)compliance, if any, should the institution demonstrate?” Although doing more would exceed the scope of what the Supreme Court determined is legally required, institutions can choose to slightly overcomply without excessive risk. For instance, they may eliminate some DEI programs but continue to support graduation celebrations for students wearing cultural and ethnic garb, host panels of Native American environmental rights advocates, or encourage gatherings of students of color looking for a safe space on campus—none of which is specifically prohibited.

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<sup>66</sup> See *supra* Part II.

<sup>67</sup> See, e.g., Molly Reinmann, *University Announces Policy Changes Following SCOTUS Affirmative Action Ruling*, YALE DAILY NEWS (Sept. 8, 2023, 2:54 AM), <https://yaledailynews.com/blog/2023/09/08/university-announces-policy-changes-following-scotus-affirmative-action-ruling/>.

The third part of determining level of compliance involves officials sanctioning and promoting permissible actions.<sup>68</sup> Here, leaders face both a legal and a moral or ethical calculus, balancing compliance with student needs. Some will decide to continue programming they believe follows the letter of the law while impeding broader extralegal demands—perhaps promoting access for students of color, protections for marginalized students, or targeted outreach for immigrants, all without violating any laws. However, even those who decide to overcomply, acceding to the extralegal mandates of the Dear Colleague letter, can follow the directives outlined below to assist vulnerable students in need of support.

## B. Permissible Actions

While the resisting overcompliance framework can help decisionmakers determine the best response to unjust or extralegal directives, the legal and political future remains uncertain. Regardless of their level of compliance, certain programs and priorities remain unassailable, even for those strictly following federal anti-DEI directives.

For example, initiatives promoting belonging and wellness are unequivocally permissible even within the bounds of new federal mandates. Because they violate neither legal nor political directives, they are reasonable options even for entities that fully comply with directives that go beyond *SFFA*. Thus, even institutions that overcomply with the Dear Colleague letter should prioritize and promote belonging and wellness.

### 1. Promoting Belonging

While individuals may respond with varying levels of resistance or compliance to ongoing attacks against campus DEI, everyone can promote belonging. Belonging refers to “a feeling of connectedness, that one is important or matters to others.”<sup>69</sup> In higher education, belonging relates to “a student’s malleable sense of their connection to campus.”<sup>70</sup> Without racial diversity, it is difficult for students of color to achieve a strong sense of belonging.<sup>71</sup> Thus, during this unprecedented backlash against DEI initiatives that have long supported students from all backgrounds and particularly those who are marginalized, universities should focus on enhancing belonging.

There are many specific belonging initiatives that universities can (continue to) employ and should emphasize. Research suggests that *cultural navigators*, mentors who help students navigate the norms of campus and

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<sup>68</sup> While some that fully comply face backlash from the public, *see* Meyersohn, *supra* note 57, and others that loudly resist find support, *see* Marshall-Genzer, *supra* note 56, campuses need not publicly signal level of compliance.

<sup>69</sup> TERRELL L. STRAYHORN, *COLLEGE STUDENTS’ SENSE OF BELONGING* 2 (2d ed. 2019).

<sup>70</sup> Meera E. Deo, *Building Belonging*, 102 *DENV. L. REV.* 771, 771 (2025).

<sup>71</sup> Similarly, it is difficult to achieve equity and inclusion without diversity. *See* Deo, *supra* note 1, at 239-40.

professional life, can be instrumental in improving belonging.<sup>72</sup> Increasing mentor accessibility for all students (not only students of color or women, for instance) would not run afoul of anti-DEI regulations because specific populations would not be prioritized, just included. Thus, greater attention and resources should be funneled to assist cultural navigators—whether faculty, student services staff, or peers—work directly with students to increase belonging.

Additionally, the professional socialization process represents a period of considerable upheaval as many new arrivals transition from recent high school or college graduates to future professionals, adapting to the expectations of their chosen careers.<sup>73</sup> Having campus resources available to assist students through this process has been empirically proven to enhance belonging—for all students, but especially those from backgrounds traditionally excluded from higher education.<sup>74</sup> While many belonging initiatives can be helpful to the student body as a whole, targeted initiatives are especially significant.<sup>75</sup> While some universities may choose to limit race- or gender-based initiatives, all institutions should continue outreach to students who work part-time or full-time, student parents, first-generation students, immigrants, and others from vulnerable populations. Whether following only *SFFA* or the excessive Dear Colleague letter directives, all of these belonging initiatives are permissible.

## 2. Enhancing Wellness

University administrators should also allocate resources toward promoting wellness. This is a critical moment to prioritize student wellness, given the very attacks described throughout this Essay—on DEI, immigrants, and higher education.<sup>76</sup> Wellness refers to the explicitly pursued goal of “being healthy.”<sup>77</sup> Various wellness techniques can be employed to reach broader wellbeing goals,<sup>78</sup>

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<sup>72</sup> Terrell L. Strayhorn, *Reframing Academic Advising for Student Success: From Advisor to Cultural Navigator*, 35 NAT'L ACAD. ADVISING ASS'N J. 56, 59 (2015).

<sup>73</sup> See John C. Weidman, Darla J. Twale & Elizabeth Leahy, *Socialization of Graduate and Professional Students in Higher Education*, 28(3) ASHE-ERIC HIGHER EDUC. REP. (2001), <https://eric.ed.gov/?id=ED457710>.

<sup>74</sup> See generally Strayhorn, *supra* note 72.

<sup>75</sup> Jacquelyn M. Petzold & Meera E. Deo, *Increasing Law Student Belonging: Student Services Professionals as Cultural Navigators*, AM. BEHAV. SCIENTIST (forthcoming 2025).

<sup>76</sup> Immigrant students from various campuses have been detained, including most prominently and terrifyingly Tufts University doctoral student Rümeyşa Öztürk, see generally Jenna Russell et al., *Federal Government Detains International Student at Tufts*, N.Y. TIMES (Mar. 26, 2025, 11:40 AM), <https://www.nytimes.com/2025/03/26/us/ice-tufts-student-detained-rumeysa-ozturk.html>, who was eventually released (Adrian Florido, *Tufts Student Rümeyşa Öztürk Freed from Immigration Detention*, NPR (May 9, 2025, 8:53 PM), <https://www.npr.org/2025/05/09/nx-s1-5393055/tufts-student-rumeysa-ozturk-ordered-freed-from-immigration-detention>).

<sup>77</sup> Wellness, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/wellness>.

<sup>78</sup> ABA NATIONAL TASK FORCE ON LAWYER WELLBEING, THE PATH TO LAWYER WELLBEING 52 (2017). Wellness can be considered a subset of wellbeing, which requires more structural (rather than individual) investment and refers to “a state of feeling healthy and happy.” *Well-being*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/well-being>.

including yoga, meditation, journaling, exercise, and even spending quality time with friends and family, prioritizing sleep, and being purposeful about nutrition.<sup>79</sup>

While a one-size-fits-all approach to wellness cannot reach every student, wellness techniques do not track race, gender, sexual orientation, or other identity characteristics. Whether someone enjoys a sense of calm during meditation, feels their muscles and mind relax while practicing yoga, or gets an adrenaline rush when exercising is unique to their own capacity and interests, not tied to identity. Thus, schools can employ blanket policies aimed to improve wellness for everyone (rather than targeting particular groups) to avoid anti-DEI attention.

Marginalized populations may nevertheless have the most to gain from wellness opportunities.<sup>80</sup> Because empirical research documents that students of color are more likely to struggle through the professional socialization process, making counseling available generally may help these students specifically, as long as they feel comfortable accessing care.<sup>81</sup> Similarly, bringing instructors to campus to lead interested students in yoga, meditation, mindfulness, or other wellness programming may be especially appreciated by students struggling with their mental health (including students of color and other marginalized populations) though no group need be singled out for outreach or programming.<sup>82</sup> These students may be even more likely to participate if administrators include them in determining what types of events to host or which instructors to invite. Keeping wellness initiatives open to all thus helps vulnerable populations while avoiding DEI ramifications.

## V. CONCLUSION

Given the level of political uncertainty involving the future of DEI in higher education, decision-makers should use the resisting overcompliance framework to determine whether and how much to comply with various directives. The framework also helps clarify what remains permissible, despite anti-DEI attacks. Some policies will be legal, though disfavored. Others may be substantively and procedurally extralegal and detested. Using the resisting overcompliance framework, administrators, attorneys, and other leaders can follow the outlined steps to determine the best path forward for their institution.

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<sup>79</sup> Leonard Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients*, 7 HARV. NEGOT. L. REV. 1, 9 (2002); see Nathalie Martin, *The Lawyer in the Lotus*, in THE BEST LAWYER YOU CAN BE 69, 70 (Stewart Levin ed. 2018); Shailini Jandial George, *The Cure for the Distracted Mind: Why Law Schools Should Teach Mindfulness*, 53 DUQUESNE L. REV. 215 (2015).

<sup>80</sup> See Allana T. Forde et al., *The Weathering Hypothesis as an Explanation for Racial Disparities in Health: A Systematic Review*, 33 ANN. EPIDEMIOL. 1 (2019) (“The weathering hypothesis states that chronic exposure to social and economic disadvantage leads to accelerated decline in physical health outcomes and could partially explain racial disparities in a wide array of health conditions,” including mental health).

<sup>81</sup> Petzold & Deo, *supra* note 75.

<sup>82</sup> Meera E. Deo, *Mandating Wellness* (sharing empirical findings of students of color and other marginalized populations struggling with mental health at higher rates than their peers) (on file with the author).

Even when legality is clear, institutions and administrators can be attacked on baseless grounds. However, when faced with a bully, resistance is key—particularly for those who support democracy, free speech, and academic freedom. Even those who choose some level of acquiescence can still resist overcompliance.



# GLP-1 DRUGS AND THE EMERGING MASS TORT CRISIS: NAVIGATING LEGAL RISKS AND REGULATORY GAPS

Angelina Ferrara\*

## I. INTRODUCTION

Imagine a patient struggling with obesity and type 2 diabetes for years, trying every diet and exercise regimen available, but seeing no long-term improvement. Now imagine they have been prescribed a series of new drugs—Ozempic (semaglutide) and Mounjaro (tirzepatide)—Food and Drug Administration (FDA) approved injectable prescription medications to treat their conditions.<sup>1</sup> These drugs give the patient some hope because they can help control blood sugar in adults who have type 2 diabetes.<sup>2</sup> However, their hope quickly turns to horror. After using these drugs, they develop gastroparesis, causing them to experience severe vomiting—so extreme that their teeth fall out—as well as stomach pain and gastrointestinal burning.<sup>3</sup> This is not a fictional story; it is the real-life experience of a Louisiana woman, Jaelyn Bjorklund.<sup>4</sup> Her case—*Bjorklund v. Novo Nordisk*—marks the first lawsuit related to Glucagon-Like Peptide-1 (GLP-1) induced stomach paralysis, filed in the U.S. District Court for the Western District of Louisiana in August 2023.<sup>5</sup>

Some predict GLP-1 medications will become the subject of the next major wave of mass tort litigation in the United States.<sup>6</sup> The rapid rise in GLP-1 prescriptions for various uses, along with the resulting sharp increase in associated lawsuits, supports this prediction.<sup>7</sup> Ultimately, this growing number of lawsuits led to a consolidation of cases into a Multidistrict Litigation (MDL) in the Eastern District of Pennsylvania.<sup>8</sup> Plaintiffs' claims include allegations that GLP-1 manufacturers failed to provide sufficient warnings about the side effects of their medications.<sup>9</sup> Plaintiffs also seek to establish that the GLP-1 manufacturers'

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<sup>1</sup> *Bjorklund v. Novo Nordisk A/S*, 705 F. Supp. 3d 636, 639 (W.D. La. 2023).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*; see also Dino Haloulos & Jarif Khan, *Weight-Loss Drugs May Spur Next Major Mass Tort*, LAW360 (July 26, 2024), <https://www.law360.com/articles/1861883/weight-loss-drugs-may-spur-next-major-mass-tort>.

<sup>6</sup> Haloulos & Khan, *supra* note 5.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

marketing and promotion of off-label weight loss use for these drugs have downplayed these risks.<sup>10</sup>

While stomach paralysis has received considerable attention, GLP-1 users have also reported other serious side effects, highlighting the continuing legal implications these manufacturers may face.<sup>11</sup> Gallbladder problems, suicidal thoughts, vision loss, and other severe symptoms have also been reported in connection with these medications.<sup>12</sup> Plaintiffs have begun taking action regarding these additional side effects, with the most recent lawsuits detailing many conditions that manufacturers allegedly failed to adequately warn patients could be potential side effects of GLP-1 drugs.<sup>13</sup> These alleged conditions include: malnutrition, cyclical vomiting, gastroenteritis, intestinal obstruction/blockage, ileus, deep vein thrombosis (DVT), and associated pulmonary embolism, esophageal injury, bowel injury, intraoperative aspiration, Wernicke's encephalopathy, death, and more.<sup>14</sup> Although this MDL focuses on gastroparesis and related conditions, non-arteritic anterior ischemic optic neuropathy (NAION) is a recently reported side effect that may result in even further legal implications for GLP-1 drug manufacturers.<sup>15</sup>

This GLP-1 litigation has received little attention thus far from law reviews and other legal journals, although some legal news sources and law firms have begun reporting on it.<sup>16</sup> Various law firms have published client alerts relating to this litigation.<sup>17</sup> These alerts provide a general background about the litigation, including information about GLP-1s and their manufacturers.<sup>18</sup> These client alerts

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Haloulos & Khan, *supra* note 5; *see also* Ronald V. Miller, Jr., *Ozempic Lawsuit*, LAWSUIT INFO. CTR. (Sept. 21, 2025), <https://www.lawsuit-information-center.com/ozempic-gastroparesis-lawsuit.html>.

<sup>13</sup> Complaint & Jury Demand at 20-21, *Bell v. Novo Nordisk Inc. et al*, No. 2:25-cv-02354 (E.D. Pa. May 8, 2025).

<sup>14</sup> *Id.* *See generally* Alyson Powell Key et al., *Ileus: What Is it?*, WEBMD (Dec. 4, 2023), <https://www.webmd.com/digestive-disorders/what-is-ileus> (Ileus is a condition where the intestinal walls cannot push food and waste through one's digestive system); Dean Shaban, *Deep Vein Thrombosis (DVT): Symptoms, Causes, Treatment*, WEBMD (Mar. 28, 2025), <https://www.webmd.com/dvt/what-is-dvt-and-what-causes-it> (DVT occurs when a blood clot forms in one of your deep veins); Shawna Seed & Jabeen Begum, *What Is Pulmonary Embolism? Symptoms, Causes, and Treatment*, WEBMD (Sept. 9, 2024), <https://www.webmd.com/lung/what-is-a-pulmonary-embolism> (Pulmonary embolism occurs when a blood clot suddenly blocks the blood flow to your lungs); William Moore & Christopher Melnosky, *Wernicke-Korsakoff Syndrome*, WEBMD (Dec. 21, 2024), <https://www.webmd.com/brain/wernicke-korsakoff-syndrome-facts> (Wernicke's encephalopathy is a combination of two conditions: Wernicke encephalopathy and Korsakoff syndrome and involves a lack of vitamin B1 reaching the brain resulting in adverse neurological symptoms).

<sup>15</sup> *See* Miller, *supra* note 12 (NAION is a condition that can lead to sudden vision loss and even full blindness).

<sup>16</sup> *See id.* *See also* Jonathan D. Orent & Sara O. Couch, *Ozempic Lawsuit*, MOTLEY RICE, LLC, <https://www.motleyrice.com/diabetes-lawsuits/ozempic#wysiwyg-799> (last visited Aug. 7, 2025); Broughton Partners, *Updates on the GLP-1 MDL*, BROUGHTON PARTNERS (Apr. 28, 2025), <https://www.broughtonpartners.com/insights/ghp-1-mdl/>.

<sup>17</sup> *See* Orent & Couch, *supra* note 16; BROUGHTON PARTNERS, *supra* note 16.

<sup>18</sup> *See* Orent & Couch, *supra* note 16; BROUGHTON PARTNERS, *supra* note 16.

also provide timely updates on the litigation and advertise their legal services to individuals who might have a potential claim against the defendant manufacturers.<sup>19</sup> One legal news source has done the same, reporting that an MDL exists, relaying the general nature of the claims, and updating readers on the current status of the litigation.<sup>20</sup> However, since this is a relatively recent and ongoing development, no extensive commentary reflecting on it currently exists. Although some law review articles published in 2025 discuss GLP-1 litigation in various contexts, few publications have taken a stance on this specific litigation.<sup>21</sup> This Comment offers a fresh perspective on the litigation and its potentially broader implications regarding medical failure-to-warn cases and pharmaceutical regulation.

This Comment takes the position that the Plaintiffs in this litigation will have difficulty establishing causation, thereby diminishing their chances of succeeding on a failure-to-warn cause of action. This litigation also highlights a deeper issue in pharmaceutical regulation: the fragmented allocation of responsibility for patient safety between drug manufacturers, physicians, and regulatory agencies. This Comment argues that the current framework has allowed gaps in oversight and accountability that undermine public health and require reform.

Section II provides an overview of GLP-1 receptor agonists, including their mechanisms, FDA-approved uses, and expanding popularity for off-label purposes such as weight loss. Section III examines the procedural and substantive developments in *MDL 3094 – In Re: GLP-1 RAs Products Liability Litigation*, focusing on the consolidation of cases, the scope of injuries alleged, and the early legal issues addressed by the court. Section IV analyzes the central failure-to-warn claims raised in the litigation, including the application of the learned intermediary doctrine, arguments concerning preemption, and judicial interpretations of labeling adequacy. Section V explores additional legal theories beyond failure-to-warn that are also alleged in these lawsuits, including negligent misrepresentation and deceptive marketing claims. Section VI assesses the current regulatory framework governing drug labeling and advertising, identifies gaps in FDA oversight, and evaluates proposed legislative efforts to strengthen consumer protections and accountability. Finally, Section VII highlights how long-standing public distrust of the pharmaceutical industry, compounded by recent litigation, reinforces the need for greater transparency and stronger initiatives to protect patient safety among manufacturers, federal agencies, and physicians.

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<sup>19</sup> See Orent & Couch, *supra* note 16; BROUGHTON PARTNERS, *supra* note 16.

<sup>20</sup> See Miller, *supra* note 12.

<sup>21</sup> See Jack Bekos, *The Ozempic Paradox: How Much is Too Much in the Race for Weight Loss and Diabetes Treatment?*, 35 *FORDHAM INTEL. PROP. MEDIA & ENT. L.J.* 776 (2025); Carson Poupore, *Weighty Consequences: How GLP-1 Agonist Litigation Highlights the Need for Greater FDA Off-Label Prescription Oversight*, 30 *ILL. BUS. L.J.* 77 (2025).

## II. FUNCTIONS AND PREVALENCE OF GLP-1 AGONISTS

GLP-1 agonists are medications that mimic the naturally occurring GLP-1 hormone, which is produced by the small intestine.<sup>22</sup> The GLP-1 hormone has several functions, including triggering insulin to be released from the pancreas, blocking glucagon secretion, slowing the emptying of one's stomach, and increasing how full one feels after eating.<sup>23</sup> GLP-1 agonists are manufactured substances that bind to the GLP receptors, triggering the effects of the GLP-1 hormone.<sup>24</sup> When these effects—such as reduced food intake, appetite, and hunger—combine, they lead to weight loss.<sup>25</sup> Some GLP-1 agonist medications that are currently available for purchase in the U.S. include: Dulaglutide (Trulicity), Exenatide (Byetta), Exenatide extended-release (Bydureon), Liraglutide (Victoza), Lixisenatide (Adlyxin), Semaglutide injection (Ozempic and Wegovy), and Semaglutide tablets (Rybelsus).<sup>26</sup>

The FDA initially approved GLP-1s to treat type 2 diabetes, but they have gained widespread popularity for managing obesity and promoting general weight loss.<sup>27</sup> Type 2 diabetes and obesity rates have been on the rise in America for years.<sup>28</sup> As awareness surrounding the importance of addressing these conditions to prevent more serious health issues grows, the demand for these medications has also increased.<sup>29</sup> Additionally, the off-label prescribing of GLP-1 agonists for weight loss has increased significantly.<sup>30</sup> Off-label prescription occurs when a physician prescribes a drug that the FDA has approved to treat a condition different from the condition that the patient is currently struggling with.<sup>31</sup> This practice is legal and common, with one in five prescriptions overall being written today for off-label use.<sup>32</sup> In this case, the FDA has approved seven GLP-1 medications to combat type 2 diabetes and obesity,<sup>33</sup> but has approved only three GLP-1s for

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<sup>22</sup> *GLP-1 Agonists*, CLEVELAND CLINIC (July 3, 2023), <https://my.clevelandclinic.org/health/treatments/13901-glp-1-agonists>.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *See id.*

<sup>26</sup> *Id.*; see also Annika Kim Constantino, *Novo Nordisk's Ozempic and Wegovy now available in the U.S. after shortages, FDA says*, CNBC NEWS (Oct. 30, 2024, 3:06 PM), <https://www.cnbc.com/2024/10/30/novo-nordisks-ozempic-wegovy-now-available-after-shortages.html>.

<sup>27</sup> Roger Cohen, Dustin Schaefer & Anne Brendel, *A Changing Regulatory Landscape for Weight Loss Drugs*, LAW360 (May 23, 2024), <https://www.law360.com/healthcare-authority/articles/1839686/a-changing-regulatory-landscape-for-weight-loss-drugs>.

<sup>28</sup> See Haloulos & Khan, *supra* note 5.

<sup>29</sup> *See id.*

<sup>30</sup> *Id.*

<sup>31</sup> Carolyn M. Clancy, *Off-Label Drugs: What You Need to Know*, AGENCY HEALTHCARE RSCH. & QUALITY (Apr. 21, 2009), <https://archive.ahrq.gov/news/columns/navigating-the-health-care-system/042109.html>.

<sup>32</sup> *Id.*

<sup>33</sup> See Alyssa Billingsley & Christinia Aungst, *5 GLP-1 Trends to Expect in 2025: Expanded Uses, Generics, Oral Options, and More*, GOOD RX (Jan. 13, 2025), <https://www.goodrx.com/classes/glp-1-agonists/glp-1-trends>.

general weight loss purposes.<sup>34</sup> Even then, the FDA requires that the user also have one additional weight-related condition.<sup>35</sup> For example, in November 2023, the FDA approved Zepbound (tirzepatide) injections for chronic weight management in adults who are overweight and who also suffer from at least one weight-related condition.<sup>36</sup>

It is debated whether the use of these drugs for general weight loss is a good treatment option.<sup>37</sup> Among the general public familiar with these drugs, a majority of 53% think they are a good option for people with obesity or weight-related health conditions to lose weight.<sup>38</sup> However, a small minority of 12% say they are a good option for people who want to lose weight but do not suffer from a weight-related health condition.<sup>39</sup> Physicians, researchers, and other experts have praised them as revolutionary in addressing obesity in America and have agreed that they are highly effective at controlling blood glucose levels and reducing body weight.<sup>40</sup> However, these experts caution that these medications are not universally effective for all patients, and complex considerations, such as dosages, costs, and side effects, remain.<sup>41</sup>

The prevalence of these medications is expected to continue rising as new uses are discovered, additional administration methods become available, and costs are reduced.<sup>42</sup> For instance, type 2 diabetes, obesity, and general weight loss are not the only instances in which GLP-1s could be used.<sup>43</sup> Shortly after coming into the market, scientists found that these medications may also help treat addiction, dementia, and heart disease.<sup>44</sup> It is projected that GLP-1 medications could receive approval for some of these new uses in 2025.<sup>45</sup> Currently, GLP-1 medications are awaiting FDA approval to treat chronic kidney disease (CKD), heart failure with preserved ejection fraction (HFpEF), and metabolic dysfunction-

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<sup>34</sup> *See id.*

<sup>35</sup> *See FDA Approves New Medication for Chronic Weight Management*, U.S. FOOD & DRUG ADMIN. (Nov. 8, 2023), <https://www.fda.gov/news-events/press-announcements/fda-approves-new-medication-chronic-weight-management>.

<sup>36</sup> *See id.* (“Overweight” is defined as having a body mass index of 27 kg/m<sup>2</sup> or greater, and the mentioned weight-related conditions include high blood pressure, type 2 diabetes, high cholesterol, etc.).

<sup>37</sup> *See Alec Tyson & Emma Kikuchi, How Americans View Weight-Loss Drugs and Their Potential Impact on Obesity in the U.S.*, PEW RSCH. CTR. (Feb. 26, 2024), <https://www.pewresearch.org/science/2024/02/26/how-americans-view-weight-loss-drugs-and-their-potential-impact-on-obesity-in-the-u-s/>.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* *See also Research Shows GLP-1 Receptor Agonist Drugs Are Effective but Come with Complex Concerns*, UNIV. CHI. DEP’T ANESTHESIA & CRITICAL CARE (June 17, 2024), <https://anesthesia.uchicago.edu/dr-yuan-senior-author-bmj-review-and-meta-analysis-glp1-agonists> [hereinafter *Complex Concerns*].

<sup>41</sup> *See Complex Concerns*, *supra* note 40.

<sup>42</sup> *See Billingsley & Aungst*, *supra* note 33.

<sup>43</sup> *See id.*

<sup>44</sup> Karen Gilchrist, *Blockbuster Weight Loss Drugs Wegovy and Ozempic Are Being Tested to Treat Addiction and Dementia*, CNBC (Sept. 7, 2023), <https://www.cnbc.com/2023/09/07/weight-loss-drugs-wegovy-ozempic-tested-to-treat-addiction-dementia.html>.

<sup>45</sup> *See Billingsley & Aungst*, *supra* note 33.

associated steatohepatitis (MASH).<sup>46</sup> Traditionally, GLP-1s are self-administered in the form of frequent injections.<sup>47</sup> However, additional oral options and longer-lasting injections are being developed, possibly attracting users who were previously put off by the prospect of frequent self-injection.<sup>48</sup> One of the new weight-loss pills being developed is Orforglipron.<sup>49</sup> It is currently in clinical trials, but if the FDA approves Orforglipron, it would be an oral alternative to injectable GLP-1 agonists.<sup>50</sup> Phase 2 results of the clinical trial showed that Orforglipron helped people lose up to 15% of their starting body weight after eight months of use.<sup>51</sup> However, the clinical trial results have also exhibited that its side effects mirror those of injectable GLP-1s.<sup>52</sup> So, although this advancement will likely induce increased and more widespread usage of GLP-1 drugs, subsequently, the number of people experiencing side effects will likely rise and compound the already occurring litigation.<sup>53</sup>

### III. MDL 3094—IN RE: GLUCAGON-LIKE PEPTIDE-1 RECEPTOR AGONISTS (GLP-1 RAS) PRODUCTS LIABILITY LITIGATION

With the rise in GLP-1 usage, the lawsuits arising from these medications have also increased.<sup>54</sup> Generally, plaintiffs' claims allege that GLP-1 manufacturers failed to provide sufficient warnings about the side effects of their products.<sup>55</sup> On August 2, 2023, one such Plaintiff filed the complaint for *Bjorklund v. Novo Nordisk*.<sup>56</sup> This became the first lawsuit in what would become *MDL 3094 In Re: Glucagon-like Peptide-1 Receptor Agonists (GLP-1 RAS) Products Liability Litigation*.<sup>57</sup> A federal MDL occurs when all cases pending in federal district courts that contain at least one common question of fact are transferred to a single federal district court for pretrial proceedings.<sup>58</sup> MDLs are continuing to become

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<sup>46</sup> *Id.*

<sup>47</sup> *See id.*

<sup>48</sup> *See id.*

<sup>49</sup> Joshua Murdock & Alyssa Billingsley, *Orforglipron: What to Know About This Next Generation Weight-Loss Pill*, GOOD RX (Aug. 8, 2025), <https://www.goodrx.com/conditions/weight-loss/orforglipron-danuglipron-new-weight-loss-drug>.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *See id.*; Haloulos & Khan, *supra* note 5.

<sup>54</sup> *See* Haloulos & Khan, *supra* note 5.

<sup>55</sup> *Id.*

<sup>56</sup> Complaint against Eli Lilly & Co., *Bjorklund v. Novo Nordisk* A/S 705 F. Supp. 3d 636, 639 (W.D. La. 2023) (No. 2:24-cv-00533).

<sup>57</sup> *See* United States District Court, Eastern District of Pennsylvania, *MDL 3094 In Re: Glucagon-like Peptide-1 Receptor Agonists (GLP-1 RAS) Products Liability Litigation*, <https://www.paed.uscourts.gov/mdl/mdl-3094-re-glucagon-peptide-1-receptor-agonists-glp-1-ras-products-liability-litigation> (last visited Sept. 25, 2025).

<sup>58</sup> *See, e.g.*, Ryan C. Hudson et al., *MDL Cartography: Mapping the Five Stages of a Federal MDL*, 89 UMKC L. REV. 801, 802 (2021) (A federal statute, 28 U.S.C. § 1407, outlines this process, which is designed to streamline litigation, reduce costs, and ensure consistent rulings. The Judicial Panel on Multidistrict Litigation (J.P.M.L.) can create an MDL upon its own initiative or by granting a motion

increasingly prevalent, with more than 50% of all federal civil cases now being a part of an MDL.<sup>59</sup>

Reflecting this growing trend, the Judicial Panel on Multidistrict Litigation (J.P.M.L.) recently consolidated a significant number of GLP-1-related cases into a new MDL.<sup>60</sup> On February 5, 2024, the J.P.M.L. ordered that 55 actions, consisting of 18 pending actions and 37 possible tag-along actions, be consolidated into an MDL in the Eastern District of Pennsylvania.<sup>61</sup> The J.P.M.L. assigned the MDL to the Honorable Gene Pratter, but following Judge Pratter's death in May 2024, the Panel appointed U.S. District Court Judge Karen Spencer Marston of the Eastern District of Pennsylvania.<sup>62</sup> These were all personal injury actions arising from the use of GLP-1 Receptor Agonists, where the plaintiffs suffered gastroparesis, ileus, intestinal obstruction or pseudo-obstruction, or other gastrointestinal injury.<sup>63</sup> These medications include Ozempic, Wegovy, and Rybelsus, all of which contain semaglutide as the active molecule and are manufactured by the Novo Nordisk defendants.<sup>64</sup> Additionally, the medications Trulicity (dulaglutide) and Monjaro (tirzepatide), manufactured by Eli Lilly and Company, are included in this litigation.<sup>65</sup>

The J.P.M.L. determined that the actions filed contained common questions of fact and that centralization in the Eastern District of Pennsylvania would be most convenient for the parties and promote efficient litigation.<sup>66</sup> All of the actions involve similar allegations that GLP-1s cause gastrointestinal injuries.<sup>67</sup> The actions also raise common questions about the Defendants' knowledge of these risks, the adequacy of their warnings, and the truthfulness of their safety representations.<sup>68</sup> The Panel found that the Eastern District of Pennsylvania would be a good location for the MDL because this district has the most actions already pending in it.<sup>69</sup> Furthermore, Novo Nordisk's headquarters is close by, and it is alleged that a significant number of witnesses and documents related to the sales,

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filed by either a plaintiff or a defendant in an underlying case. The J.P.M.L. is responsible for directing or denying the transfer and determining the court where the pretrial proceedings will take place and the judge who will preside over them. After consolidated discovery has been conducted all actions are supposed to be remanded back to their original district court for trial. A case being transferred into an MDL is an involuntary occurrence, and a client or lawyer cannot choose to opt out).

<sup>59</sup> *Id.* at 803.

<sup>60</sup> *In re Glucagon-Like Peptide-1 Receptor Agonists GLP-1 Ras Prods. Liab. Litig.*, 717 F. Supp. 3d 1370 (J.P.M.L. 2024).

<sup>61</sup> *Id.* at 1375.

<sup>62</sup> Terry Turner & Emily Miller, *New Federal Judge Assigned to Ozempic Lawsuits as MDL Grows*, DRUGWATCH (June 11, 2024), <https://www.drugwatch.com/news/2024/06/11/new-federal-judge-assigned-to-ozempic-lawsuits-as-mdl-grows/>.

<sup>63</sup> *In re Glucagon-Like Peptide-1 Receptor Agonists GLP-1 Ras Prods. Liab. Litig.*, 717 F. Supp. 3d at 1372.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 1373.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *In re Glucagon-Like Peptide-1 Receptor Agonists GLP-1 Ras Prods. Liab. Litig.*, 717 F. Supp. 3d at 1374.

marketing, regulatory affairs, and drug safety of Novo Nordisk's products are likely located there.<sup>70</sup>

After the MDL was consolidated in the Eastern District of Pennsylvania, the court granted Defendants' motion to split discovery and focus on two issues before continuing discovery.<sup>71</sup> These two issues are: (1) gastroparesis diagnostic testing and (2) preemption and adequacy of warnings.<sup>72</sup> In deciding this motion, the court dismissed the Plaintiff's argument that evaluating the Defendants' marketing efforts was necessary to determine issues of preemption and adequacy of warnings.<sup>73</sup> The court explained that the Defendants' marketing to individual consumers might become relevant in later stages of the case.<sup>74</sup> For now, however, the court directed the parties to refrain from exploring that issue as it is unnecessary to decide the legal questions at hand.<sup>75</sup> In October 2024, the Plaintiffs moved for reconsideration of that ruling, and the court denied it, further expanding on this justification.<sup>76</sup> The court stated that both the application of the learned intermediary doctrine to this case and the viability of the Plaintiffs' direct-to-consumer marketing claim are legal issues governed by state law.<sup>77</sup> They further stated that these matters do not require extensive discovery beyond what is already being produced for the preemption and labeling adequacy issues.<sup>78</sup>

The court also rejected the Plaintiffs' argument that they are entitled to physician-centered marketing discovery because the Food, Drug, and Cosmetics Act ("FDCA") broadly defines "labeling" to include such promotional materials.<sup>79</sup> Although the Defendants' communications to physicians are "labels" under the FDCA, they are not essential to the court's determination of whether the drug's approved labeling includes the warning Plaintiffs seek to add.<sup>80</sup> Additionally, these physician communications are not necessary to determine whether the FDA would have rejected such additional warnings, thereby preempting Plaintiffs' state law failure-to-warn claims.<sup>81</sup>

In December 2024, the J.P.M.L. addressed motions to expand the scope of the MDL.<sup>82</sup> In one instance, the Panel approved the inclusion of claims related to Saxenda, another GLP-1 RA, finding that it shared common factual questions with the existing cases in the MDL.<sup>83</sup> This expansion aimed to ensure uniform pretrial

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<sup>70</sup> *Id.*

<sup>71</sup> *In re Glucagon-Like Peptide-1 Receptor Agonists GLP-1 Ras Prods. Liab. Litig.*, MDL No. 3094, 2024 U.S. Dist. LEXIS 188802, at \*1 (E.D. Pa. Oct. 17, 2024).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at \*2.

<sup>74</sup> *See id.*

<sup>75</sup> *Id.*

<sup>76</sup> *See id.* at \*2; *id.* at \*29-30.

<sup>77</sup> *In re Glucagon-Like Peptide-1 Receptor Agonists GLP-1 Ras Prods. Liab. Litig.*, MDL No. 3094, 2024 U.S. Dist. LEXIS 188802, at \*13 (E.D. Pa. Oct. 17, 2024).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at \*24.

<sup>80</sup> *Id.* at \*28-29.

<sup>81</sup> *Id.*

<sup>82</sup> *See In re Glucagon-like Peptide-1 Receptor Agonists (GLP-1 RAs) Prods. Liab. Litig.*, MDL No. 3094, 2024 U.S. Dist. LEXIS 226558 (J.P.M.L. Dec. 12, 2024).

<sup>83</sup> *Id.* at \*2-3.

proceedings and avoid duplicative discovery.<sup>84</sup> Conversely, the Panel denied a motion to include claims related to deep vein thrombosis (DVT) injuries, since these claims involve distinct mechanisms of harm unrelated to the central gastrointestinal injuries.<sup>85</sup> Similarly, the Panel opted not to add claims alleging vision issues, such as NAION, to the existing MDL in January 2025.<sup>86</sup> Although NAION will not be added to this existing MDL, discussion has occurred regarding the creation of a new MDL specifically focused on this condition.<sup>87</sup> This highlights that this fight does not end with the conclusion of the MDL at hand.<sup>88</sup> As of June 2025, twenty-one New Jersey Plaintiffs alleging permanent vision loss after taking Wegovy or Ozempic are seeking to consolidate their claims into a multicounty litigation against Novo Nordisk.<sup>89</sup> Several studies published in *JAMA Ophthalmology* have investigated a potential causal relationship between GLP-1 receptor agonists and optic nerve damage.<sup>90</sup> This side effect—permanent blindness, developing suddenly and without warning—is a severe and debilitating injury that will guarantee an influx of lawsuits, media coverage, and future jury trials.<sup>91</sup>

The gastroparesis MDL is still ongoing and currently in its pretrial stages. As of April 2025, the number of cases in the MDL was 1,685.<sup>92</sup> At the March 2025 MDL status conference, plaintiffs' attorneys estimated the litigation could eventually involve tens of thousands of cases.<sup>93</sup> Furthermore, an internal survey of plaintiff firms participating in the MDL revealed that approximately 7,000 potential cases are currently under active investigation.<sup>94</sup>

#### IV. CLAIMS

A central legal claim against the GLP-1 manufacturers in MDL 3094 is failure-to-warn.<sup>95</sup> Tort liability for failure-to-warn may arise under theories of

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<sup>84</sup> *Id.* at \*3.

<sup>85</sup> *Id.* at n.2.

<sup>86</sup> BROUGHTON PARTNERS, *supra* note 16.

<sup>87</sup> *See* Miller, *supra* note 12.

<sup>88</sup> *See id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*; *see also* Cindy X. Cai et al., *Semaglutide and Nonarteritic Anterior Ischemic Optic Neuropathy*, 143 *JAMA OPHTHALMOLOGY* 304 (Feb. 20, 2025); Juan P. Brito et al., *GLP-1RA Use and Thyroid Cancer Risk*, 151 *JAMA OTOLARYNGOLOGY-HEAD & NECK SURGERY* 243 (Jan. 23, 2025); Emma Simonsen et al., *Use of Semaglutide and Risk of Non-Arteritic Anterior Ischemic Optic Neuropathy: A Danish–Norwegian Cohort Study*, 27 *DIABETES, OBESITY & METABOLISM* 3094 (Dec. 11, 2024).

<sup>91</sup> Miller, *supra* note 12.

<sup>92</sup> BROUGHTON PARTNERS, *supra* note 16.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *In re* Glucagon-Like Peptide-1 Receptor Agonists (GLP-1 RAS) Prods. Liab. Litig., No. MDL No. 3094, 2025 U.S. Dist. LEXIS 159202, at \*21 (E.D. Pa. Aug. 15, 2025) (Although MDL 3094 centralizes cases for coordinated federal pretrial proceedings under 28 U.S.C. § 1407, it does not create a single, uniform body of substantive tort law. Because MDL 3094 aggregates claims arising nationwide, no single state's failure-to-warn doctrine governs the MDL as a whole. After coordinated

negligence, strict liability, or breach of warranty.<sup>96</sup> Negligent failure-to-warn claims require that the manufacturer failed to adequately warn about a particular risk that a reasonable manufacturer would have warned about.<sup>97</sup> Strict liability requires only a showing that the manufacturer did not adequately warn about dangers they knew or should have known at the time the product was manufactured and distributed.<sup>98</sup> However, under both theories, the analysis conducted is essentially the same.<sup>99</sup> To succeed on a failure-to-warn claim, a plaintiff generally must show that the manufacturer had a duty to warn about the risk at issue, the manufacturer failed to adequately warn about that risk, and that failure proximately caused the plaintiff's injury.<sup>100</sup>

For medical products, manufacturers have a duty to warn physicians rather than patients under the learned intermediary doctrine.<sup>101</sup> The learned intermediary doctrine holds that the manufacturer must inform the physician, who then advises the patient; therefore, the manufacturer is not required to warn the patient directly.<sup>102</sup> The rationale behind this doctrine is that physicians possess the necessary medical expertise and relevant situational information to make the best decisions for a patient's health.<sup>103</sup> Therefore, if the product is properly labeled with adequate instructions and risk warnings, the manufacturer has met its obligation to inform the prescribing physician.<sup>104</sup> It is then reasonable to expect that the physician will use that information to make treatment decisions that prioritize the patient's best interests.<sup>105</sup> Accordingly, in failure-to-warn actions relating to health products, the plaintiff must allege facts showing "that the defendant failed to warn (or inadequately warned) the physician of a risk associated with the product that was not otherwise known to the physician" and "that this failure to warn the physician was both a cause in fact and the proximate cause of the plaintiff's injury."<sup>106</sup> An adequate warning is one that a reasonably prudent manufacturer would have provided under the circumstances, taking into account the knowledge common to the prescribing physician.<sup>107</sup>

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pretrial proceedings, actions are generally remanded to their originating courts for trial, and the governing failure-to-warn standards will therefore depend on the applicable substantive law, often state law, as determined in the individual action. Accordingly, this section cites various state-law authorities to offer an illustrative, non-exhaustive overview of common elements of failure-to-warn claims across jurisdictions). *See Hudson et al., supra* note 58.

<sup>96</sup> 8 NHPS: PERSONAL INJURY: TORT AND INS. PRACTICE § 8.11 (2025).

<sup>97</sup> 4 BUSINESS TORTS § 36.05 (2025).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* *See also* Bell v. Union Pac. R.R. Co., No. 20-cv-1393 (WMW/KMM), 2021 U.S. Dist. LEXIS 29407, at \*9 (D. Minn. Feb. 17, 2021); Schreiner v. Wieser Concrete Prods., 294 Wis. 2d 832, 838 (Wis. App. Ct. 2006); 1 MAINE TORT LAW § 12.06 (2025).

<sup>101</sup> *See Hoffmann-La Roche Inc. v. Mason*, 27 So. 3d 75, 77 (Fla. Dist. Ct. App. 2009) (per curiam).

<sup>102</sup> *See id.*; Blackburn v. Shire U.S., Inc., 380 So. 3d 354, 359-60 (Ala. 2022).

<sup>103</sup> *See Hoffmann-La Roche Inc.*, 27 So. 3d at 77.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> Stahl v. Novartis Pharms. Corp., 283 F.3d 254, 265-66 (5th Cir. 2002).

<sup>107</sup> *See* N.J. STAT. ANN. § 2A:58C-4 (2024).

In failure-to-warn suits, the most challenging element to prove is usually causation.<sup>108</sup> It is difficult to prove that the lack of an adequate warning was the proximate cause of the injury, and had an adequate warning been provided, the physician would have acted differently.<sup>109</sup> The learned intermediary doctrine complicates causation in these cases because if the physician fails to act on the manufacturer's warning, the causal chain is broken, shielding the manufacturer from liability.<sup>110</sup>

As federal regulations exist concerning drug warnings and labeling, manufacturers will attempt to argue that these federal provisions supersede state law, as seen in MDL 3094.<sup>111</sup> This is the doctrine of federal preemption, which, simply put, means compliance or non-compliance with federal law will be determinative, regardless of conflicting state law.<sup>112</sup> Here, the relevant federal provisions originate from the FDA, and manufacturers in similar actions have attempted to argue that compliance with these provisions shields them from failure-to-warn liability.<sup>113</sup> However, compliance with FDA warning labels does not automatically relieve a drug manufacturer of failure-to-warn product liability.<sup>114</sup> Courts have consistently held that FDA and FDCA regulations establish minimum standards for warnings, and compliance with these standards

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<sup>108</sup> See, e.g., *Hoffmann-La Roche Inc.*, 27 So. 3d at 75 (reversing the trial court's denial of motion for a directed verdict where plaintiff failed to show a different warning would have altered the prescribing decision); *Krasnopolsky v. Warner-Lambert Co.*, 799 F. Supp. 1342, 1346-47 (E.D.N.Y. 1992) (showing plaintiff did not meet preponderance of the evidence standard).

<sup>109</sup> See, e.g., *Hoffmann-La Roche Inc.*, 27 So. 3d at 75 (plaintiffs could not establish causation as the physician testified that even if the label contained all the information suggested by appellee's expert, he would still have prescribed the drug); *Krasnopolsky v. Warner-Lambert Co.*, 799 F. Supp. 1342, 1346-47 (E.D.N.Y. 1992) (finding no causation because the prescribing physician knew of the risk of adverse renal reactions, so the alleged warning deficiency would not have altered the physician's conduct).

<sup>110</sup> See *Humes v. Clinton*, 792 P.2d 1032, 1042-43 (Kan. 1990) (holding an IUD manufacturer was not liable for failing to warn the patient directly where it provided physician and patient information sheets to the prescribing physician, and the physician failed to convey the information or provide the sheet to the patient).

<sup>111</sup> See *In re Glucagon-Like Peptide-1 Receptor Agonists GLP-1 Ras Prods. Liab. Litig.*, MDL No. 3094, 2024 U.S. Dist. LEXIS 188802, at \*2 (E.D. Pa. Oct. 17, 2024).

<sup>112</sup> See BRYAN L. ADKINS ET AL., CONG. RSCH. SERV., R45825, FEDERAL PREEMPTION: A LEGAL PRIMER (2023).

<sup>113</sup> See *Rite Aid v. Levy-Gray*, 876 A.2d 115, 130-32 (Md. Ct. Spec. App. 2005) (defendant contends that under the Supremacy Clause of the Constitution, Congress, through enactment of the labeling provisions of the FDCA, intended to preempt state law claims against prescription drug manufacturers based on representations in, or omissions from, the product's "label," as approved by the FDA, and that this immunity should apply to pharmacies that provide their customers with information concerning prescription drugs that is substantially the same as the manufacturer's label).

<sup>114</sup> *Id.* at 131-32 (explaining that FDA approval of prescription drug labeling typically does not preempt traditional failure-to-warn claims and instead "FDA regulations of prescription drugs are generally viewed as setting *minimum* standards, both as to design and warning"); see *Brochu v. Ortho Pharmaceutical Corp.*, 642 F.2d 652, 658 (1st Cir. 1981) (stating that FDA approval of warning language is not conclusive on the adequacy of the warnings, and in the case at hand, the absence of any reference to a prominent study establishing the relationship between thromboembolic disease and the oral contraceptives was grounds for a jury finding the warnings factually inaccurate).

does not necessarily satisfy a manufacturer's duty to warn under state law.<sup>115</sup> Additionally, the FDA is not primarily responsible for drug labeling.<sup>116</sup> The Supreme Court has recognized that under FDA and FDCA regulations, a drug manufacturer is responsible for ensuring the content of its drug label is adequate and remains adequate as long as the drug is on the market.<sup>117</sup> Manufacturers must continue to monitor their labeling even after the drugs are on the market, and revise it accordingly as new safety information is released.<sup>118</sup>

The lead case, *Bjorklund v. Novo Nordisk*, offers some insight into how this litigation will proceed and the arguments the Plaintiffs will make. The Plaintiff in *Bjorklund* admitted that the Ozempic labels provided a warning concerning "minor delay in gastric emptying" in the "Mechanism of Action" section.<sup>119</sup> She also admitted that the "Drug Interaction" section of the label warned that this delayed gastric emptying could affect the absorption of orally administered drugs.<sup>120</sup> Lastly, she conceded that "nausea, vomiting, diarrhea, abdominal pain, and constipation," which are symptoms of gastroparesis, were listed as potential adverse events.<sup>121</sup> She nonetheless argued that the warning was inadequate because it did not identify *gastroparesis* as a risk of Ozempic or convey the possible severity of the listed gastrointestinal adverse effects.<sup>122</sup> She also alleged that, if equipped with an adequate warning, her physician would not have prescribed the medication.<sup>123</sup> The court held that the plaintiff's failure-to-warn allegations had set forth a plausible claim for relief and denied the motion to dismiss.<sup>124</sup> Since this leading case was then consolidated into the "Ozempic" MDL, which is still in its early stages, it is unclear whether these claims will be successful.

### A. Viability of Failure-to-Warn Claims

With failure-to-warn claims at the center of this MDL and additional lawsuits being filed against GLP-1 drug manufacturers, assessing the potential success of these claims is crucial. The drug manufacturer Defendants are currently attempting to "shave off a large chunk" of the Plaintiffs' master complaint, asserting that the allegations are not sufficiently specific.<sup>125</sup> They request that the

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<sup>115</sup> *Rite Aid*, 876 A.2d at 131-32 (listing many cases which have upheld state law product liability claims against pharmaceutical manufacturers whose labels have been FDA approved); *Brochu*, 642 F.2d at 658.

<sup>116</sup> *Wyeth v. Levine*, 555 U.S. 555, 570-71 (2009) (noting that drug manufacturers, not the FDA, bear primary responsibility for the content of prescription-drug labels).

<sup>117</sup> *See id.* at 571.

<sup>118</sup> *Id.*

<sup>119</sup> *Bjorklund v. Novo Nordisk A/S*, 705 F. Supp. 3d 636, 641 (W.D. La. 2023).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Aleeza Furman, 'We Don't Know What Is Being Alleged': Ozempic Defendants Argue Plaintiffs' Master Complaint Is Too Vague, LEGAL INTELLIGENCER (Apr. 22, 2025), <https://www.law.com/thelegalintelligencer/2025/04/22/we-dont-know-what-is-being-alleged-ozempic-defendants-argue-plaintiffs-master-complaint-is-too-vague/>.

court dismiss twelve of the seventeen causes of action asserted in the master complaint.<sup>126</sup> The Defendants stated that they would address the other five claims, which include two failure-to-warn counts, at a later date.<sup>127</sup> As of August 1, 2025, the court has not yet issued a decision granting or denying this motion; however, the motion reinforces that failure-to-warn will remain the central claim.<sup>128</sup>

### 1. Causation

As mentioned previously, causation will likely be most difficult for the plaintiffs to prove. The lead case, *Bjorklund*, can serve as an example.<sup>129</sup> It would be difficult to prove beyond a preponderance of the evidence that her physician would not have prescribed Plaintiff Jackie Bjorklund Ozempic if the label included “gastroparesis” as a risk. The same physician felt comfortable prescribing Ozempic when its label included a warning about delayed gastric emptying and other gastrointestinal conditions, such as “nausea, vomiting, diarrhea, abdominal pain, and constipation,” which are symptoms of gastroparesis.<sup>130</sup> Even if it can be said that the difference between listing the disease rather than its symptoms is drastic, proving the physician would have acted differently with this change is its own challenge.

Although these cases include common questions of fact,<sup>131</sup> certainly the thousands of plaintiffs involved, and their prescribing physicians might have acted differently had they been presented with a warning label including “gastroparesis.” Maybe some would have refrained from prescribing a GLP-1 medication, while others would have acted the same way if the condition had been listed on the label. This would depend on the physician’s comfort level with the possible adverse side effects, which can vary across patients,<sup>132</sup> along with the patient’s need for the drug. Seeing how drastically these drugs have proven to positively affect some users’ way of life,<sup>133</sup> it is likely some physicians would have decided the risk of gastroparesis was not enough to deter them from prescribing the drug. Similarly, the same physician may have opted not to prescribe a GLP-1 medication if “gastroparesis” had been listed as a side effect, because the potential benefit for another patient did not outweigh the risk.

Under the learned intermediary doctrine, if the label adequately warns the physician, the physician’s duty is to ensure the patient fully understands the risks of taking the medication and to offer recommendations tailored to the patient’s

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> Matthew Dolman, *Ozempic Lawsuit: Lawsuits Filed Against Ozempic*, LAWSUIT LEGAL NEWS (Aug. 1, 2025), <https://lawsuitlegalnews.com/ozempic-lawsuit/>.

<sup>129</sup> *See Bjorklund v. Novo Nordisk A/S*, 705 F. Supp. 3d 636, 641 (W.D. La. 2023).

<sup>130</sup> *Id.*

<sup>131</sup> *See In re Glucagon-Like Peptide-1 Receptor Agonists GLP-1 Ras Prods. Liab. Litig.*, 717 F. Supp. 3d 1370, 1373 (J.P.M.L. 2024).

<sup>132</sup> *See Complex Concerns*, *supra* note 40.

<sup>133</sup> *See id.*; Tyson & Kikuchi, *supra* note 37.

situation.<sup>134</sup> It is possible that some physicians in this MDL did not adequately inform patients of the known side effects of GLP-1 before prescribing it, thereby depriving patients of the freedom to make informed decisions about their health. Additionally, the learned intermediary rule allows physicians to decide which risks they do or do not disclose to their patients.<sup>135</sup> Physicians can ignore a manufacturer's warning altogether, deciding that a risk does not exist, is not severe enough to warrant alerting the patient about, or is inapplicable in the context of a particular patient's medical needs.<sup>136</sup> Even if gastroparesis were a listed side effect, it is possible that the physician would deem this side effect unlikely or unimportant, depending on their patient, and not warn about it at all.<sup>137</sup> This would effectively eliminate the causation element necessary to prove a failure-to-warn claim.<sup>138</sup>

Because this litigation is an MDL, the specific facts and circumstances of the "bellwether" trials chosen could significantly influence its outcome.<sup>139</sup> A bellwether trial is essentially a test trial in a litigation involving multiple individual cases that helps all parties involved in the process predict how future litigation is likely to turn out.<sup>140</sup> The bellwether trials do not guarantee the outcomes of any future cases, but if the bellwether trials favor the plaintiffs in an MDL, it is more likely that the defendants will offer a global settlement.<sup>141</sup> Cases can be selected for a bellwether trial in various ways, depending on the federal district court's specific litigation process.<sup>142</sup> Regardless of the method, once a group of potential bellwether cases has been identified, both plaintiff and defense lawyers conduct extensive pretrial discovery to investigate the claims.<sup>143</sup> Following discovery, the lawyers are allowed to select cases for test trials that they believe will help them obtain a favorable outcome for their clients.<sup>144</sup> Depending on the success of these cases, either side might be persuaded to settle before cases are remanded back to their originating court.<sup>145</sup> Because the specific facts of each case in this MDL are

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<sup>134</sup> See Anthony Abeln & Morrison Mahoney, *Weighing the Risks: Physicians' Duty to Warn in Prescribing GLP-1 Medications*, GREAT AM. INS. GRP. <https://www.greatamericaninsurancegroup.com/content-hub/news-details/weighing-the-risks-physicians-duty-to-warn-in-prescribing-glp-1-medications> (last visited Aug. 7, 2025).

<sup>135</sup> See James M. Beck, *Unimpressed Learned Intermediaries Defeat Warning Causation*, DRUG & DEVICE L. (May 30, 2022), <https://www.druganddevicelawblog.com/2022/05/unimpressed-learned-intermediaries-defeat-warning-causation.html>.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> See *A Bellwether Trial: What Is It & How It Works*, WALLACE MILLER (July 12, 2023), <https://www.wallacemiller.com/the-bellwether-trial-what-is-it-how-does-it-work-in-mass-tort-litigation/> [hereinafter *Bellwether Trials*].

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* (These selection mechanisms include the plaintiffs' and defendants' lawyers selecting an equal number of bellwether cases, the MDL judge selecting a pool of cases they think represent the litigation, or random selection by a computer).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Bellwether Trials*, *supra* note 139.

likely to differ, selecting the bellwether trials could be extremely important in forecasting the litigation's overall outcome.

## 2. Adequate Warning

Another failure-to-warn element that could be difficult to establish is an inadequate warning. An adequate warning is one that a reasonably prudent manufacturer would have given physicians under the circumstances.<sup>146</sup> Here, Plaintiffs may argue that the word “gastroparesis” should have been included on the label. The Plaintiffs may go further and argue that even this would not have been enough since it would not fully convey the severity of that risk. Additionally, in this MDL, not all Plaintiffs experienced gastroparesis; some experienced ileus, intestinal obstruction, pseudo-obstruction, or other gastrointestinal injury.<sup>147</sup> It is unknown what labeling the Plaintiffs would propose adequately warns of these various injuries and conditions. “Gastroparesis and related conditions” might be sufficient, or they may argue that each specific condition or side effect must be individually named for the GLP-1 label to be adequate.

These questions raise a broader issue concerning drug labeling and what is required of drug manufacturers to avoid liability from failure-to-warn lawsuits. Overwarning, in particular, has been addressed in a fair amount of case law and scholarly articles.<sup>148</sup> The Third Restatement of Torts recognizes that an excessive amount of warnings may be disregarded by users, reducing the significance of warnings about risks and weakening the efficacy of warnings generally.<sup>149</sup> Additionally, courts in a wide variety of failure-to-warn cases have emphasized that including too many adverse effects in product labeling can be problematic.<sup>150</sup> One court recognized that while it is vital for manufacturers to warn of potential side effects, they must also avoid overwarning so as not to deter potentially beneficial uses of the drug by overstating risk and diluting the impact of legitimate warnings.<sup>151</sup> This is reflected in a regulatory provision that states warnings may only be added when there is at least “reasonable evidence of an association of a serious hazard with a drug.”<sup>152</sup> Another court states that if drug manufacturers were forced to list every risk to avoid the possibility of liability, physicians would start ignoring or discounting the warnings and their purpose of communicating vital information to physicians would be undermined.<sup>153</sup> Here, juries may consider the

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<sup>146</sup> N.J. STAT. ANN. § 2A:58C-4 (2024).

<sup>147</sup> *In re Glucagon-Like Peptide-1 Receptor Agonists GLP-1 Ras Prods. Liab. Litig.*, 717 F. Supp. 3d 1370, 1372 (J.P.M.L. 2024).

<sup>148</sup> James M. Beck, *On Overwarning*, DRUG & DEVICE L. (Jan. 9, 2014), <https://www.druganddevicelawblog.com/2014/01/on-overwarning.html> (quoting Restatement (Third) of Torts, Products Liability §2, comment j (1998)).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*; see also *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980); *Hood v. Ryobi America Corp.*, 181 F.3d 608 (4th Cir. 1999); *Aetna Casualty & Surety Co. v. Ralph Wilson Plastics Co.*, 509 N.W.2d 520, 523 (Mich. App. 1993).

<sup>151</sup> See *Mason v. Smithkline Beecham Corp.*, 596 F.3d 387, 392 (7th Cir. 2010).

<sup>152</sup> 21 C.F.R. § 201.80(e) (2025).

<sup>153</sup> *Thomas v. Hoffmann-LaRoche*, 949 F.2d 806, 816 n.40 (5th Cir. 1992).

possibility that the GLP-1 drug manufacturers listed general symptoms and refrained from listing every possible risk to avoid overwarning physicians and destroying the efficacy of the label as a whole.

As previously mentioned, preemption is rarely deemed a valid defense, and drug manufacturers are responsible for ensuring their warning labels are adequate.<sup>154</sup> However, in this MDL and in other similar cases, defendants have asserted a form of conflict preemption known as impossibility preemption.<sup>155</sup> Under conflict preemption, state law is displaced either when it is impossible to follow both federal and state requirements or when the state rule hinders Congress's objectives.<sup>156</sup> For conflict preemption, the Supreme Court set forth the governing framework in *Wyeth v. Levine*.<sup>157</sup> In *Wyeth*, the Plaintiff was severely injured when she administered a drug using the "IV-push" method and subsequently sued Wyeth, the drug manufacturer, for failing to adequately warn about the risks of this method.<sup>158</sup> Wyeth responded that the failure-to-warn claim was preempted because the FDA would not have approved the desired warning.<sup>159</sup> The Supreme Court rejected Wyeth's argument, but noted that the claim would have been preempted upon "clear evidence" that the FDA would have rejected the proposed label change.<sup>160</sup> Of course, it is difficult to prove whether the FDA would approve or reject a change to a drug label.

Here, the court has identified the issue of preemption as a primary concern in pretrial discovery and cites *Wyeth*, indicating that the court will be utilizing the framework in its analysis.<sup>161</sup> The court states that to answer this preemption question, they will need the FDA-approved warning label, the alleged deficiencies of the warning, what was provided to the FDA, and what was withheld from the FDA.<sup>162</sup> Even if the FDA would have approved a label including "gastroparesis," invalidating the Defendant's impossibility preemption argument, it seems drug manufacturers are presented with conflicting instructions when it comes to drug labeling in general. Similar to the court opinions detailed above, the FDA states that overwarning can discourage beneficial use of the medication or overshadow more critical warnings.<sup>163</sup> The FDA and federal courts both promote the idea that drug warning labels should not make the drug seem riskier than necessary and, in turn, deter beneficial uses, but should also warn about potential side effects.<sup>164</sup> Therefore, drug manufacturers are tasked with adequately listing possible side

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<sup>154</sup> *Wyeth v. Levine*, 555 U.S. 555, 570-71 (2009).

<sup>155</sup> *See id.* at 555; *Mount Olivet Cemetery Ass'n v. Salt Lake City*, 164 F.3d 480, 486 (10th Cir. 1998); *Cerveney v. Aventis, Inc.*, 855 F.3d 1091, 1098 (10th Cir. 2017).

<sup>156</sup> *Mount Olivet Cemetery Ass'n*, 164 F.3d at 486.

<sup>157</sup> *Wyeth*, 555 U.S. at 555.

<sup>158</sup> *Id.* at 560.

<sup>159</sup> *Id.* at 563.

<sup>160</sup> *Id.* at 571.

<sup>161</sup> *In re Glucagon-Like Peptide-1 Receptor Agonists GLP-1 Ras Prods. Liab. Litig.*, No. MDL No. 3094, 2024 U.S. Dist. LEXIS 188802, at \*21, \*25-29 (E.D. Pa. Oct. 17, 2024).

<sup>162</sup> *Id.* at \*29

<sup>163</sup> U.S. FOOD & DRUG ADMIN., GUIDANCE ON MEDICAL DEVICE PATIENT LABELING: FINAL GUIDANCE FOR INDUSTRY AND FDA REVIEWERS AT 42 (Apr. 19, 2001).

<sup>164</sup> *See id.*; *Mason v. Smithkline Beecham Corp.*, 596 F.3d 387, 392 (7th Cir. 2010).

effects but not including too many risks as to overwarn or overwhelm the user. If no set guidelines are published conveying what warnings are or are not necessary, drug manufacturers will likely rely on the FDA for guidance during the labeling approval process.

## V. ADDITIONAL CLAIMS

Although failure-to-warn claims are central to MDL 3094, manufacturers may face additional claims related to their marketing and distribution of GLP-1 medications. Complaints being filed against GLP-1 drug manufacturers assert a variety of claims beyond failure-to-warn.<sup>165</sup> These allegations include breach of express and implied warranty, fraudulent concealment, fraudulent misrepresentation, unfair trade practices, negligent misrepresentation and marketing, strict product liability misrepresentation, innocent misrepresentation, negligent design, strict liability design defect, negligence, and negligent undertaking.<sup>166</sup> Although the court has declined to allow discovery regarding manufacturers' marketing practices at this stage of litigation, they will inevitably arise as complaints continue to include negligent misrepresentation and marketing allegations.<sup>167</sup>

A recent complaint filed against Novo Nordisk on May 8, 2025, alleges negligent misrepresentation and presents arguments regarding Novo Nordisk's marketing and promotion of Ozempic.<sup>168</sup> One strategy used by Novo Nordisk in encouraging the purchase and use of Ozempic is limiting the financial burdens associated with procuring the drug.<sup>169</sup> For example, after the FDA approved Ozempic, Novo Nordisk offered an "Instant Savings Card to reduce co-pays to as low as \$25 per prescription fill for up to two years."<sup>170</sup> Novo Nordisk also promoted the safety and efficacy of Ozempic through statements made "on its websites, in press releases, through in-person presentations, through the drug's label, in print materials, on social media, and through other public outlets."<sup>171</sup>

The manufacturer's aggressive marketing has led to monumental increases in Ozempic's use.<sup>172</sup> On July 30, 2018, Novo Nordisk released its first television

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<sup>165</sup> See, e.g., Complaint & Jury Demand, *Bell*, *supra* note 13; Complaint & Demand for Jury Trial, *Legros v. Novo Nordisk A/S et al*, No. 2:25-cv-02356 (E.D. Pa. May 8, 2025); Master Long Form Complaint & Demand for Jury Trial, *Fentress v. Novo Nordisk Inc. et al*, No. 2:25-cv-02309 (E.D. Pa. May 6, 2025).

<sup>166</sup> See, e.g., Complaint & Jury Demand, *Bell*, *supra* note 13; Complaint & Demand for Jury Trial, *Legros*, *supra* note 165; Master Long Form Complaint & Demand for Jury Trial, *Fentress*, *supra* note 165.

<sup>167</sup> See *In re Glucagon-Like Peptide-1 Receptor Agonists GLP-1 Ras Prods. Liab. Litig.*, MDL No. 3094, 2024 U.S. Dist. LEXIS 188802, at \*2 (E.D. Pa. Oct. 17, 2024); see, e.g., Complaint & Jury Demand, *Bell*, *supra* note 13; Complaint & Demand for Jury Trial, *Legros*, *supra* note 165; Master Long Form Complaint & Demand for Jury Trial, *Fentress*, *supra* note 165.

<sup>168</sup> See Complaint & Jury Demand, *Bell*, *supra* note 13, at 5-8.

<sup>169</sup> See *id.* at 5-6.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 6.

<sup>172</sup> See *id.* at 7-8.

commercial advertisement for Ozempic.<sup>173</sup> This advertisement claimed that, in a study, adults lost up to twelve pounds on average, yet it also included a disclaimer stating that Ozempic is not a weight-loss drug.<sup>174</sup> The complaint states that in 2022, Novo Nordisk spent \$180.2 million on Ozempic advertising, with about \$157 million of that total going toward national television advertising.<sup>175</sup> The complaint also touches on marketing strategies beyond television advertisements used by Novo Nordisk in its promotion of Ozempic.<sup>176</sup> These included \$11 million spent in 2022 on meals and travel expenses in connection with educating almost 12,000 doctors about Ozempic and other GLP-1s, with the goal of increasing their likelihood of prescribing them.<sup>177</sup>

Novo Nordisk is not the only party working to promote Ozempic through advertisements.<sup>178</sup> Advertisements posted by a variety of groups on social media sites have also become common, increasing public awareness and interest in the drug.<sup>179</sup> On June 15, 2023, NBC News published a report about the thousands of weight-loss ads on social media for the GLP-1 drugs like Ozempic and Wegovy.<sup>180</sup> The majority of those ads were found to be distributed by online pharmacies, medical spas, and diet clinics.<sup>181</sup> As of June 2023, Novo Nordisk was still publishing online social media advertisements for its semaglutide products, contradicting their prior claims that they would stop running ads due to a shortage of the drug.<sup>182</sup> On TikTok, as of November 14, 2023, the hashtag #Ozempic had over 1.3 billion views, up from 273 million views on November 22, 2022.<sup>183</sup>

With the extensive nature of Novo Nordisk's marketing established, the complaint goes on to allege that Novo Nordisk's promotional materials were false and misleading.<sup>184</sup> It claims that Novo Nordisk's advertising campaigns, labeling materials, print advertisements, commercial media, and marketing "contained omissions and concealment of truth about the dangers of Ozempic."<sup>185</sup> Negligent misrepresentation claims derive from and are centered in the general doctrine of negligence and therefore share common aspects with negligent failure-to-warn and

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<sup>173</sup> See, e.g., *Ozempic TV Spot 'Oh!'*, iSPOT.TV (July 30, 2018), <https://www.ispot.tv/ad/d6Xz/ozempic-oh> [hereinafter *Ozempic TV Spot*]; Complaint & Jury Demand, *Bell*, *supra* note 13, at 6.

<sup>174</sup> *Ozempic TV Spot*, *supra* note 173; Complaint & Jury Demand, *Bell*, *supra* note 13, at 6.

<sup>175</sup> Complaint & Jury Demand, *Bell*, *supra* note 13, at 7; see also Ben Adams, *The Top 10 Pharma Drug Ad Spenders for 2022*, FIERCE PHARMA (May 1, 2023, 2:03 AM), <https://www.fiercepharma.com/special-reports/top-10-pharma-drug-brand-ad-spenders-2022>.

<sup>176</sup> See Complaint & Jury Demand, *Bell*, *supra* note 13, at 6-8.

<sup>177</sup> See *id.* at 7; see also Nicolas Florko, *Novo Nordisk Bought Prescribers over 450,000 Meals and Snacks to Promote Drugs like Ozempic*, NAT'L CTR. HEALTH RSCH. (July 5, 2023), <https://www.center4research.org/novo-nordisk-gave-doctors-450000-meals-ozempic/>.

<sup>178</sup> See Complaint & Jury Demand, *Bell*, *supra* note 13, at 8.

<sup>179</sup> See *id.*

<sup>180</sup> *Id.*

<sup>181</sup> See *id.*

<sup>182</sup> *Id.* at 8.

<sup>183</sup> *Id.* at 8, n.21.

<sup>184</sup> Complaint & Jury Demand, *Bell*, *supra* note 13, at 29.

<sup>185</sup> *Id.* at 29.

general negligence claims.<sup>186</sup> However, a key distinction is that negligent misrepresentation arises from communication rather than other conduct, and the plaintiff's reliance on that communication is required to establish causation.<sup>187</sup> Negligent misrepresentation causes of action require that the defendant made an incorrect statement about a past or existing material fact, without reasonable grounds for believing it is true or with any knowledge that it is false.<sup>188</sup> The statement must have also been made with the purpose of inducing the plaintiffs to rely on the misrepresented fact.<sup>189</sup> Additionally, the plaintiff must justifiably rely on the misrepresentation and suffer damages as a result of that reliance.<sup>190</sup> As the litigation continues to progress, marketing claims could become more prevalent.

## VI. FDA REGULATION OF GLP-1S

Under the Federal Food, Drug, and Cosmetic Act, a manufacturer cannot introduce a new drug to the market without FDA approval, which indicates that the drug is safe and effective.<sup>191</sup> To prove that the drug meets these criteria, the manufacturer must conduct clinical and nonclinical animal and human testing and submit their results to the FDA in the form of a New Drug Application (NDA).<sup>192</sup> The NDA must include the proposed label.<sup>193</sup> It must also include complete reports about investigations performed to assess whether the drug is safe and effective.<sup>194</sup> In addition, the applicant must submit comprehensive information on the drug's formulation and the methods used for its manufacture, processing, and packaging.<sup>195</sup> The filing should also include relevant nonclinical research and any other materials necessary to evaluate the drug's safety and effectiveness, thereby providing a comprehensive basis for review.<sup>196</sup>

After FDA approval of the application, the manufacturer is generally not allowed to change the label without FDA permission.<sup>197</sup> However, one existing exception allows manufacturers to modify the label without FDA approval through

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<sup>186</sup> See RESTATEMENT (THIRD) OF TORTS: MISCELLANEOUS PROVISIONS § 18, at 172 (AM. L. INST., Tentative Draft No. 3, 2024).

<sup>187</sup> *Id.*

<sup>188</sup> *Sisk v. Weir Valves & Controls United States*, 2021 Cal. Super. LEXIS 16490, at \*10; *see also* *Betkiewics v. Bayer Corp. (In re Fluoroquinolone Prods. Liab. Litig.)*, 517 F. Supp. 3d 806, 823-24 (D. Minn. 2021).

<sup>189</sup> *Sisk*, 2021 Cal. Super. LEXIS 16490, at \*10; *see also* *Betkiewics*, 517 F. Supp. 3d at 823-24.

<sup>190</sup> *Sisk*, 2021 Cal. Super. LEXIS 16490, at \*10; *see also* *Betkiewics*, 517 F. Supp. 3d at 823-24.

<sup>191</sup> *Cervený v. Aventis, Inc.* 855 F.3d 1091, 1096 (10th Cir. 2017) (citing 21 U.S.C. § 355(a) (2025)); *see The FDA's Drug Review Process: Ensuring Drugs Are Safe and Effective*, U.S. FOOD & DRUG ADMIN. (Nov. 24, 2017), <https://www.fda.gov/drugs/information-consumers-and-patients-drugs/fdas-drug-review-process-ensuring-drugs-are-safe-and-effective> [hereinafter *Drug Review Process*].

<sup>192</sup> *Drug Review Process*, *supra* note 191.

<sup>193</sup> *Cervený*, 855 F.3d at 1096 (citing 21 C.F.R. § 314.50(c)(2)(i)).

<sup>194</sup> *Id.* at 1096 (quoting 21 U.S.C. § 355(b)(1)(A)(i)).

<sup>195</sup> *Id.* at 1096 (quoting 21 U.S.C. § 355(b)(1)(A)(ii)-(iv)).

<sup>196</sup> *Id.* at 1096; *see also* 21 C.F.R. § 314.50(d)(2), (5)(iv) (this list of requirements for submission of a valid NDA is not exhaustive).

<sup>197</sup> *Cervený*, 855 F.3d at 1096 (quoting 21 U.S.C. § 331(a), (c), 352; 21 C.F.R. § 314.70(a), (b)).

a “changes being effected” (CBE) labeling change.<sup>198</sup> The CBE regulation gives the manufacturer the power to change a label to add or strengthen a warning, precaution, or adverse reaction, or to add or change an instruction about dosage and administration, etc., before the FDA has considered whether to allow the change.<sup>199</sup> The FDA will only approve the change if it is supported by reasonable evidence of a link between the drug and a serious hazard.<sup>200</sup> The central theme of federal drug regulation that the “manufacturer bears responsibility for the content of its label at all times” is reflected in the manufacturer’s ability to make CBE labeling changes.<sup>201</sup>

The drug approval process occurs within a structured framework that involves: analysis of the target condition and available treatments, assessment of benefits and risks from clinical data, and strategies for managing risks.<sup>202</sup> The FDA website reinforces that one of its risk management strategies includes an FDA-approved drug label that communicates the possible benefits and risks of the drug and offers ways to detect and manage risks.<sup>203</sup> Sometimes, additional risk management is necessary, and in such cases, a drug manufacturer may be required to implement a Risk Evaluation and Mitigation Strategy (REMS).<sup>204</sup>

REMS is a drug safety program that the FDA will require for certain medications depending on the severity of their safety concerns.<sup>205</sup> The goal is continuous monitoring to ensure that the medication’s benefits outweigh its risks.<sup>206</sup> Only a few medications require a REMS, and currently, the only weight loss drug included is Qsymia due to the possibility of birth defects when taken during pregnancy.<sup>207</sup> These regulatory tools work together to help ensure that medications are used safely and effectively by informing both healthcare providers and patients of potential risks.<sup>208</sup>

In addition to labeling and risk management requirements, such as REMS, the FDA also regulates how drugs are promoted and advertised after approval.<sup>209</sup>

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<sup>198</sup> *Mason v. Smithkline Beecham Corp.*, 596 F.3d 387, 392 (7th Cir. 2010).

<sup>199</sup> *Id.*; 21 C.F.R. § 314.70(c)(6)(iii)(A)-(E)).

<sup>200</sup> *Mason*, 596 F.3d at 392 (quoting 21 C.F.R. § 201.57(e) (2003)).

<sup>201</sup> *Id.*

<sup>202</sup> *Development & Approval Process*, U.S. FOOD & DRUG ADMIN. (Aug. 8, 2022), <https://www.fda.gov/drugs/development-approval-process-drugs>.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Risk Evaluation and Mitigation Strategies*, U.S. FOOD & DRUG ADMIN. (May 20, 2025), <https://www.fda.gov/drugs/drug-safety-and-availability/risk-evaluation-and-mitigation-strategies-rems>.

<sup>206</sup> *Id.*

<sup>207</sup> *Drug Databases: Approved Risk Evaluation and Mitigation Strategies (REMS): Qsymia (phentermine and topiramate)*, U.S. FOOD & DRUG ADMIN. (July 11, 2025), <https://www.accessdata.fda.gov/scripts/cder/rems/index.cfm?event=IndvRemsDetails.page&REMS=45>; see also *Drug Databases: Approved Risk Evaluation and Mitigation Strategies (REMS): Index*, U.S. FOOD & DRUG ADMIN. (July 11, 2025), <https://www.accessdata.fda.gov/scripts/cder/rems/index.cfm> (noting that Qsymia is the only weight loss drug currently included on the FDA’s index listing all drugs required to use REMS).

<sup>208</sup> See *Development & Approval Process*, *supra* note 202.

<sup>209</sup> See Dominick DiSabatino & Arushi Pandya, *Proposed Legislation May Crack Down on Online*

As mentioned previously, online and direct-to-consumer advertisements by social media influencers and telehealth providers concerning semaglutide and GLP-1 drugs have increased.<sup>210</sup> Although compliance with FDA regulations does not preclude manufacturer liability, these regulations still play a role in shaping the scope of the manufacturer's duties and defenses.<sup>211</sup> After a drug has been approved, the FDA is required to enforce its regulations governing drug advertising and promotion to ensure that the drug's presentation is not false or misleading.<sup>212</sup>

However, the FDA has not addressed the increasing volume of social media advertisements produced by telehealth companies and even healthcare providers.<sup>213</sup> These types of advertisements have generally been outside of the FDA's regulatory scope, unless they have a financial relationship with a drug's manufacturer.<sup>214</sup> However, in September 2024, Senator Dick Durbin and Mike Braun proposed the bipartisan Protecting Patients from Deceptive Drugs Ads Online Act.<sup>215</sup> The Act seeks to eliminate this "gray area" and heighten oversight of influencer and telehealth company advertising.<sup>216</sup> In a letter of support for the bill, the American College of Physicians emphasized that the legislation aims to close a regulatory loophole in prescription drug promotion.<sup>217</sup> The bill would require the FDA to issue warning letters and impose fines on influencers and telehealth companies that engage in deceptive or misleading promotions of prescription drugs for financial gain.<sup>218</sup> These penalties would apply in cases where promotional content includes false or inaccurate statements, omits critical information about a drug, or fails to provide standard disclosures about risks and side effects.<sup>219</sup> As the landscape of drug advertising evolves, legislation like the Protecting Patients from Deceptive Drugs Ads Online Act seeks to address regulatory gaps, ensuring greater accountability and consumer protection in the marketing of drugs.<sup>220</sup>

## VII. IMPACT OF PHARMA REPUTATION AND ALLOCATION OF RESPONSIBILITY

According to Gallup's latest survey on Americans' opinions of major industries, the pharmaceutical industry is the lowest-rated sector, with only 20%

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*Drug Ads*, LAW360 (Sept. 25, 2024), <https://www.law360.com/articles/1882297/proposed-legislation-may-crack-down-on-online-drug-ads>.

<sup>210</sup> *Id.*

<sup>211</sup> *See id.*; *Wyeth v. Levine*, 555 U.S. 555 (2009).

<sup>212</sup> DiSabatino & Pandya, *supra* note 209.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> Letter from Isaac O. Opole, American College of Physicians President, to Dick Durbin, United States Senator, and Mike Braun, former United States Senator (Aug. 28, 2024) (on file with American College of Physicians).

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *See id.*

of U.S. adults viewing it positively.<sup>221</sup> Americans' unfavorable ratings of the pharmaceutical industry (61% negative) are closely followed by their dislike of the oil and gas industry (53% negative), the healthcare industry (51% negative), and the federal government (58% negative).<sup>222</sup> This is not a new development, as the pharmaceutical industry has held or shared the lowest ranking since 2016.<sup>223</sup> The rapid escalation of lawsuits against GLP-1 drug manufacturers and the current MDL echo the very dynamics that have historically undermined public trust in the pharmaceutical sector.<sup>224</sup> As with previous pharmaceutical lawsuits, such as those involving opioids or thalidomide, this litigation highlights concerns about whether companies prioritize commercial success over patient safety and transparency.<sup>225</sup> Plaintiffs argue that aggressive marketing for off-label weight loss use, coupled with insufficient risk disclosure, has left patients vulnerable and uninformed, reinforcing the perception that profit motives outweigh ethical responsibilities.<sup>226</sup>

The lack of trust held by Americans towards pharmaceutical manufacturers is not unwarranted. There have been instances of manufacturers withholding data and information concerning clinical study results or side effects from the FDA and the public.<sup>227</sup> Although clinical trials are conducted before a drug's approval, unexpected adverse effects can arise after the drug is released to the public.<sup>228</sup> Drug manufacturers are required to report these unanticipated adverse events or any other severe side effects to the FDA within fifteen days of being alerted by a patient.<sup>229</sup> A study, however, found that one in ten manufacturers failed to alert the FDA within this timeline, thereby violating these regulations.<sup>230</sup> The study also found that manufacturers were less likely to disclose side effects if those side effects had the potential to be fatal.<sup>231</sup> Simultaneously, there are instances in which federal agencies do little or nothing to enforce the laws or ensure compliance with their own regulations. Additionally, many Americans have

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<sup>221</sup> Jane Sarasohn-Kahn, *Americans' Perspectives on Pharma and Healthcare Industries Are Low and Low-Ish Compared with Most Other Sectors*, HEALTHPOPULI (Sept. 19, 2024), <https://www.healthpopuli.com/2024/09/19/americans-perspectives-on-pharma-and-healthcare-industries-are-low-and-low-ish-compared-with-most-other-sectors/>.

<sup>222</sup> Jeffrey M. Jones, *Grocery, Restaurant Industry Images Slide in U.S.*, GALLUP (Sept. 12, 2024), <https://news.gallup.com/poll/650318/grocery-restaurant-industry-images-slide.aspx>.

<sup>223</sup> *Id.*

<sup>224</sup> See Chris Lo, *The People vs Big Pharma: Tackling the Industry's Trust Issues*, PHARM. TECH. (Aug. 20, 2018), <https://www.pharmaceutical-technology.com/features/people-vs-big-pharma-tackling-industrys-trust-issues/>.

<sup>225</sup> *See id.*

<sup>226</sup> *See id.*; Complaint & Jury Demand, *Bell*, *supra* note 13; Complaint & Demand for Jury Trial, *Legros*, *supra* note 165; Master Long Form Complaint & Demand for Jury Trial, *Fentress*, *supra* note 165.

<sup>227</sup> See Charles Piller, *FDA and NIH let Clinical Trial Sponsors Keep Results Secret and Break the Law*, SCIENCE.ORG (Jan. 13, 2020), <https://www.science.org/content/article/fda-and-nih-let-clinical-trial-sponsors-keep-results-secret-and-break-law>.

<sup>228</sup> See Charlie Plain, *Drug Companies Failing to Properly Report Side Effects*, UNIV. MINN.: SCH. PUB. HEALTH (July 30, 2015), <https://www.sph.umn.edu/news/drug-companies-failing-properly-report-side-effects/>.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

experienced side effects from pharmaceutical drugs that they felt had not been fully explained to them. Drug manufacturers bear significant responsibility for pharmaceutical safety. When submitting a New Drug Application to the FDA, it is imperative that the applicant be transparent in reporting any data or information regarding the drug's safety so the FDA can effectively fulfill its responsibilities.<sup>232</sup> Additionally, as depicted by the litigation discussed, drug manufacturers are responsible for ensuring they adequately warn about their product's side effects. Manufacturers can err on the side of caution by following FDA guidelines when labeling and marketing products, but even then, they are not precluded from liability.<sup>233</sup> However, some states have passed statutes that protect drug manufacturers from punitive damages when their drugs were manufactured and labeled in compliance with FDA regulations.<sup>234</sup> Reflecting the importance of drug manufacturer transparency, this defense is unavailable to manufacturers who fraudulently withheld material and relevant information regarding the drug's harmfulness from the FDA.<sup>235</sup>

Any business that makes a product utilized by the public is also required to ensure that its product can be used safely and to warn about possible risks. However, drug safety is a shared responsibility that also involves regulatory agencies such as the FDA and prescribing physicians. It seems problematic to place the full burden on manufacturers when the system involves multiple stakeholders. Additionally, in marketing, all businesses advertise their products to increase revenue, and these drug manufacturers will do the same. Simultaneously, these manufacturers play a vital role in communicating the benefits and risks of these medications through advertising, and it is expected that they are held to a higher standard. If they follow FDA protocols and still face legal claims, it may indicate gaps not just in industry conduct but in the regulatory framework itself. This litigation serves not only as a warning to drug manufacturers but also as a wake-up call to regulatory agencies and physicians, challenging them to take greater initiative to keep Americans safe. Drug manufacturers, of course, should still be held accountable when they commit wrongdoing, but it is imperative that the FDA and physicians fulfill their responsibilities as well. The FDA must set clear guidelines for these manufacturers to comply with, and physicians must adequately warn individuals who use the manufacturer's products.

### VIII. CONCLUSION

No matter the outcome of this litigation, Jackie Bjorklund and thousands of others will struggle with the chronic condition of gastroparesis for the rest of their lives. When someone suffers an injury, it is the responsibility of the legal system to hold those responsible accountable and make the victim as whole as

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<sup>232</sup> See generally 21 U.S.C. § 355(b)(1) (2025) (stating the requirements for submitting a New Drug Application).

<sup>233</sup> See generally *Wyeth v. Levine*, 555 U.S. 555 (2009) (stating FDA approvals do not provide a complete defense to tort claims).

<sup>234</sup> See, e.g., OHIO REV. CODE ANN. § 2307.80 (2025); N.J. STAT. ANN. § 2A:58C-5 (2025).

<sup>235</sup> See, e.g., OHIO REV. CODE ANN. § 2307.80; N.J. STAT. ANN. § 2A:58C-5.

possible again. Here, *MDL 3094 In Re: Glucagon-like Peptide-1 Receptor Agonists (GLP-1 RAS) Products Liability Litigation*, is attempting to achieve this objective.

At this stage, who is legally responsible for these injuries is still undetermined; however, this litigation serves as a reminder that pharmaceutical safety is a burden shared by multiple entities. Without a clear allocation of responsibility among these entities and diligence for fulfilling those delegated responsibilities, injuries like these will continue to occur. Simply put, drug manufacturers must comply with federal regulations and state law by adequately warning physicians about the drug's risks. Physicians must adequately warn their patients about these risks using their medical expertise and professional judgment. The FDA must create and enforce specific and clear regulations to be followed. When one of these entities shirks its responsibilities, the patient suffers. Here, the blame has primarily been placed on the drug manufacturer for allegedly not adequately warning about their product's side effects. It is quite possible this blame is warranted, and if that is the case, then hopefully this party will be held responsible. Even so, looking forward, it is essential to identify where each of the entities involved could have prevented the injuries that sparked this litigation and, hopefully, where they can stop similar injuries in the future.

The drug manufacturers could have conducted more intensive research. The drug manufacturers could have included "gastroparesis" on their labels. The FDA could have opted not to approve the medications until further research into their long-term effects was conducted. The FDA could have issued more specific and straightforward labeling requirements to guide drug manufacturers. The FDA could have placed more restrictions on how drug manufacturers advertise these drugs. Physicians could have investigated outside medical research before prescribing the medication to their patients. Physicians could have done a better job explaining its side effects. No matter who is held legally responsible, this litigation has highlighted the need for change in pharmaceutical safety regulation and the fact that every party involved has room to improve.

# IS THE FOURTH AMENDMENT SEXIST?

Alexandra McKee\*

## I. INTRODUCTION

In 1971, President Richard Nixon declared drug abuse “public enemy number one,” and ignited a decades-long War on Drugs that transformed the U.S. criminal justice system.<sup>1</sup> What began as a policy to curb drug use swiftly evolved into a punitive crackdown, greatly increasing penalties, enforcement, and incarceration for nonviolent drug-related offenses.<sup>2</sup> In 1981, President Ronald Reagan expanded the scope of the War on Drugs significantly by emphasizing criminal punishment, and increased nonviolent drug incarcerations from 50,000 in 1980 to 400,000 in 1997.<sup>3</sup>

The War on Drugs not only filled prisons and intensified enforcement, but the campaign also profoundly impacted women.<sup>4</sup> From 1986 to 1999, the number of women incarcerated for drug offenses alone rose by 888%, far outpacing the incarceration rate for men.<sup>5</sup>

Women now account for an increasingly large share of all arrests: 16% in 1980 and 27% by 2017.<sup>6</sup> This disparity is also reflected in traffic stop data.<sup>7</sup> While traffic stops have declined overall since 1999, the drop has been significantly steeper for men.<sup>8</sup> Consequently, stops involving women increased by 378,000.<sup>9</sup> Although the male search rate dropped by half during that period, the rate for women remained unchanged.<sup>10</sup>

The War on Drugs’ enforcement protocols not only filled prisons; it also reshaped how courts interpret constitutional protections during law enforcement encounters, particularly under the Fourth Amendment.<sup>11</sup> Courts gradually expanded the automobile exception during this transformation, allowing police officers to search vehicles without a warrant if they had probable cause.<sup>12</sup> As the

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<sup>1</sup> See *War on Drugs*, BRITANNICA, <https://www.britannica.com/topic/war-on-drugs> (last visited Oct. 2, 2025).

<sup>2</sup> See *id.*

<sup>3</sup> *Id.*

<sup>4</sup> See *Policing Women: Race and Gender Disparities in Police Stops, Searches, and Use of Force*, PRISON POL’Y INITIATIVE (May 14, 2019), <https://www.prisonpolicy.org/blog/2019/05/14/policingwomen/> [hereinafter *Policing Women*].

<sup>5</sup> *Caught in the Net: The Impact of Drug Policies on Women and Families*, ACLU 1 (2005), [https://assets.aclu.org/live/uploads/document/asset\\_upload\\_file431\\_23513.pdf?utm\\_source](https://assets.aclu.org/live/uploads/document/asset_upload_file431_23513.pdf?utm_source).

<sup>6</sup> *Id.* at 1.

<sup>7</sup> *Policing Women*, *supra* note 4.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> See generally Ilya Somin, *The War on Drugs as a Constitutional Failure*, JOTWELL (Aug. 8, 2024), <https://conlaw.jotwell.com/the-war-on-drugs-as-a-constitutional-failure/>.

<sup>12</sup> *Am. Fur Co. v. United States*, 2 Pet. 358 (1829) (upholding an 1822 law permitting officers to

War on Drugs progressed, so too did the erosion of privacy protections, particularly for passengers.<sup>13</sup> Reflecting this erosion, in *Wyoming v. Houghton*, the Supreme Court ruled that officers may search a passenger's purse during a traffic stop without individualized suspicion.<sup>14</sup> This precedent grants law enforcement significant discretion over personal item searches.<sup>15</sup>

In practice, this broad discretion over personal item searches functions in gendered ways. Diverging state court rulings on purse searches have created uncertainty and raised concerns about gender bias.<sup>16</sup>

In *State v. Edwards*, a recent South Dakota case, Wanda Edwards was a passenger in a vehicle that the police stopped for a headlight violation.<sup>17</sup> During the traffic stop, an officer forcibly seized and searched the purse she was wearing on her shoulder.<sup>18</sup> Officers found drugs in the purse, and the trial court convicted Edwards of possession.<sup>19</sup> The South Dakota Supreme Court affirmed the conviction, holding that South Dakota does not recognize a “purse exception” to the automobile exception.<sup>20</sup>

Edwards then petitioned the U.S. Supreme Court to resolve a split among state courts and address gender disparity in Fourth Amendment search protections.<sup>21</sup> The central question in the petition was whether police officers must have probable cause to search a purse held or worn by a passenger during a traffic stop—as the Supreme Courts of Kansas, North Dakota, and Idaho have held—or whether such searches may be conducted without a warrant—as the South Dakota Supreme Court, joined by the Supreme Courts of Minnesota, Nebraska, and Ohio, have held.<sup>22</sup> This split results in unequal treatment of personal items closely

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search a trader's goods for liquor on reasonable suspicion); *Lambert v. United States*, 282 Fed. 413 (9th Cir. 1922) (sustaining the warrantless search and seizure of an automobile for smuggled liquor based on probable cause); *Ash v. United States*, 299 Fed. 277 (4th Cir. 1924) (finding that officers may search an automobile without a warrant when the facts and circumstances give them reasonable grounds to believe the vehicle is carrying contraband); *Carroll v. United States*, 267 U.S. 132 (1925) (holding that probable cause justifies warrantless vehicle searches because of mobility).

<sup>13</sup> See *United States v. Ross*, 456 U.S. 798, 825 (1982) (“If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of *every part of the vehicle and its contents* that may conceal the object of the search.”) (emphasis added).

<sup>14</sup> See *Wyoming v. Houghton*, 526 U.S. 295 (1999).

<sup>15</sup> See *Houghton*, 526 at 307; Kim Franke Folstad, *Smart Cops Will Skip Searches of Purses*, DESERET NEWS (Apr. 24, 1999), <https://www.deseret.com/1999/4/24/19441758/smart-cops-will-skip-searches-of-purses/>.

<sup>16</sup> See *State v. Groshong*, 135 P.3d 1186 (Kan. 2006); *State v. Boyd*, 64 P.3d 419 (Kan. 2003); *State v. Tognotti*, 663 N.W.2d 642 (N.D. 2003); *State v. Newsom*, 979 P.2d 100 (Idaho 1998) (holding that officers conducting a lawful warrantless search of an automobile are not permitted to search a purse held by a passenger). *But see* *State v. Barrow*, 989 N.W.2d 682 (Minn. 2023); *State v. Lang*, 942 N.W.2d 388 (Neb. 2020); *State v. Mercier*, 885 N.E.2d 942 (Ohio 2008) (holding that a lawful warrantless automobile search may include the search of a purse held by a passenger).

<sup>17</sup> See *State v. Edwards*, 13 N.W.3d 199, 200 (S.D. 2024).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> See Petition for Writ of Certiorari, *Wanda Lynn Edwards v. State of South Dakota*, No. 24-863 (2025) [hereinafter Brief for Petitioner].

<sup>22</sup> Brief for Petitioner at 1.

associated with the individual, especially in the treatment of purses compared to pockets.<sup>23</sup> At present, some courts treat items like pockets, wallets, and purses differently based on classification and the user's gender.<sup>24</sup>

This Comment argues that, upon granting certiorari in *Edwards*, the Supreme Court should adopt a purse exception to the Fourth Amendment. This exception would establish a uniform, gender-neutral rule requiring probable cause to search a person's pockets, wallet, or purse when those items are physically attached to the body during a lawful automobile search.

Section I explains the scope and limits of the automobile exception under the Fourth Amendment and focuses on how courts have historically treated vehicle container searches during traffic stops. In Section II, this Comment examines the current judicial split among state courts on whether purses should receive the same heightened Fourth Amendment protection as pockets, emphasizing the gendered implications of differing approaches. Further, Section III explores how the disparate treatment of purses and pockets during vehicle searches reinforces gender-based privacy disparities, highlighting the consequences of grounding Fourth Amendment protections in outdated societal norms and clothing design. Section IV analyzes the constitutional reasoning behind the majority and minority approaches, highlighting how certain interpretations reinforce a gender-based double standard in search and seizure law. Then, Section V explores the constitutional importance of gender-neutral search standards, arguing that the unequal treatment of purses and pockets during traffic stops undermines the Fourth Amendment and perpetuates structural gender bias. Finally, Section VI proposes reforms through Supreme Court clarification, federal or state legislation, and the implementation of law enforcement training to ensure a uniform, gender-neutral standard for purse and pocket searches.

## II. THE FOURTH AMENDMENT AND WARRANTLESS VEHICLE SEARCHES

The Fourth Amendment to the United States Constitution establishes the legal principles governing vehicle and container searches during traffic stops.<sup>25</sup> The Amendment protects individuals against unreasonable searches and seizures, and requires that police officers only issue warrants upon probable cause and with judicial authorization.<sup>26</sup> A search occurs when a government agent intrudes upon an area in which a person has a reasonable expectation of privacy.<sup>27</sup> An officer seizes a person when they restrain the person's liberty through arrest, physical force, or a show of authority that meaningfully interferes with their freedom of

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<sup>23</sup> *See id.*

<sup>24</sup> *See id.*

<sup>25</sup> *Carroll v. United States*, 267 U.S. 132 (1925); *California v. Carney*, 471 U.S. 386, 390-94 (1985).

<sup>26</sup> U.S. CONST. amend. IV.

<sup>27</sup> U.S. CONST. amend. IV; *California v. Acevedo*, 500 U.S. 565 (1991) (clarifying the scope of warrantless searches of containers in automobiles).

movement.<sup>28</sup> According to the Supreme Court's decision in *Katz v. United States*, people demonstrate a reasonable expectation of privacy when they subjectively expect privacy and society recognizes that expectation as objectively reasonable.<sup>29</sup>

The automobile exception permits warrantless vehicle searches when officers have probable cause and the vehicle is readily mobile, reflecting a balancing of privacy against law enforcement efficiency.<sup>30</sup> When police conduct a traffic stop, certain conditions may permit them to search a vehicle, including any open or closed containers, and take evidence without a warrant under the automobile exception.<sup>31</sup> For a warrantless search to be legal under this exception, two conditions must be met: (1) there must be probable cause to believe the vehicle contains contraband or evidence of a crime; and (2) the vehicle must be "readily mobile," or capable of ready movement.<sup>32</sup>

The inherent mobility of vehicles largely justifies the automobile exception because it creates a risk that suspects might lose or destroy evidence before officers can obtain a warrant.<sup>33</sup> First articulated in *Carroll v. United States*, the Supreme Court reasoned that vehicles may be moved quickly beyond the reach of a warrant.<sup>34</sup> Suspects can easily discard, conceal, or transport evidence out of the jurisdiction before officers have a chance to preserve it.<sup>35</sup> For example, if law enforcement officers observe illegal drugs in plain view inside a suspect's car during a traffic stop, they cannot risk the suspect driving away and disposing of the evidence before a warrant is obtained.<sup>36</sup> Over time, the Supreme Court has reaffirmed and expanded this exception in cases like *California v. Carney*, where the Court emphasized that individuals have a diminished expectation of privacy in their vehicles due to their public use and heavy regulation.<sup>37</sup>

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<sup>28</sup> See *Brendlin v. California*, 551 U.S. 249 (2007) (emphasizing that stopping a vehicle and detaining its occupants is a seizure within the meaning of the Fourth Amendment); *Thompson v. Clark*, 596 U.S. 36, 50 (2022) (explaining that a Fourth Amendment seizure involves either an arrest, the use of physical force, or a show of actual authority that restrains a person's liberty).

<sup>29</sup> *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

<sup>30</sup> *Carroll v. United States*, 267 U.S. 132 (1925) (holding that the automobile exception allows warrantless vehicle searches when officers have probable cause to believe the vehicle contains contraband because its inherent mobility and the practical demands faced by law enforcement); *Chambers v. Maroney*, 399 U.S. 42 (1970) (reaffirming the automobile exception and emphasizing that the mobility of vehicles creates exigent circumstances that justify immediate searches without a warrant when probable cause exists).

<sup>31</sup> *United States v. Ross*, 456 U.S. 798 (1982) (holding that if probable cause justifies the search of every part of the vehicle and its contents that may conceal the object of the search, including closed containers found within the vehicle); *Wyoming v. Houghton*, 526 U.S. 295, 302-04 (1999) (extending the automobile exception to include the warrantless search of a passenger's personal belongings within the vehicle provided there is probable cause to search the vehicle).

<sup>32</sup> *Maryland v. Dyson*, 527 U.S. 465, 467 (1999).

<sup>33</sup> *Carroll*, 267 U.S. at 153.

<sup>34</sup> See *id.*

<sup>35</sup> *Id.*

<sup>36</sup> See, e.g., *Washington v. Chrisman*, 455 U.S. 1 (1982).

<sup>37</sup> See *California v. Carney*, 471 U.S. 386, 391-93 (1985).

Unlike the heightened protection afforded to private homes, vehicles are subject to a lower threshold of Fourth Amendment protection.<sup>38</sup> This distinction stems from the deeply rooted principle that the home is the quintessential domain of personal privacy, historically recognized by the courts as deserving the highest level of constitutional protection.<sup>39</sup> The Supreme Court has emphasized that individuals have a heightened expectation of privacy in their homes, which cannot be easily intruded upon without a warrant and probable cause.<sup>40</sup> The reduced expectation of privacy in vehicles arises from their operation on public roads, extensive government regulations, and inherent mobility.<sup>41</sup> The Supreme Court recognizes these factors as distinguishing vehicles from homes under the Fourth Amendment.<sup>42</sup>

Moreover, drivers must comply with extensive government regulations such as licensing, registration, insurance, and vehicle inspections, which inherently reduce the privacy associated with vehicle ownership and use.<sup>43</sup> Licensing and registration require individuals to provide identifying information to state authorities, which law enforcement agencies can access without a warrant for investigative or enforcement purposes.<sup>44</sup> Mandatory insurance provisions generate permanent records that connect specific vehicles and drivers, allowing government entities to track vehicle ownership and user history.<sup>45</sup> Drivers must undergo routine vehicle inspections, which often include visual searches of the interior or cargo areas, normalizing third-party oversight within the vehicle.<sup>46</sup>

Despite the reduced expectation of privacy in vehicles, searches remain limited by probable cause and the nature of the object sought.<sup>47</sup> The Supreme Court emphasized that the validity of a warrantless automobile search depends on whether probable cause exists to believe that the item is located in a particular place.<sup>48</sup> As a result, officers may search containers, including those belonging to passengers, only if they are capable of concealing an item officers have probable cause to search for.<sup>49</sup>

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<sup>38</sup> See, e.g., *South Dakota v. Opperman*, 428 U.S. 364 (1976) (discussing the diminished expectation of privacy in vehicles compared to homes, citing their mobility and regulation as justifications for warrantless searches under the automobile exception).

<sup>39</sup> See *Payton v. New York*, 445 U.S. 573, 589-90 (1980) (“[T]he Fourth Amendment has drawn a firm line at the entrance to the house.”).

<sup>40</sup> *Id.*

<sup>41</sup> *Opperman*, 428 U.S. 364; *Carney*, 471 U.S. 386.

<sup>42</sup> See *Florida v. Jimeno*, 500 U.S. 248, 253 (1991) (Marshall J., dissenting) (quoting *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (plurality opinion)) (“A car is ordinarily not used as a residence or a repository of personal effects. It travels public thoroughfares where both its occupants and its contents are in plain view.”).

<sup>43</sup> *Carney*, 471 U.S. at 392; *Opperman*, 428 U.S. at 368-69.

<sup>44</sup> See, e.g., *Delaware v. Prouse*, 440 U.S. 648, 653 (1979) (observing that license and registration data provide law enforcement with vehicle and driver identification without individualized suspicion).

<sup>45</sup> See 18 U.S.C. § 2721 (2022).

<sup>46</sup> *Opperman*, 428 U.S. at 368; 49 U.S.C. § 31142 (2022).

<sup>47</sup> *United States v. Ross*, 456 U.S. 798 (1982).

<sup>48</sup> *Id.*

<sup>49</sup> *Wyoming v. Houghton*, 526 U.S. 295, 307 (1999).

This broad interpretation of the automobile exception has significantly influenced how state high courts treat purses during traffic stops.<sup>50</sup> Although many states adhere to the federal rule established in *Houghton* and allow searches of a passenger's belongings without individualized suspicion, others have imposed stricter limitations.<sup>51</sup>

### III. DIFFERENT POLICIES BETWEEN STATES

State courts disagree over whether a passenger's purse may be searched without individualized suspicion during a vehicle stop, resulting in varied legal standards across states.<sup>52</sup>

The legality of purse searches frequently arises during traffic stops, where officers rely on the automobile exception to search containers within the vehicle.<sup>53</sup> In states such as Minnesota, Nebraska, Ohio, and South Dakota, officers may search a passenger's purse without a warrant or separate probable cause, so long as they have general probable cause to search the vehicle—a rule that the Supreme Court established in *Houghton*.<sup>54</sup> Specifically, issues related to probable cause frequently arise during traffic stops when officers observe evidence of contraband in plain view, detect its odor, or make a lawful arrest that justifies a search incident to arrest.<sup>55</sup> In those circumstances, the search of a vehicle may extend to containers within reach, such as a passenger's purse.<sup>56</sup>

Unlike the majority, the high courts of Kansas, Idaho, and North Dakota follow a narrower interpretation based on Justice Breyer's concurrence in *Houghton* that affords greater privacy protection to purses physically held or worn by the passenger.<sup>57</sup> These states require officers either to obtain a warrant or have separate, item-specific probable cause to believe that the particular container—

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<sup>50</sup> See generally Brief for Petitioner, *supra* note 21, at 15.

<sup>51</sup> See *State v. Groshong*, 135 P.3d 1186 (Kan. 2006); *State v. Boyd*, 64 P.3d 419 (Kan. 2003); *State v. Tognotti*, 663 N.W.2d 642 (N.D. 2003); *State v. Newsom*, 979 P.2d 100 (Idaho 1998) (holding that officers conducting a lawful warrantless search of an automobile are not permitted to search a purse held by a passenger). *But see* *State v. Barrow*, 989 N.W.2d 682 (Minn. 2023); *State v. Lang*, 942 N.W.2d 388 (Neb. 2020); *State v. Mercier*, 885 N.E.2d 942 (Ohio 2008) (holding that a lawful warrantless automobile search may include the search of a purse held by a passenger).

<sup>52</sup> Brief for Petitioner, *supra* note 21, at 15.

<sup>53</sup> See *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (consent searches); see *Arizona v. Gant*, 556 U.S. 332 (2009) (search incident to lawful arrest in vehicles); see also *Kentucky v. King*, 563 U.S. 452 (2011) (exigent circumstances).

<sup>54</sup> *State v. Steele*, 613 N.W.2d 825, 830 (S.D. 2000); *Lang*, 942 N.W.2d at 400; *Barrow*, 989 N.W.2d at 687; *State v. Green*, 231 N.E.3d 524, 532 (Ohio Ct. App. 2023).

<sup>55</sup> See *Wyoming v. Houghton*, 526 U.S. 295, 307 (1999) (“Officers with probable cause to search a car may inspect passengers’ belongings found in the car that are capable of concealing the object of the search.”); *Gant*, 556 U.S. at 343 (holding that a search incident to arrest is permissible only when it is reasonable to believe the arrestee might access the vehicle or that the vehicle contains evidence of the offense of arrest); *California v. Acevedo*, 500 U.S. 565, 580 (1991) (“[T]he police may search without a warrant if their search is supported by probable cause.”).

<sup>56</sup> *New York v. Belton*, 453 U.S. 454, 461 (1981); *Texas v. Brown*, 460 U.S. 730, 739 (1983).

<sup>57</sup> *State v. Newsom*, 979 P.2d 100, 102 (Idaho 1998); *State v. Boyd*, 64 P.3d 419, 427 (Kan. 2003); *State v. Tognotti*, 663 N.W.2d 642, 643 (N.D. 2003).

such as a purse a passenger places on their lap—contains evidence or contraband.<sup>58</sup> This means that while general probable cause might justify searching parts of the vehicle or unclaimed containers, officers must have a distinct factual basis connecting the item to suspected illegal activity prior to searching it.<sup>59</sup>

For example, if officers smell marijuana coming from a vehicle, that may provide probable cause to search the car and a passenger's purse under the majority view.<sup>60</sup> Under the minority approach, the odor of marijuana alone would not justify searching a purse resting in a passenger's lap.<sup>61</sup> Officers must have a reason to believe that the purse contains contraband, such as observing the passenger place the marijuana into the purse or receiving a credible<sup>62</sup> tip that someone hid drugs there.<sup>63</sup>

#### IV. PURSES, POCKETS, AND THE GENDER DIVIDE IN PRIVACY RIGHTS

The differing treatment of purses and pockets reflects underlying gender-based assumptions embedded in clothing design and societal norms.<sup>64</sup> If someone places a purse on the floor, seat, or elsewhere in the vehicle, some observers would view the purse more like a container in the traditional sense than a personal item closely tied to the individual.<sup>65</sup> The U.S. Supreme Court in *Houghton* made clear that if police have probable cause to search a vehicle, that authority allows for the search of “all containers within a car, without qualification as to ownership.”<sup>66</sup>

In contrast, courts classify items in pants pockets as being on the person and thus entitled to heightened Fourth Amendment protection.<sup>67</sup> The Supreme Court emphasized the “significantly heightened protection”<sup>68</sup> the Fourth Amendment affords to the person, noting that “even a limited search of the outer

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<sup>58</sup> *Newsom*, 979 P.2d at 102; *Boyd*, 64 P.3d at 427; *Tognotti*, 663 N.W.2d at 643.

<sup>59</sup> *Newsom*, 979 P.2d at 102; *Boyd*, 64 P.3d at 427; *Tognotti*, 663 N.W.2d at 643.

<sup>60</sup> *People v. Stout*, 477 N.E.2d 498, 502 (1985).

<sup>61</sup> *See United States v. Di Re*, 332 U.S. 581, 587 (1948); *Wyoming v. Houghton*, 526 U.S. 295, 308 (1999) (Breyer, J., concurring).

<sup>62</sup> *Illinois v. Gates*, 462 U.S. 213, 221 (1983) (A “credible” tip is evaluated under the totality of the circumstances approach, which considers factors such as the informant's reliability, the basis of their knowledge, and any corroboration of the tip by law enforcement).

<sup>63</sup> *See generally Di Re*, 332 U.S. at 587 (reaffirming that probable cause to search an individual's person must be an individualized inquiry and not a generalized allowance). Because probable cause to search an individual's person is individualized, the probable cause to search someone's purse, too, must be individualized.

<sup>64</sup> *See* HANNAH CARLSON, *POCKETS: AN INTIMATE HISTORY OF HOW WE KEEP THINGS CLOSE* 14-16 (2023).

<sup>65</sup> *See, e.g., State v. Steele*, 613 N.W.2d 825, 830 (S.D. 2000); *see also State v. Barrow*, 989 N.W.2d 682, 687 (Minn. 2023).

<sup>66</sup> *Houghton*, 526 U.S. at 301 (emphasis added).

<sup>67</sup> *See id.* at 308 (Breyer, J., concurring) (arguing that “if a woman's purse, like a man's billfold, were attached to her person[,] it might then amount to a kind of ‘outer clothing’ which under the Court's cases would properly receive increased protection”).

<sup>68</sup> *Id.* at 305.

clothing” is impermissible.<sup>69</sup> This reasoning reflects longstanding societal gender norms.<sup>70</sup> Women’s clothing—especially dresses, skirts, and fitted slacks—often lacks adequately sized or functional pockets, making it difficult or impossible to carry everyday items like a wallet, phone, or keys without an external bag.<sup>71</sup> In contrast, men’s clothing—such as jeans, cargo pants, and suit jackets—routinely features large, deep pockets designed for carrying personal belongings.<sup>72</sup> Given these limitations, women are more likely to carry purses or handbags out of necessity, while men are typically able to store personal items securely on their person.<sup>73</sup>

As the famous fashion designer Christian Dior once stated, “Men have pockets to keep things in, women for decoration.”<sup>74</sup> Studies show that only 5% of women’s pockets can hold a smartphone, compared to 85% of men’s pockets.<sup>75</sup> Women’s pockets are, on average, 48% shorter and 6.5% narrower than men’s.<sup>76</sup> As one study indicated, within the sample size studied, only 5% of women’s pockets are deep enough to fit an entire hand past the knuckle, while 100% of men’s pockets can fully accommodate a man’s hand.<sup>77</sup> Likewise in a video, fashion and tech blogger Monica Mallon compares the front pockets in women’s and men’s jeans from American Eagle, both purchased at the same price.<sup>78</sup> In the women’s jeans, her iPhone protrudes from the front pocket by about an inch.<sup>79</sup> In contrast, the iPhone fits entirely inside the men’s pocket, with an additional inch of space remaining at the top.<sup>80</sup> And those able to find pants with pockets are the lucky ones: In many cases, women’s clothing lacks pockets altogether, leaving them with little choice but to carry their wallets in external bags like purses to store personal belongings, unlike men who can more easily keep items on their person.<sup>81</sup>

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<sup>69</sup> Terry v. Ohio, 392 U.S. 1, 24-25 (1968) (“Even a limited search of the outer clothing . . . constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience.”).

<sup>70</sup> *Id.*

<sup>71</sup> See Clare Bolon, *The Missing Void: Lack of Pockets in Womenswear and its Effect on Daily Life*, UNIV. N. COLO. 20 (2025), <https://digscholarship.unco.edu/cgi/viewcontent.cgi?article=1125&context=honors> (“Women’s slacks, dresses, and blazers often do not have pockets . . .”).

<sup>72</sup> See Jacqui Palumbo, *Dress Codes: Why Don’t Women Get as Many Pockets as Men?*, CNN (Apr. 9, 2025), <https://www.cnn.com/2025/04/09/style/women-clothes-pockets-men-dress-codes>.

<sup>73</sup> See *id.* (“The absence of pockets in women’s clothing, shaped by aesthetic choices and patriarchal norms, makes purses essential”).

<sup>74</sup> Aditi Sinha, *Pockets Pledge: Demanding Functional Pockets for Women’s Apparel*, CHANGE.ORG, <https://www.change.org/p/pockets-pledge-demanding-functional-pockets-for-women-s-apparel> (last visited June 3, 2025).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Study: Women’s Pants Pockets Are Too Small Compared to Men’s*, 6ABC.COM (Aug. 23, 2018), <https://6abc.com/us--world-pockets-jeans-womens-are-too-small/4041424>.

<sup>78</sup> Monica Mallon, *Pockets in “Women’s” Pants Vs. “Men’s” Pants*, at 00:53, YOUTUBE (Feb. 18, 2018), <https://www.youtube.com/watch?v=a2mGRj0ehNk>.

<sup>79</sup> *Id.* at 01:56.

<sup>80</sup> *Id.* at 02:21.

<sup>81</sup> See Katherine Lyons, *In the Pocket of the Patriarchy: History Behind the Absence of Pockets from*

This lack of pockets in women's clothing is not a 21st century development. Historically, designers and institutions not only denied women the privilege of functional pockets but also deprived them of the privacy that pockets afford. During World War II, thousands of women volunteered for the Women's Auxiliary Army Corps, yet the uniforms they received were designed without the pockets included in men's uniforms.<sup>82</sup> Their skirts had no pockets at all, and military officials deemed breast pockets inappropriate because they disrupted the balance between military appearance and femininity.<sup>83</sup> True to its decision, a US Army recruitment poster showed a line of women marching in uniform behind their leader carrying a handbag over her shoulder.<sup>84</sup>

So we come to the crux of this Comment: It is illogical to protect a man's wallet in his pocket while denying the same protection to a woman's purse on her shoulder because they largely serve the same purpose, and occupy a similar social and physical space as extensions of the person—each functioning as a private container for personal effects that accompany one through public life.<sup>85</sup>

The Fourth Amendment protects areas in which individuals have a reasonable expectation of privacy, regardless of how society assigns value to different types of containers.<sup>86</sup> Like a pocket, a purse often holds highly personal items—such as identification cards, credit and debit cards, insurance information, and cash—and because it holds those highly personal items, it functions, in effect, as an extension of the person.<sup>87</sup>

Although critics argue that purses offer women additional storage capacity unavailable to men,<sup>88</sup> firearms instructor Massad Ayoob's demonstration of tactical cargo pants challenges that assumption.<sup>89</sup> By detailing the extensive

*Traditionally Female Clothing*, BADGER HERALD (Sept. 25, 2022), <https://badgerherald.com/artsetc/2022/09/25/in-the-pocket-of-the-patriarchy-history-behind-the-absence-of-pockets-from-traditionally-female-clothing/>.

<sup>82</sup> Hua Hsu, *What's Really in Your Pocket?*, NEW YORKER (Sept. 18, 2023), [https://www.newyorker.com/magazine/2023/09/25/the-stealthy-power-of-pockets?utm\\_source](https://www.newyorker.com/magazine/2023/09/25/the-stealthy-power-of-pockets?utm_source).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> See *United States v. Ross*, 456 U.S. 798, 822 (1982) (holding that probable cause allows the search of all containers in the vehicle, no distinction between “worthy” and “unworthy” containers); see also *California v. Acevedo*, 500 U.S. 565, 573 (1991) (expanding *Ross* and holding that the Fourth Amendment does not require police to obtain a warrant to open a paper bag in an automobile in the absence of probable cause to search the entire car).

<sup>86</sup> *Bond v. United States*, 529 U.S. 334, 338-39 (2000) (applying *Katz* two-part test and holding that physical manipulation of a bus passenger's bag constitutes a search).

<sup>87</sup> Petition for Writ of Certiorari at 15, *Mercier v. Ohio* No. 08-17 (July 2, 2008), [https://law.yale.edu/sites/default/files/documents/pdf/Clinics/Mercier\\_yale.pdf](https://law.yale.edu/sites/default/files/documents/pdf/Clinics/Mercier_yale.pdf) [hereinafter *Mercier Writ of Certiorari*] (arguing that “Personal items that men characteristically carry in their pockets or billfolds (like medical prescriptions or telephone numbers) are shielded from discovery in a suspicionless search, while the same items may be discovered when carried by a woman in her purse”).

<sup>88</sup> See Bolon, *supra* note 71, at 47 (“Purses give the wearer an opportunity to carry more required items than men due to the extra space . . .”).

<sup>89</sup> Wilson Combat, *Massad Ayoob's Practical Cargo Pants. Unloading Every Day Carry Pants Pockets - Critical Mas Ep78*, YOUTUBE (Feb. 11, 2024), <https://www.youtube.com/watch?v=2XikXNjPILU>.

number of items he routinely carries, Ayooob illustrates that men's clothing, particularly cargo pants, can accommodate a comparable or even greater quantity of personal effects than a purse.<sup>90</sup> In one front pocket, he stores a pocketknife, money clip, hotel key card, lighter, and pocket change.<sup>91</sup> In the other, he carries two handkerchiefs, a wallet, and a flashlight.<sup>92</sup> Another pocket holds a phone, a handgun magazine, speed strips for reloading, eye drops, lens wipes, band-aids, and a pill box.<sup>93</sup> The hip pocket contains a spare wallet, a spare flashlight, and an additional magazine.<sup>94</sup> In storing so many items in his cargo pockets, Ayooob highlights how men's clothing can have functional storage, and thus enable them to carry essentials without relying on external containers like purses, which receive less constitutional protection.<sup>95</sup>

Courts' failure to afford purses the same protection as pockets creates practical confusion for officers and perpetuates constitutional inequality.<sup>96</sup> By relying on how accessible or where the purse appears to be within a vehicle to justify a warrantless search, courts ignore that pockets are often just as accessible but receive greater protection.<sup>97</sup>

The failure to extend Fourth Amendment protection to purses places an unequal burden on women, who must store personal effects in handbags that are more susceptible to warrantless searches than men's pockets.<sup>98</sup> On a practical level,

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<sup>90</sup> *See id.* at 9:03.

<sup>91</sup> *Id.* at 04:50.

<sup>92</sup> *Id.* at 06:17.

<sup>93</sup> *Id.* at 05:14.

<sup>94</sup> *Id.* at 07:08.

<sup>95</sup> *Wyoming v. Houghton*, 526 U.S. 295, 305 (1999) (emphasizing the "significantly heightened protection" the Fourth Amendment affords to the person); *Terry v. Ohio*, 392 U.S. 1, 24-25 (1968) ("Even a limited search of the outer clothing . . . constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience.").

<sup>96</sup> *Compare State v. Boyd*, 64 P.3d 419, 427 (Kan. 2003) (searching a passenger's purse violates her Fourth Amendment rights); *State v. Newsom*, 979 P.2d 100, 102 (Idaho 1998) (passenger may take her purse when leaving car; officers cannot create justification by forcing her to leave it); *State v. Tognotti*, 663 N.W.2d 642, 643 (N.D. 2003) (holding that the Fourth Amendment is violated when an officer instructs a non-arrested passenger to leave her purse in the vehicle and then searches it incident to another occupant's arrest), *with State v. Steele*, 613 N.W.2d 825, 830 (S.D. 2000) (holding that the search of a non-arrested passenger's purse was valid because it was a container within the vehicle at the time of the arrest); *State v. Lang*, 942 N.W.2d 388, 400 (2020) (finding that the automobile exception justified the search of a passenger's purse that she took with her when leaving the car because it was a container within the vehicle and probable cause had been established); *State v. Barrow*, 989 N.W.2d 682, 687 (Minn. 2023) (holding that the search of a passenger's purse is lawful under the automobile exception because the purse was a container within the car at the time probable cause arose and could conceal the object of the search); *State v. Green*, 231 N.E.3d 524, 532 (Ohio Ct. App. 2023) (finding that the automobile exception applied because there was probable cause to search the vehicle for contraband, which extended to a passenger's bag, even though it was removed from the vehicle).

<sup>97</sup> *See United States v. Di Re*, 332 U.S. 581, 587 (1948) (holding that probable cause to search a vehicle does not automatically extend to a passenger's person).

<sup>98</sup> *See Wyoming v. Houghton*, 526 U.S. 295, 308 (1999) (Breyer J., concurring) (emphasizing that the automobile container rule "applies only to containers found within automobiles" and "does not extend to the search of a person found in that automobile").

the courts' failures to afford purses the same protection as pockets creates uncertainty for law enforcement officers, making it difficult to determine when a container search is constitutionally permissible during a traffic stop.<sup>99</sup> Without clear guidance, officers risk conducting unlawful searches, potentially leading courts to suppress evidence and exposing departments to civil liability.<sup>100</sup> Constitutionally, the lack of a uniform standard undermines the Fourth Amendment's promise of individualized privacy by allowing courts to treat purses and pockets differently based on physical design and gender-based assumptions about their users.<sup>101</sup> This unequal treatment disproportionately impacts women and reinforces structural disparities in Fourth Amendment protections.

## V. JUDICIAL APPROACHES TO PURSE & POCKET SEARCHES

### A. Majority Approach

The majority approach permits broad vehicle and container searches under *New York v. Belton* and *Arizona v. Gant*, which provide some leeway to law enforcement in searching vehicles during traffic stops.<sup>102</sup> *Belton* allows officers to search the passenger compartment of a vehicle, including the contents of any containers, during or following an arrest.<sup>103</sup> Proponents of this approach argue that the Supreme Court's later ruling in *Gant* appropriately narrowed *Belton*, limiting

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<sup>99</sup> Compare *Boyd*, 64 P.3d at 427 (searching a passenger's purse violates her Fourth Amendment rights); *Newsom*, 979 P.2d at 102 (passenger may take her purse when leaving car; officers cannot create justification by forcing her to leave it), and *Tognotti*, 663 N.W.2d at 643 (holding that the Fourth Amendment is violated when an officer instructs a non-arrested passenger to leave her purse in the vehicle and then searches it incident to another occupant's arrest), with *Steele*, 613 N.W.2d at 830 (holding that the search of a non-arrested passenger's purse was valid because it was a container within the vehicle at the time of the arrest); *Lang*, 942 N.W.2d at 400 (finding that the automobile exception justified the search of a passenger's purse that she took with her when leaving the car because it was a container within the vehicle and probable cause had been established); *Barrow*, 989 N.W.2d at 687 (holding that the search of a passenger's purse is lawful under the automobile exception because the purse was a container within the car at the time probable cause arose and could conceal the object of the search); *Green*, 231 N.E.3d at 532 (finding that the automobile exception applied because there was probable cause to search the vehicle for contraband, which extended to a passenger's bag, even though it was removed from the vehicle).

<sup>100</sup> See IACP National Law Enforcement Policy Center, *Motor Vehicle Inventories 2* (1995), <https://www.ojp.gov/pdffiles1/Digitization/153975NCJRS.pdf> (explaining that "a department's failure to have an established [inventory] policy will render any evidence discovered during any inventory by that department's personnel inadmissible").

<sup>101</sup> *Mercier Writ of Certiorari*, *supra* note 87, at 15 (arguing that "Personal items that men characteristically carry in their pockets or billfolds (like medical prescriptions or telephone numbers) are shielded from discovery in a suspicionless search, while the same items may be discovered when carried by a woman in her purse").

<sup>102</sup> *New York v. Belton*, 453 U.S. 454 (1981); *Arizona v. Gant*, 556 U.S. 332 (2009).

<sup>103</sup> See *Belton*, 453 U.S. at 460-61.

such searches to situations where the arrestee can access the vehicle or where officers reasonably believe it contains evidence related to the offense.<sup>104</sup>

This interpretation equates purses with other containers like backpacks and briefcases,<sup>105</sup> even as courts afford pockets and their contents heightened constitutional protection.<sup>106</sup> Proponents of equating purses with other containers argue that *Gant* draws no distinctions among containers based on ownership, whether belonging to the driver or a passenger, male or female.<sup>107</sup> By eliminating the requirement to establish probable cause for each individual container, this rule allows officers to act quickly and decisively during a traffic stop.<sup>108</sup> The majority approach, requiring officers to consider container ownership or the gender of the individual carrying that container, introduces ambiguity into on-the-spot decision-making and thus hampers effective policing.<sup>109</sup> This requirement could delay searches, increase risk to officer safety, and result in the loss of evidence.<sup>110</sup> This reasoning reflects the belief that in rapidly evolving situations, officers must be able to act quickly without stopping to evaluate whether the suspect personally possesses or carries the container, whether it is a purse, backpack, or briefcase.<sup>111</sup>

### B. Minority Approach

The minority view emphasizes that the convenience of law enforcement must not override the Fourth Amendment's protection against unreasonable searches.<sup>112</sup> Proponents of the minority view rely on *United States v. Di Re*, in which the Court held that probable cause to search a vehicle does not, by itself, justify a search of a passenger's person or belongings.<sup>113</sup> These advocates argue

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<sup>104</sup> See *Gant*, 56 U.S. at 345-46.

<sup>105</sup> See *United States v. Ross*, 456 U.S. 798, 821 (1982) (holding that the same principle applies to any containers found within a vehicle when officers have probable cause).

<sup>106</sup> *Wyoming v. Houghton*, 526 U.S. 295, 305 (1999) (emphasizing the "significantly heightened protection" the Fourth Amendment affords to the person); *Terry v. Ohio*, 392 U.S. 1, 24-25 (1968) ("Even a limited search of the outer clothing . . . constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience").

<sup>107</sup> See *Houghton*, 526 U.S. at 302.

<sup>108</sup> *Id.*

<sup>109</sup> *State v. Steele*, 613 N.W.2d 825 (S.D. 2000); *State v. Lang*, 942 N.W.2d 388 (2020); *State v. Barrow*, 989 N.W.2d 682 (Minn. 2023); *State v. Green*, 231 N.E.3d 524 (Ohio Ct. App. 2023); see *State v. Edwards*, 13 N.W.3d 199 (S.D. 2024).

<sup>110</sup> See *New York v. Belton*, 453 U.S. 454, 458 (1981) (emphasizing the need for a bright line rule to avoid hesitation by officers and reduce risks during arrests).

<sup>111</sup> *Steele*, 613 N.W.2d at 827 (holding that officers may require a passenger to leave her purse in the vehicle and search it incident to driver's arrest); *State v. Groshong*, 135 P.3d 1186, 1190 (Kan. 2006) (allowing the search of a passenger's purse left in the vehicle once probable cause developed, treating it the same as any other container in the car); *Hawley v. State*, 913 So. 2d 98, 101 (Fla. Dist. Ct. App. 2005) (upholding search of a purse left in vehicle during search incident to arrest because the officer's authority to search the car arose before the passenger requested her purse).

<sup>112</sup> *State v. Newsom*, 979 P.2d 100 (Idaho 1998); *State v. Boyd*, 64 P.3d 419 (Kan. 2003); *State v. Tognotti*, 663 N.W.2d 642 (N.D. 2003).

<sup>113</sup> See *United States v. Di Re*, 332 U.S. 581 (1948) (limiting vehicle search authority to areas where probable cause exists); *Newsom*, 979 P.2d 100; *Boyd*, 64 P.3d 419; *Tognotti*, 663 N.W.2d 642.

that purses passengers wear or hold are functionally similar to wallets or coat pockets because they are physically attached to the person and contain highly personal items.<sup>114</sup> As the Petitioner in *Edwards* explained, a purse is “a special personal container” whose search “very nearly involves the same intrusion as the search of the person herself.”<sup>115</sup> The intrusion, she contends, is akin to a search of outer clothing, which courts have long recognized as deserving heightened constitutional protection.<sup>116</sup> Advocates of this approach also draw on reasoning in *Terry v. Ohio*. In that case, the Supreme Court acknowledged that even a limited frisk for weapons implicates the Fourth Amendment when the search includes a suspect’s outer clothing.<sup>117</sup> The Court emphasized that searches of the body or clothing are a particularly intrusive form of seizure under the Fourth Amendment.<sup>118</sup> Subsequent cases have reaffirmed that the expectation of privacy in one’s person and effects is so high it requires strong justification for any search.<sup>119</sup>

The Court’s decision in *Gant* does little to confront the gendered realities of container searches and a more sensible framework would recognize, as Justice Breyer suggested, that some containers function as personal extensions of the body. While *Gant* restricted the conditions under which officers may search a vehicle incident to arrest,<sup>120</sup> the Court did not address whether a purse that a passenger holds is constitutionally distinguishable from a wallet someone carries in a pocket.

Advocates for the minority approach argue for the approach articulated by Justice Breyer in his *Houghton* concurrence.<sup>121</sup> Breyer’s concurrence suggests that if a woman is clutching her purse at the time of the stop, courts should treat the purse as an extension of her person and apply the same level of Fourth Amendment

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<sup>114</sup> See Brief for Petitioner, *supra* note 21, at 9 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 308 (1999) (Breyer, J., concurring) (“It would matter if a woman’s purse, like a man’s billfold, were attached to her person. It might then amount to a kind of ‘outer clothing,’ which under the Court’s cases would properly receive increased protection.”)).

<sup>115</sup> *Houghton*, 526 U.S. at 308 (Breyer, J., concurring).

<sup>116</sup> See *Terry v. Ohio*, 392 U.S. 1, 16 (1968); *Houghton*, 526 U.S. at 308 (arguing that “if a woman’s purse, like a man’s billfold, were attached to her person[,] it might then amount to a kind of ‘outer clothing’ which under the Court’s cases would properly receive increased protection”).

<sup>117</sup> *Terry*, 392 U.S. at 16.

<sup>118</sup> *Id.* at 16-17.

<sup>119</sup> See, e.g., *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993) (reaffirming *Terry*); *United States v. Place*, 462 U.S. 696, 707 (1983) (“[A] person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment.”).

<sup>120</sup> *Arizona v. Gant*, 556 U.S. 332, 344-45 (2009) (restricting the search incident to arrest exception and explaining that the Fourth Amendment protects against officers from “rummag[ing] at will among a person’s private effects”).

<sup>121</sup> See *Houghton*, 526 U.S. at 308 (Breyer, J., concurring) (While the Court in *Houghton* did not resolve the question whether police can conduct a warrantless search of a purse worn by a passenger during a traffic stop, Justice Breyer anticipated the issue in his concurrence. He reasoned that the key question would be whether a passenger held the purse: “It would matter if a woman’s purse, like a man’s billfold, were attached to her person. It might then amount to a kind of ‘outer clothing,’ which under the Court’s cases would properly receive increased protection.”) (internal citations omitted) (cleaned up).

protection as they would to a wallet.<sup>122</sup> The dissenting opinion in *Houghton* contends that the majority improperly created a new distinction between items a passenger stores in their clothing and those kept in containers like purses.<sup>123</sup> Whether the item is in a pocket or a purse, they emphasize that courts should give both items equal constitutional protection.<sup>124</sup> The dissent maintains that searching a passenger's purse or briefcase can pose just as significant a privacy invasion as the unlawful search at issue in *Di Re*.<sup>125</sup> This approach would align with the Court's precedent on personal belongings, particularly *Bond*, which established that searches of containers physically attached to or closely associated with a person, including pockets and personal bags, require individualized suspicion due to the greater expectation of privacy.<sup>126</sup>

The minority approach offers a doctrinally sound and gender-neutral framework by treating purses as akin to coat pockets, both deserving equal Fourth Amendment protection.<sup>127</sup> A purse, like a coat pocket, typically contains personal items such as wallets, phones, identification, medication, and keys—objects closely tied to daily life and individual identity.<sup>128</sup> Unlike backpacks or briefcases, which are often set aside or used to transport bulkier items, people typically hold purses on the body, and these bags serve a purpose that is functionally indistinguishable from a pocket.<sup>129</sup> The minority approach offers a more principled reading of Fourth Amendment protections. This standard provides clarity while upholding the Constitution's commitment to safeguarding individual privacy.<sup>130</sup>

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<sup>122</sup> *Id.*

<sup>123</sup> *Wyoming v. Houghton*, 526 U.S. 295, 309-10 (1999) (Stevens, J., dissenting).

<sup>124</sup> *Id.* at 310.

<sup>125</sup> *Id.*

<sup>126</sup> *Bond v. United States*, 529 U.S. 334, 338-39 (2000) (holding that although a bus passenger placing a carry-on bag in an overhead bin expects that his bag may be handled, an officer cannot physically manipulate the carry-on bag in an exploratory manner).

<sup>127</sup> *Houghton*, 526 U.S. at 308 (Breyer, J., concurring) (arguing that “if a woman’s purse, like a man’s billfold, were attached to her person[,] it might then amount to a kind of ‘outer clothing’ which under the Court’s cases would properly receive increased protection”).

<sup>128</sup> *Cf.* Matilda Pollard, *The Privacy of Purses*, STRIKE MAGS. (Jan. 25, 2023), <https://www.strikemagazines.com/blog-2-1/the-privacy-of-purses> (“[Purses] do contain . . . lip glosses, feminine hygiene products, and spare hair elastics; but they are also intimate culminations of our lives.”); *see generally* Cynthia Lee, *Package Bombs, Footlockers, and Laptops: What the Disappearing Container Doctrine Can Tell Us About the Fourth Amendment*, 100 J. CRIM. L. & CRIMINOLOGY 1403, 1406 (2010) (“What we keep in our purses, wallets, briefcases, and suitcases can reveal a great deal about our lives.”).

<sup>129</sup> *See generally Houghton*, 526 U.S. at 308 (Breyer, J., concurring) (“Purses are special containers. They are repositories of especially personal items that people generally like to keep with them at all times.”).

<sup>130</sup> *See Arizona v. Gant*, 556 U.S. 332, 345 (2009) (purse searches implicate “[t]he central concern underlying the Fourth Amendment—the concern about giving police officers unbridled discretion to rummage at will among a person’s private effects”).

## VI. THE IMPORTANCE OF GENDER-NEUTRAL PROTECTIONS IN PERSONAL ITEM SEARCHES

Existing Fourth Amendment doctrine protects pockets,<sup>131</sup> but the law remains unclear or less protective with respect to purses, raising concerns about gender equity.<sup>132</sup> Men generally store their wallets in pockets, whereas women commonly use purses.<sup>133</sup> The Fourth Amendment affords heightened protections to wallets kept in pockets, as well as to other items people keep in their clothing pockets.<sup>134</sup> As a result of *Terry v. Ohio*, law enforcement is permitted to conduct a limited search for weapons to ensure officer safety.<sup>135</sup> The scope of a *Terry* search is strictly limited to a pat-down of the outer clothing, unless officers can articulate a specific basis to believe the person is armed and dangerous.<sup>136</sup> State courts have consistently held that ordering a person to empty their pockets without first conducting a pat-down or without reasonable suspicion exceeds the permissible scope of a *Terry* search.<sup>137</sup>

Some states have further held that compliance with such an order, particularly in a coercive traffic stop setting, may not constitute voluntary consent.<sup>138</sup> In *Pirri v. State*, for example, the court found that requiring a suspect to empty his pockets without reasonable suspicion rendered the search unconstitutional.<sup>139</sup> Absent a clear and specific threat to officer safety or other

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<sup>131</sup> *Ybarra v. Illinois*, 444 U.S. 85, 89 (1979) (concluding that the search and seizure of items from an individual's pocket violated the Fourth Amendment because there was no probable cause to search him, even though the police had a warrant to search the premises and another individual).

<sup>132</sup> *Mercier Writ of Certiorari*, *supra* note 87, at 15 (arguing that “The Ohio Supreme Court’s rule therefore has consequences that are illogical, arbitrary, and fundamentally inequitable”); *Houghton*, 526 U.S. at 310 (Stevens, J., dissenting) (criticizing the majority for creating a distinction between property contained in a passenger’s briefcase or purse).

<sup>133</sup> See *Why Don’t Women Use Wallets?*, TRAYVAX, <https://www.trayvax.com/blogs/news/why-dont-women-use-wallets?srsid=AfmBOorpqYc-KnOkrD3EArw9EeyT9sQVjOvKpacrMg8xFrLaIjhCcoaL> (last visited June 27, 2025).

<sup>134</sup> *State v. Debrossard*, No. 13CA3395, 2015 WL 1278401 (Ohio Ct. App. Mar. 18, 2015) (finding that ordering a suspect to empty his pockets exceeded the permissible scope of a *Terry* pat-down); *State v. McClure*, No. 19CA9, 2020 WL 1910737 (Ohio Ct. App. Apr. 16, 2020) (holding that a police officer may not order a suspect to empty their pockets instead of conducting a pat-down search for weapons).

<sup>135</sup> *Terry v. Ohio*, 392 U.S. 1, 24 (1968) (“When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm”).

<sup>136</sup> *Id.* at 26-27; see also *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993) (reaffirming that a *Terry* frisk is “strictly limited to that which is necessary for the discovery of weapons . . .” and may not exceed a pat down of the outer clothing).

<sup>137</sup> *State v. Flowers*, 734 N.W.2d 239 (Minn. 2007); *Commonwealth v. Jackson*, 302 A.3d 737 (Pa. 2023); *State v. McCall*, 378 So. 3d 329 (La. Ct. App. 2024).

<sup>138</sup> *Pirri v. State*, 428 So. 2d 285, 286 (Fla. Dist. Ct. App. 1983).

<sup>139</sup> *Id.*

exigent circumstances, police cannot lawfully compel people to empty their pockets during a traffic stop.<sup>140</sup>

When courts permit warrantless purse searches while treating pockets as constitutionally protected, they amplify the risk of disproportionate harm to women, especially through vicarious criminal liability.<sup>141</sup> Due to societal norms and clothing design, women are more likely to carry personal items in purses rather than in pockets.<sup>142</sup> Because personal items are held away from the body as opposed to directly next to the body like with pockets, this makes women's belongings more accessible during searches, potentially exposing them to contraband that others placed there without their knowledge.<sup>143</sup> In *People v. Webb*, the Colorado Supreme Court upheld the search of a woman's purse during the execution of a warrant based on her son's suspected methamphetamine use.<sup>144</sup> Even though the purse was in her bedroom, and she was not the target of the investigation, the court held that the search was lawful because the purse was a container in a room the suspect could access and reasonably could have used to hide contraband.<sup>145</sup> In another instance, a police officer testified, based on his training and experience, that male drug traffickers often use women to hide contraband in hopes of evading an intrusive physical search.<sup>146</sup>

Scholars and jurists have criticized the gendered framework of privacy in law, noting that treating purses as less private than pockets perpetuates structural bias in Fourth Amendment jurisprudence.<sup>147</sup> Allowing law enforcement to treat a woman's purse as less private than a man's pocket codifies structural bias into constitutional law. Such practices also conflict with broader legal norms protecting individual privacy.<sup>148</sup> In *Bond v. United States*, the Supreme Court held that squeezing a passenger's bag on a bus violated the Fourth Amendment because it invaded a personal container in which the individual had a reasonable expectation of privacy.<sup>149</sup> The Court emphasized that squeezing or manipulating the exterior of

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<sup>140</sup> *Sibron v. New York*, 392 U.S. 40, 65-66 (1968); *Ybarra v. Illinois*, 444 U.S. 85, 92-93 (1979); *United States v. Brown*, 996 F.3d 998, 1007-10 (9th Cir. 2021).

<sup>141</sup> See generally *People v. Webb*, 325 P.3d 566 (Colo. 2014) (holding a search warrant extended to a purse located in appellee's bedroom because appellee's son could have reasonably placed contraband therein).

<sup>142</sup> See *Bolon*, *supra* note 71, at 8.

<sup>143</sup> See, e.g., *Webb*, 325 P.3d at 568.

<sup>144</sup> *Id.* at 571.

<sup>145</sup> *Id.* at 566.

<sup>146</sup> *Delagarza v. State*, 635 S.W.3d 716, 725 (Tex. App. 2021).

<sup>147</sup> Victoria Schwartz, *Leveling Up to a Reasonable Woman's Expectation of Privacy*, 93 U. CO. L. REV. 117, 141 (2022) (claiming that under the dissent's logic in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), a court applying the majority's "sex of the student" factor could conclude that a search of an adolescent female student's purse could be particularly intrusive for purposes of determining the reasonableness of the scope of the search).

<sup>148</sup> See *Katz v. United States*, 389 U.S. 347, 351 (1967) ("[T]he Fourth Amendment protects people, not places."); see generally *United States v. Di Re*, 332 U.S. 581, 587 (1948) (stating that probable cause to search a car does not extend automatically to search of passengers without individualized suspicion).

<sup>149</sup> *Bond v. United States*, 529 U.S. 334, 338-39 (2000).

a passenger's bag constitutes a search because such handling goes beyond what a traveler reasonably expects and is aimed at discovering the contents of the bag.<sup>150</sup>

A purse that a person holds or wears during a traffic stop presents the same constitutional concerns. Women often keep their purses close to their bodies, either resting on their laps or held within easy reach. Like the bag in *Bond*, a purse typically holds intimate, sensitive items that a person would reasonably expect to remain private.<sup>151</sup> Treating the purse as less protected than a carry-on bag simply because it is in a vehicle erodes the constitutional principle that privacy attaches to places, people, and personal effects.<sup>152</sup> If the Fourth Amendment protects a traveler's bag from physical manipulation on a bus, it should also protect a passenger's purse from police searches during a roadside stop without probable cause.<sup>153</sup>

State courts' disparate treatment of purses and pockets creates an inconsistent legal standard that leads to arbitrary outcomes based on container form and gender association rather than constitutional principle.<sup>154</sup> The *Edwards* petition brings these disparities into sharp focus.<sup>155</sup> Courts that allow warrantless searches of purses while requiring probable cause to search pockets and their contents convert gendered social norms into search triggers under the Fourth Amendment.<sup>156</sup> Upholding a uniform standard for purses and pockets is essential to ensure that courts apply constitutional protections fairly and without bias.

## VII. ESTABLISHING A UNIFORM STANDARD FOR PERSONAL ITEM SEARCHES UNDER THE FOURTH AMENDMENT

### A. Supreme Court and Legislative Solutions

The Supreme Court is best positioned to resolve the current circuit split and clarify that purses held or worn during traffic stops are constitutionally protected.<sup>157</sup> U.S. Supreme Court decisions are binding on all federal and state

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<sup>150</sup> *Id.* at 337-38.

<sup>151</sup> *Cf. id.* at 337-39 ("Obviously, petitioner's bag was not part of his person. But travelers are particularly concerned about their carry-on luggage; they generally use it to transport personal items that, for whatever reason, they prefer to keep close at hand.").

<sup>152</sup> *Bond*, 529 U.S. 334 (holding that physical manipulation of a bus passenger's carry-on bag violated the Fourth Amendment because travelers have a reasonable expectation of privacy in their luggage).

<sup>153</sup> *See id.*

<sup>154</sup> Brief for Petitioner, *supra* note 21, at 26 (noting that men typically carry personal effects in their pockets, whereas women rely on handbags due to the lack of large, functional pockets in women's clothing; an intentional design choice that has produced gendered differences in how individuals store personal items).

<sup>155</sup> *Id.* at 25 ("The South Dakota Supreme Court gave men greater Fourth Amendment protections than women by treating purses differently from pockets.").

<sup>156</sup> *See generally id.* at 27 ("By ruling that the Fourth Amendment protects pockets differently than it protects purses, the court has drawn an arbitrary distinction whereby men's belongings effectively receive greater protection than women's belongings.").

<sup>157</sup> *See id.* at 13 ("Without this Court's intervention, the disagreement will persist, weakening the Fourth Amendment's protections and making them depend on the accident of geography.").

courts when interpreting federal law and the Constitution.<sup>158</sup> While state courts may interpret their own laws, they cannot contradict federal constitutional interpretations.<sup>159</sup> Thus, if the Court rules in *Edwards* that a purse carried on one's person deserves the same Fourth Amendment protection as items kept in a pocket, that decision would bind all state courts.<sup>160</sup>

The Court should clarify that a purse a passenger holds in a vehicle is analogous to her coat pockets and deserves the same Fourth Amendment protection against warrantless search.<sup>161</sup> Justice Breyer's concurrence in *Houghton* supports this view, characterizing a purse worn or held during a traffic stop as an extension of the person.<sup>162</sup> Adopting this reasoning would ensure consistent, gender-neutral Fourth Amendment protections by recognizing that personal containers carried on the body, regardless of their form, are just as private and constitutionally recognized as those that people store in their pockets.<sup>163</sup>

In the absence of Supreme Court clarification, federal and state legislatures can codify protections for purses that passengers wear or carry during vehicle stops. Lawmakers could enact statutes requiring officers to obtain a warrant or possess specific probable cause before searching a purse that a passenger wears or carries.<sup>164</sup> Codifying this standard would reduce gender-based disparities in search practices and promote constitutional values of privacy and equal protection.<sup>165</sup>

## B. Law Enforcement Training Reform through PERF & ICAT

To implement a gender-neutral standard effectively, police departments must update their training. Law enforcement can implement these reforms through structures already in place.<sup>166</sup> The Police Executive Research Forum (PERF), a national research organization, is uniquely equipped to facilitate this change.<sup>167</sup>

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<sup>158</sup> See Robyn Painter & Kate Mayer, *Which Court is Binding? A Modern Guide to Authority in Federal and State Courts*, WRITING CTR. GULC (2017), <https://www.law.georgetown.edu/wp-content/uploads/2018/07/Which-Court-is-Binding-HandoutFinal.pdf>.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> Brief for Petitioner, *supra* note 21, at 28.

<sup>162</sup> *Id.* at i.

<sup>163</sup> *Id.* at 28.

<sup>164</sup> *Id.* at 22-23 (arguing that specific probable cause should be required to search personal containers held or worn by passengers).

<sup>165</sup> *Id.* at 26 (describing how clothing design compels women to carry handbags, leading to differential legal treatment).

<sup>166</sup> See *About PERF*, POLICE EXEC. RSCH. F., <https://www.policeforum.org/about-perf> (last visited June 26, 2025) (describing PERF's national training initiatives and research infrastructure); see also Dean Hawkins, *Search of Personal Containers Incident to a Search Warrant*, FED. L. ENF'T TRAINING CTRS., [https://www.fletc.gov/sites/default/files/imported\\_files/training/programs/legal-division/downloads-articles-and-faqs/research-by-subject/4th-amendment/SearchofPersonalContainers.pdf](https://www.fletc.gov/sites/default/files/imported_files/training/programs/legal-division/downloads-articles-and-faqs/research-by-subject/4th-amendment/SearchofPersonalContainers.pdf) (last visited July 19, 2025).

<sup>167</sup> See Police Executive Research Forum, *Guiding Principles on Use of Force* 30 (Mar. 2016), <https://www.policeforum.org/assets/guidingprinciples1.pdf> (describing PERF's national role in developing adaptable police training programs).

PERF has already developed the Integrating Communications, Assessment, and Tactics (ICAT) training program, and 34 states have adopted it.<sup>168</sup>

PERF can build on ICAT's existing structure to create a supplemental module focused on personal container searches of lawfully stopped vehicles, emphasizing that a purse a passenger physically wears or holds is analogous to the individual's clothing pockets.<sup>169</sup> This module could include case-based scenarios, interactive simulations to train officers in conducting constitutionally compliant and unbiased searches, and legal briefings on *Houghton, Di Re*, and other relevant case law.<sup>170</sup> PERF can help officers understand that people carry purses, like pockets, on their person and that both often contain highly personal items deserving equal protection.

Integrating these reforms into existing ICAT structures improves efficiency, reduces costs, and enhances constitutional compliance and public trust.<sup>171</sup> ICAT's flexible scenario-based format allows agencies to incorporate legal updates without overhauling their existing training systems.<sup>172</sup> Police departments can simply supplement existing instruction on Fourth Amendment search and seizure, minimizing logistical burdens and financial costs.<sup>173</sup> By expanding ICAT to address constitutional standards for personal container searches and ensure uniform treatment of purses and pockets, law enforcement agencies can promote gender-neutral, legally compliant practices nationwide without building an entirely new infrastructure.<sup>174</sup>

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<sup>168</sup> Police Executive Research Forum, *Implementing the ICAT Training Program at Your Agency* 17 (May 2023), <https://www.policeforum.org/assets/ICATImplementation.pdf> [hereinafter *Implementing the ICAT*].

<sup>169</sup> *COPS Training Portal*, POLICE EXEC. RSCH. F., <https://copstrainingportal.org/> (last visited June 18, 2025); Brief for Petitioner, *supra* note 21, at 31.

<sup>170</sup> See *Implementing the ICAT*, *supra* note 168 (describing scenario-based and interactive training models designed to promote constitutional and unbiased policing); see also Seth Stoughton, *Law Enforcement's "Warrior" Problem*, 128 HARV. L. REV. 225 (2015) [https://harvardlawreview.org/wp-content/uploads/2015/04/vol128\\_Stoughton.pdf](https://harvardlawreview.org/wp-content/uploads/2015/04/vol128_Stoughton.pdf) (arguing that police training culture shapes officer decision-making and should be redirected toward constitutional and impartial policing); *Wyoming v. Houghton*, 526 U.S. 295 (1999); *United States v. Di Re*, 332 U.S. 581 (1948).

<sup>171</sup> Robin S. Engel et al., *Examining the Impact of Integrating Communications, Assessment, and Tactics (ICAT) De-escalation Training for the Louisville Metro Police Department: Initial Findings*, NAT'L POLICING INST. ii (2022) (reissued), [https://www.policinginstitute.org/wp-content/uploads/2022/12/LMPD\\_ICAT-Evaluation-Initial-Findings-Report\\_FINAL\\_10.30.20-Update\\_Dec-2022-Reissue.pdf](https://www.policinginstitute.org/wp-content/uploads/2022/12/LMPD_ICAT-Evaluation-Initial-Findings-Report_FINAL_10.30.20-Update_Dec-2022-Reissue.pdf) ("[P]ERF emphasizes that ICAT training is flexible and adaptable, encouraging that agencies be creative in how they incorporate the training modules into new or existing programs . . ."); Maria Ponomarenko & Barry Friedman, *Democratic Accountability and Policing*, in 2 REFORMING CRIMINAL JUSTICE 5-6, 12 (Acad. Just. ed., 2016) (arguing that clear, publicly endorsed policy standards align police conduct with community values and enhance trust).

<sup>172</sup> Engel et al., *supra* note 171.

<sup>173</sup> See *Implementing the ICAT*, *supra* note 168 (describing recent ICAT additions, including modules on suicide-by-cop and intervention tactics).

<sup>174</sup> *Id.*

### C. Policy Alignment at the Department Level

Alongside training reform, departments must ensure that their written policies reflect this constitutional standard.<sup>175</sup> Vehicle searches carry broad implications, with law enforcement officers conducting over 20 million traffic stops annually.<sup>176</sup> Yet existing police policies often lack clarity about when and how to search personal items like purses.<sup>177</sup> This lack of clarity creates liability risks for police officers and undermines public trust.<sup>178</sup> As such, departments should revise their internal policies to clarify that wallets, purses, and pockets must be treated with the same constitutional protections, regardless of who carries them. One effective mechanism for ensuring this compliance is formal legal review.<sup>179</sup> Departments could conduct periodic audits of their training materials and search protocols.<sup>180</sup>

These policy updates are practical to implement and require only minor additions to existing training systems.<sup>181</sup> Although these reforms carry some financial costs, the benefits are substantial.<sup>182</sup> Some police academies already have foundational training in search and seizure, and updating these modules to reflect gender-neutral standards would involve only a marginal increase in time and

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<sup>175</sup> See, e.g., Hawkins, *supra* note 166.

<sup>176</sup> Emily R. Dindial & Emily Berkowitz, *Why Police Traffic Stops Are Dangerous and Ineffective*, ACLU (Oct. 30, 2025), <https://www.aclu.org/news/criminal-law-reform/why-police-traffic-stops-are-dangerous-and-ineffective>.

<sup>177</sup> See Ken Wallentine, *Lack of Written Policy Invalidates Vehicle Inventory Searches*, LEXIPOL (Apr. 28, 2020) (emphasizing that the Supreme Court does not require written inventory policies to qualify as “standard criteria”), [https://www.lexipol.com/resources/blog/lack-of-written-policy-invalidates-vehicle-inventory-searches/#:~:text=The%20inventory%20search%20exception%20to,%E2%80%9D; see also Brian J. Smith, \*The Inventory Search Exception: When Police Can Search Your Impounded Vehicle Without a Warrant\*, SMITH'S OHIO LEGAL BLOG \(Nov. 10, 2025\), <https://www.brianjsmithesq.com/blog/2025/11/10/the-inventory-search-exception-when-police-can-search-your-impounded-vehicle-without-a-warrant#:~:text=These%20standardized%20procedures%20must%20provide,might%20alter%20the%20standard%20procedure> \(noting that vague policies that give officers discretion about when and how to inventory vehicles fails to limit the scope of searches to an objectively reasonable intrusion\).](https://www.lexipol.com/resources/blog/lack-of-written-policy-invalidates-vehicle-inventory-searches/#:~:text=The%20inventory%20search%20exception%20to,%E2%80%9D; see also Brian J. Smith, The Inventory Search Exception: When Police Can Search Your Impounded Vehicle Without a Warrant, SMITH'S OHIO LEGAL BLOG (Nov. 10, 2025), https://www.brianjsmithesq.com/blog/2025/11/10/the-inventory-search-exception-when-police-can-search-your-impounded-vehicle-without-a-warrant#:~:text=These%20standardized%20procedures%20must%20provide,might%20alter%20the%20standard%20procedure)

<sup>178</sup> Daigle Law Group, *Developing Constitutional & Effective Policies: What They Didn't Teach You at the Academy* 13, 15, 17 (2023), <https://dlglearningcenter.com/wp-content/uploads/2023/01/DLG-Policy-Development-white-paper-update.pdf>.

<sup>179</sup> *Id.* at 23.

<sup>180</sup> *Id.* at 38-39 (noting that departments can promote compliance by implementing a structured schedule of periodic audits every two years and inspections of their training manuals and search protocols).

<sup>181</sup> See *5 Ways Online Learning Improves Police Department Roll Call Training*, LEXIPOL (Feb. 26, 2020), <https://www.lexipol.com/resources/blog/5-ways-online-learning-improves-police-department-roll-call-training/> (explaining that online roll call platforms allow supervisors to quickly deliver pre-built lessons, track policy acknowledgements, and use short modular training, making lessons focused and flexible).

<sup>182</sup> See generally Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 42 (2009) (arguing that proactive reforms, though not cost-free, ultimately prevent costly constitutional violations and litigation).

resources.<sup>183</sup> These reforms are legally necessary to ensure compliance with the Fourth Amendment and administratively feasible within existing training structures.<sup>184</sup> Without individualized suspicion, searching a purse carried on the person violates the Fourth Amendment in ways that courts would not permit for a wallet that someone keeps in a pocket.<sup>185</sup>

### VIII. CONCLUSION

The constitutional logic that protects a wallet that a man tucks into his pocket while in a vehicle must apply equally to a purse that a woman carries on her shoulder while in a vehicle. Purses are special containers that people typically keep close because they hold “especially personal items.”<sup>186</sup> No doctrinal basis supports treating a purse that someone clutches in their lap as less private than a wallet stored in a pocket.<sup>187</sup> The fact that one is inside a pocket while the other hangs at a person’s side is a distinction of form, not substance.<sup>188</sup> Yet Fourth Amendment doctrine continues to treat these containers differently, permitting warrantless searches of purses during traffic stops while shielding pockets from similar intrusion.<sup>189</sup> Current search practices perpetuate unequal treatment of similarly situated individuals based largely on gendered stereotypes of dress and behavior.<sup>190</sup> The Constitution and legal precedent do not support this discrepancy.

The notion that purses deserve less protection because they are not sewn into clothing or carried as close to the body as pockets ignores the functional realities of modern life and the constitutional principles articulated in *Terry*, *Di Re*, and *Bond*.<sup>191</sup> Courts consistently recognize that containers worn or carried on the

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<sup>183</sup> See Ryan Buhrig, *The Case for Case-Based Learning in Police Recruit Training*, 97 SAGE J. (2023), <https://journals.sagepub.com/doi/10.1177/0032258X231181322?> (observing that legal instruction on search and seizure is already embedded in police recruit training, making doctrinal updates feasible with minimal additional time and resources).

<sup>184</sup> See *Motor Vehicle Inventories*, *supra* note 100, at 2 (explaining that “a department’s failure to have an established [inventory] policy will render any evidence discovered during any inventory by that department’s personnel inadmissible”).

<sup>185</sup> Compare *State v. Edwards*, 13 N.W.3d 199 (S.D. 2024), with *State v. Boyd*, 64 P.3d 419 (Kan. 2003).

<sup>186</sup> *Wyoming v. Houghton*, 526 U.S. 295, 308 (1999) (Breyer, J., concurring) (“Purses are special containers. They are repositories of especially personal items that people generally like to keep with them at all times.”).

<sup>187</sup> *Id.* (arguing that “[I]f a woman’s purse, like a man’s billfold, were attached to her person[,] it might then amount to a kind of outer clothing . . .” and would receive increased protection).

<sup>188</sup> See *id.* at 307-09 (noting concerns about searches of containers held by passengers and their similarity to items stored on the person).

<sup>189</sup> See *id.*

<sup>190</sup> See Brief for Petitioner, *supra* note 21, at 31 (quoting *United States v. Ross*, 456 U.S. 798, 822 (1982)) (“Just as men who carry their effects in pockets are entitled to Fourth Amendment protections from warrantless searches, women who carry their effects in purses may ‘[C]laim an equal right to conceal [their] possessions from official inspection . . .’”).

<sup>191</sup> *Terry v. Ohio*, 392 U.S. 1, 24-25 (1968) (recognizing the intrusion involved in even limited searches of a person’s clothing); *United States v. Di Re*, 332 U.S. 581, 587 (1948) (rejecting the assumption that probable cause to search a vehicle automatically permits searching a passenger’s

body are closely tied to the person, triggering heightened privacy protections.<sup>192</sup> The Fourth Amendment guarantees protection against unreasonable search and seizures, but when courts permit warrantless searches of purses while shielding pockets, they risk converting that guarantee into a selectively granted privilege. To preserve the integrity of the Fourth Amendment, courts must adopt a uniform rule regarding lawful automobile searches: purses that a person wears or carries must receive the same constitutional protection as clothing pouches, pockets, and wallets.<sup>193</sup>

The Supreme Court should use *State v. Edwards* as an opportunity to clarify that courts must treat purses that a person carries during a traffic stop the same as they treat pockets under the Fourth Amendment.<sup>194</sup> Such a ruling would restore doctrinal consistency,<sup>195</sup> reflect modern realities, and promote gender-neutral enforcement of constitutional rights. In the absence of Supreme Court action, federal and state legislatures can codify these protections, and law enforcement agencies can incorporate them through training platforms like PERF's ICAT program.<sup>196</sup> The Fourth Amendment demands a standard that safeguards privacy equally for all individuals, free from the influence of outdated and gender-based assumptions.

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personal effects); *Bond v. United States*, 529 U.S. 334, 338-39 (2000) (holding that manipulating a personal bag on a bus violated the Fourth Amendment because of the expectation of privacy in items closely associated with the person).

<sup>192</sup> See *United States v. Berry*, 560 F.2d 861, 864 (7th Cir. 1977) (noting that unlike a briefcase, a purse "is carried with the person at all times" and "might be characterized as 'immediately associated with the person of the arrestee'"); see also *Stewart v. State*, 611 S.W.2d 434, 438 (Tex. Crim. App. 1981) (deeming the search of a purse to be a search of items "immediately associates with the person" because "as a matter of common usage, a purse is an item carried on an individual's person in the sense that a wallet or items found in pockets are" and unlike luggage, a purse "is carried with a person at all times").

<sup>193</sup> Brief for Petitioner, *supra* note 21, at 31.

<sup>194</sup> See *id.* at 14-18 (urging the Court to resolve the constitutional question of whether a purse worn by a passenger may be searched without item-specific probable cause).

<sup>195</sup> See *Ross*, 456 U.S. at 822 ("[A] constitutional distinction between 'worthy' and 'unworthy' containers would be improper.").

<sup>196</sup> *Implementing the ICAT*, *supra* note 168.