



Volume 13 (2016) | ISSN 1932-1821 (print) 1932-1996 (online)
DOI 10.5195/taxreview.2016.47 | <http://taxreview.law.pitt.edu>

THE HATE EXCLUSION: MORAL TAX EQUITY FOR DAMAGES
RECEIVED ON ACCOUNT OF RACE, SEX, OR SEXUAL
ORIENTATION DISCRIMINATION

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THE HATE EXCLUSION: MORAL TAX EQUITY FOR DAMAGES
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Bobby L. Dexter*

Abstract

Scholars on both sides of the reparations literature divide commonly contemplate some form of federal monetary outlay. At the same time, given both the absence of such an outlay and the dire prognosis that such largesse is forthcoming, tax scholars rarely contribute to traditional reparations literature. With this Article, Professor Dexter introduces the notion that reparations take the form of narrowly-tailored federal tax expenditures. Such an approach, he argues, presents fertile ground for the resolution of longstanding differences in the reparations debate. In addition to highlighting the various political and administrative merits of a tax expenditure approach to reparations, he argues that allowing the exclusion of damages received on account of specific forms of discrimination—even if suffered at the hands of a private actor—would offer immediate and precisely-targeted reparational relief not only to those suffering the modern day impact of slavery and race discrimination under federal imprimatur but also to those impacted by the United States’ well-documented history of hostility with respect to women and sexual minorities. Readily acknowledging that considerable progress has been made (often via the firm and necessarily-persistent hand of federal mandate), Professor Dexter presents current day-to-day events (including the conduct of certain law enforcement personnel and specific public officials openly hostile to marriage equality) as evidence of a lingering yet defiant, federally-sculpted,

* Professor of Law, Chapman University Dale E. Fowler School of Law. I would like to extend my sincere thanks to Chapman University for its financial support not only during the production of this Article but also in connection with its presentation at various venues. Thanks are also in order for helpful commentary offered by members of the Chapman Law faculty, participants at the Third National People of Color Legal Scholarship Conference, and those attending annual meetings of the Law & Society Association and the Southeastern Association of Law Schools. If, notwithstanding the wise counsel of my commentators, errors persist, I claim them as my own.

Pitt Tax Review | ISSN 1932-1821 (print) 1932-1996 (online)
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federally-nourished national psyche. The narrow tailoring of relief and the moral force of the unclean hands theory of exclusion, he reasons, neutralizes arguments advanced in traditional reparations literature regarding excessive act, wrongdoer, and victim attenuation.

INTRODUCTION

“The evil that men do, lives after them”

Frederick Douglass¹

“He has endeavored, in every way that he could to destroy her confidence in her own powers, to lessen her self-respect, and to make her willing to lead a dependent and abject life.”

Elizabeth Cady Stanton²

“It takes no compromising to give people their rights. It takes no money to respect the individual. . . . It takes no survey to remove repression.”

Harvey Milk³

Aggressively seeking to hasten the end of the Civil War and thereby preserve the Union,⁴ President Abraham Lincoln issued the Emancipation Proclamation on January 1, 1863. Given that the proclamation applied only to specific states and regions then in rebellion against the United States, slavery was not abolished throughout the country until the requisite number of states ratified the Thirteenth Amendment on December 6, 1865. Only in June of 2009, almost 150 years later, did the United States Senate formally apologize for the institution of slavery,⁵ yet in doing so, it carefully noted

¹ Frederick Douglass, Address Commemorating Independence Day in Rochester, NY (July 5, 1852), in 501 MUST-KNOW SPEECHES 274–75 (Octopus Publishing Group Ltd. 2009) (quoting WILLIAM SHAKESPEARE, THE TRAGEDY OF JULIUS CAESAR act 3, sc. 2).

² Elizabeth C. Stanton, Address at the First Women’s Rights Convention in Seneca Falls, NY (July 1848), in 501 MUST-KNOW SPEECHES 248–49 (Octopus Publishing Group Ltd. 2009).

³ Harvey Milk, Concession Speech in San Francisco, CA (1973), in THE MAYOR OF CASTRO STREET: THE LIFE AND TIMES OF HARVEY MILK 76 (St. Martin’s Griffin 1988).

⁴ President Abraham Lincoln stated the following: “My paramount objective in this struggle is to save the Union, and is *not* either to save or to destroy slavery.” See ROGER MATUZ, THE PRESIDENTS FACT BOOK 261 (2004).

⁵ A Senate Concurrent Resolution issued in 2009 provides, in pertinent part, as follows:

Whereas the system of slavery and the visceral racism against people of African descent upon which it depended became enmeshed in the social fabric of the United States Whereas African-Americans continue to suffer from the consequences of slavery and Jim Crow laws—long after both systems were formally abolished—through enormous damage and loss, both tangible and intangible, including the loss of human dignity and liberty The Congress—(A) acknowledges the fundamental injustice, cruelty, brutality, and inhumanity of slavery and Jim Crow laws;

that its apology was neither authorization nor support for any claim against the United States nor a settlement of any claim against the United States.⁶ The Senate's act, however egregiously belated, was an important symbolic step, yet if Uncle Sam has visions of crossing the finish line of meaningful reparational justice, he best gear up for a grueling triathlon.

The United States cannot help but display the filthy paws of participatory guilt with respect to slavery and subsequent decades of oppression and rank race discrimination. Disturbingly true as well is the fact that the government's historical hands are not entirely clean with respect to discrimination on the basis of sex, and the soiling lingers stubbornly with respect to sexual orientation discrimination; to date, no federal law prohibits discrimination in employment (or in various other contexts) on the basis of sexual orientation. Scholars have long lamented the harms flowing from sex and sexual orientation discrimination at the behest of the federal government and individual states, but the discontent has never matured into specific demands for traditional reparations. No wonder. Even in the wake of numerous demands and voluminous scholarly commentary with respect to reparations for slavery and Jim Crow laws, there exists little room for realistic optimism with respect to direct reparation payments. Courts have been

(B) apologizes to African-Americans on behalf of the people of the United States, for the wrongs committed against them and their ancestors who suffered under slavery and Jim Crow laws;

S. Con. Res. 26, 111th Cong. (2009) [hereinafter Apology]. To date, the U.S. House of Representatives has not passed this resolution.

⁶ *Id.*

dismissive,⁷ Congress has proven consistently resistant,⁸ and wholly aside from the objections of segments of the population,⁹ some perceive intractable issues of causation/attenuation with respect to allowing any remedial measure to be visited on those they see as latter-day innocents.¹⁰

This Article offers up a decidedly novel possibility by introducing the federal income tax arena as fertile ground for the resolution of longstanding differences in the reparations debate. Both sides of the reparations literature divide have persistently contemplated some form of overt federal outlay, but neither side has seriously considered the tax expenditure route as a viable alternative. Rather than broach the politically flammable subject of direct reparations payments, Congress could instead use the federal income tax system to provide reparation-based *exclusions* for specific discrete and insular minorities who have secured damages, by final litigation victory or settlement, because they suffered legally redressable discrimination (i.e., the

⁷ See *Cato v. United States*, 70 F.3d 1103, 1111 (9th Cir. 1995) (concluding that reparations for slavery and discrimination are the province of Congress and not the courts). The plaintiff sought reparations of \$100,000,000 “for forced, ancestral indoctrination into a foreign society; kidnapping of ancestors from Africa; forced labor; breakup of families; removal of traditional values; deprivations of freedom; and imposition of oppression, intimidation, miseducation and lack of information about various aspects of their indigenous character.” *Id.* at 1106. Reparations plaintiffs may also face issues of standing. See Eric J. Miller, *Representing the Race: Standing to Sue in Reparations Lawsuits*, 20 HARV. BLACKLETTER L.J. 91, 92 (2004) (noting that the standing model requires some continuing relationship between victim, perpetrator, and harm and that if “the relation is to survive the absence of the original victim, there must be some harm that is transmitted from victim to victim across generations”). He goes on to question the intergenerational transmission of injury by mere biological relation. *Id.* at 95.

⁸ See Kaimipono D. Wenger, *Causation and Attenuation in the Slavery Reparations Debate*, 40 U.S.F. L. REV. 279, 280 (2006) (noting the difficulty the reparations cause had in Congress and in various courts).

⁹ The burden of traditional reparations would fall on descendants of perpetrators as well as the descendants of non-perpetrators. *Id.* at 297 n.80. Accordingly, there is overwhelming opposition of whites to traditional reparations. *Id.* at 280 n.3.

¹⁰ According to some commentators, victim, wrongdoer, and act attenuation present hurdles in establishing causation in a traditional reparations context. *Id.* at 280–82. Traditional wrongdoer attenuation arguments rest on the notion that current citizens/governments bear insufficient nexus to slaveholders to justify imposition of liability on present-day citizens/governments. *Id.* at 296–97 & n.80. This attenuation problem was avoided in Holocaust litigation because the focus was on existing governments and corporate entities. *Id.* at 303. I do not buy the distinction. American citizens routinely celebrate the nation’s centennials, bicentennials, and the like, apparently rejoicing ecstatically and with great fanfare (and fireworks) the fact that the United States of the eighteenth century set up by the so-called Founding Fathers has endured for centuries. To this day, the National Archives houses, protects, and preserves the nation’s formative documents, which are from the eighteenth century.

“unclean hands theory of exclusion”). Section 104(a)(2) of the Code currently allows taxpayers to exclude non-punitive damages from their gross income, so long as those damages were awarded on account of physical injury or physical sickness. Thus, damages awarded as a result of race-, sex-, or sexual orientation-based discrimination do not qualify for the exclusion. Accordingly, Uncle Sam must wait patiently for taxes on the amount awarded, but in due course, he may confidently present and demand his piece of the action. I argue that even when a private actor bears a healthy measure of direct responsibility for discriminating, history clarifies that the private actor does not stand wholly alone at the scaffold of guilt.¹¹ Consider the case of race discrimination. From its inception, the United States set the stage for centuries of overt oppression and discrimination by readily accommodating, protecting, and enforcing slavery by constitutional mandate. To worsen matters, for decades after the abolition of slavery, the federal government fully endorsed and participated in racial discrimination and failed to wield its power to halt the horror of lynching. In his seminal work on reparations for African-Americans, the eminent tax scholar, Professor Boris Bittker, articulated a consistent viewpoint, noting the following:

As a working hypothesis . . . , I am prepared to accept the theory that statutes, ordinances, and other official actions have been the predominant source of the racial discrimination that has blighted our public and private life. If accepted, this premise is a justification for publicly financed reparations to the victims of discrimination, even though some of the damage may stem from “private” behavior that might have occurred in the absence of official encouragement or even in violation of official prohibitions.¹²

Likewise, the United States, directly or indirectly, played a substantial role in the historical subordination of women and the persistent direction of hostility towards sexual minorities.¹³ Thus, the United States created and enabled the perpetuation of a national psyche in which various forms of discrimination and subjugation were either consciously required or passively

¹¹ See Avital Mentovich & John T. Jost, *The Ideological “Id”? System Justification and the Unconscious Perpetuation of Inequality*, 40 CONN. L. REV. 1095 (2008).

¹² BORIS I. BITTKER, *THE CASE FOR BLACK REPARATIONS* 25–26 (2003).

¹³ Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1435 (1992) (arguing that “homosexual sodomy statutes work to legitimize homophobic violence and thus violate the right to be free from state-legitimated violence at the hands of private and public actors”). Professor Thomas explains that those attacking gays and lesbians do so under color/cover of state law. *Id.* at 1491.

validated.¹⁴ Although corrective measures exist with respect to race, sex, and (as of late) sexual orientation discrimination, empirical evidence amply demonstrates that substantial inequities persist, and a healthy part of the blame for that persistence rests squarely on the shoulders of the United States. Thus, for federal income tax purposes, a powerful, coercive, and discriminating federal hand in the matter fully justifies the reparational exclusion of damages awarded on account of race, sex, or sexual orientation discrimination.

Part I of this Article provides basic information concerning the exclusion of certain litigation/settlement damages from a taxpayer's gross income under § 104(a)(2) of the Code. Part I also highlights relatively recent amendments limiting the scope of the exclusion and devotes some attention to related scholarly commentary before going on to lay out the merits of (and challenges presented by) the damage exclusion proposal vis-à-vis traditional reparations payments. Focusing pointedly on African-Americans, women, and sexual minorities, Parts II, III, and IV serve largely to set forth the extensive harms inflicted (or permitted) by the United States over time, the corrective measures, if any, that have been effected, and the evidence which indicates that the corrective measures have fallen far short of eradicating the negative impact of the original harm. Part V presents a summary and final conclusions.

I. BACKGROUND

Section 104(a)(2) of the Code generally provides that taxpayers may exclude from the gross income the amount of damages received (by suit or agreement) on account of personal physical injuries or physical sickness.¹⁵ The exclusion does not apply to punitive damages,¹⁶ and barring the

¹⁴ Apology, *supra* note 5 (stating that “the system of slavery and the *visceral* racism against people of African descent upon which it depended became enmeshed in the social fabric of the United States”) (emphasis added).

¹⁵ I.R.C. § 104(a)(2). Note that to the extent amounts are attributable to deductions allowed under § 213 for a prior taxable year, the exclusion under § 104 does not apply. *Id.*

¹⁶ *Id.* For an exception relating to specific wrongful death actions, see I.R.C. § 104(c).

application of circumstantial exception,¹⁷ the exclusion does not apply to amounts rewarded for emotional distress.¹⁸ Prior to its amendment in the Small Business Job Protection Act of 1996, § 104(a)(2) was available as authority for excluding damages awarded/received in various discrimination lawsuits.¹⁹ Since that time, scholars have argued that various classes of damages merit tax exclusion. Some reason that emotional distress damages do not, in fact, constitute “income,”²⁰ others argue that restorations of human capital (whether physical or mental) merit exclusion,²¹ and yet others argue that the physical/non-physical distinction is simply unwarranted.²² Indeed, one commentator goes so far as to argue that because of the impact on those receiving damages after suffering dignitary torts, the 1996 amendments reflect “unconscious judicial and legislative discrimination.”²³ Rather than arguing that discrimination damages are the virtual equivalent of physical injury/sickness damages (or wholly beyond the realm of “income”), the unclean hands theory of exclusion simply points an accusing finger at the United States, recruits the damaging force of unassailable historical fact, and calls for an amendment to the Code. At the same time, the exclusion approach borrows from the moral force of current reparations literature while arguably circumventing a number of the problems associated with direct reparation payment requests.

Prior scholars have discussed potential use of the Code to effect reparational justice in connection with direct payments. Professors

¹⁷ I.R.C. § 104(a). The Code provides that emotional distress does not constitute a physical injury or physical sickness but contains a carve-out with respect to damage amounts received as compensation for medical care attributable to emotional distress. *Id.* (flush language).

¹⁸ *Id.* Amounts paid for emotional distress attributable to physical injury or physical sickness are excludable under § 104(a)(2). Treas. Reg. § 1.104-1(c)(1).

¹⁹ Mark J. Wolff, *Sex, Race, and Age: Double Discrimination in Torts and Taxes*, 78 WASH. U. L.Q. 1341, 1343–44 (2000).

²⁰ Laura A. Quigley, *Reparations Rights Tax Relief Restores Human Rights As a Civil Right in Tax Tort Reform*, 40 VAL. U. L. REV. 41, 42 (2005).

²¹ Frank J. Doti, *Personal Injury Income Tax Exclusion: An Analysis and Update*, 75 DENV. U. L. REV. 61, 63 (1997) (arguing that the exclusion under § 104(a)(2) should be limited to injury to original human capital (i.e., a sound body and a sound mind)).

²² Wolff, *supra* note 19, at 1454–64 (arguing the equivalence of physical and non-physical injuries).

²³ *Id.* at 1347.

Waterhouse and Smith conclude that § 104(a)(2), in its current form, would not support exclusion of a direct reparation payment, given that such a payment would not compensate for physical injury or physical sickness²⁴ and might be deemed non-excludable as punitive.²⁵ They also note, of course, that Congress could simply provide for the exclusion of direct reparations payments from gross income.²⁶ Such an act would have strong atonement force²⁷ and substantively parallel the treatment of Japanese internees and Holocaust victims receiving reparations.²⁸ In the aftermath of the forced relocation and internment of Japanese-Americans during World War II, there was a congressional apology, a public education fund foundation was created, and compensation of \$20,000 was paid to each survivor.²⁹ Regarding Holocaust-related reparations and the like, current non-Code tax law provides that a taxpayer's gross income does not include certain excludable restitution payments received by victims (or the heirs of victims) who suffered persecution on the basis of race, religion, physical or mental disability, or sexual orientation at the hands of Nazi Germany, an Axis regime, or any other Nazi-controlled/allied country.³⁰

²⁴ Carlton Waterhouse & Andre Smith, *No Reparation without Taxation: Applying the Internal Revenue Code to the Concept of Reparations for Slavery and Segregation* 29 (FIU Legal Studies Research Paper Series, Paper No. 08-28), available at <http://ssrn.com/abstract=1547326> (last visited Apr. 20, 2010).

²⁵ *Id.* at 32.

²⁶ *Id.* at 19.

²⁷ *Id.* at 31; see also Harold S. Peckron, *Reparation Payments—An Exclusion Revisited*, 34 U.S.F. L. REV. 705, 711–12 n.46 (2000) (noting that the Service has previously embraced a moral theory of exclusion with respect to certain reparation payments from sovereign governments because the income “constitutes reimbursement for the deprivation of a civil or personal right”). Peckron also notes that the exclusion for personal physical injuries and physical sickness reflects Congressional intent to incorporate social policy into governing statutory provisions. *Id.* at 707.

²⁸ Peckron, *supra* note 27, at 707; see also Waterhouse & Smith, *supra* note 24, at 31.

²⁹ BITTKER, *supra* note 12, at xv.

³⁰ See generally Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 803, 115 Stat. 38, 149–50. Different motivations gave rise to the horrors of slavery on the one hand and the horrors of the Holocaust on the other. See Andrew Bell-Fialkoff, *A Brief History of Ethnic Cleansing*, 72 FOREIGN AFF. 110, 111 (1993) (noting that the removal of Africans from their homeland for use as slaves was not “ethnic cleansing” as commonly understood because the desire was to import a slave population to a region rather than to expel that population from a region). These differing motivations do not, however, dictate or support differential treatment of actual reparation payments or reparational tax exclusions.

The unclean hands theory of exclusion seeks comparable atonement, but directs the point of revenue impact to the aforementioned tax exclusion for specific discrimination damages which, far from being as speculative as an award of reparations, are regularly awarded in fact. At the same time, the theory broadens the eligibility base in recognition of the fact that several distinct groups qualify for the form of relief contemplated. In each victim arena, the United States bears the guilt of prior invidious (or at least conscious) discrimination, and failure to allow exclusion of the relevant damages would permit the United States to collect revenue rooted, to some extent, in its own historical (or ongoing) wrongdoing.³¹ Such a reality would be one step worse than merely allowing the United States to escape penalty. Various federal courts see no harm in forcing a private party paying damages to “gross up” the amount paid to offset the negative tax impact of a lump sum payment (relative to a stream of small amounts over time).³² Does it not make a healthy amount of sense for the United States to forego revenue in this context because the United States, itself, had a coercive hand in creating the society in which a private actor ultimately carried out the discrimination? The unclean hands theory of exclusion champions that notion and, at the same time, effectively addresses many of the concerns regularly voiced in direct payment reparations literature.

In this case, there exists a clear relationship between the original wrongdoer (the United States) and the original victim (the person suffering present-day discrimination), just as Professors Posner and Vermeule insist that there must be.³³ Additionally, it is the wrongdoer itself foregoing revenue

³¹ BITTKER, *supra* note 12, at 124 (“[A] federal program of black reparations . . . would be intended as compensation for a century of state and federal violations of the equal-protection clause.”).

³² See *Eshelman v. Agere Sys., Inc.*, 554 F.3d 426, 442 (3d Cir. 2009) (holding that the lower court could “award a prevailing employee an additional sum of money to compensate for the increased tax burden a back pay award may create” because such an award “will, in the appropriate case, help to make a victim whole”); *Sears v. Atchison, Topeka, & Santa Fe Ry. Co.*, 749 F.2d 1451, 1456 (10th Cir. 1984) (holding that the lower court did not abuse its discretion when it “included a tax component in the back pay award to compensate class members for their additional tax liability as a result of receiving over seventeen years of back pay in one lump sum”). *But see Dashnaw v. Peña*, 12 F.3d 1112, 1116 (D.C. Cir. 1994) (concluding that the aggrieved party was not entitled to a gross-up in his award to account for the tax impact of receiving back pay in a lump sum because the court knew of “no authority for such relief”).

³³ See Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 698 (2003) (stating that “[r]eparations claims thus involve three relationships: (1) the relationship between the original wrongdoer and the original victim; (2) the relationship between the original wrongdoer and the possible payer of reparations; and (3) the relationship between the original

(i.e., the equivalent of direct payment in the opinion of some),³⁴ and the victim and the ultimate beneficiary are one and the same. Thus, there are no clear issues with respect to the wrongful act, wrongdoer, or victim attenuation.³⁵ One commentator noted the following in discussing traditional reparations:

[T]he present-day plaintiffs must demonstrate a present-day injury, although that injury is attributable to the manner in which their ancestors were treated.³⁶

* * *

[T]he sorts of legally relevant injuries are harms suffered by individuals that are attributable to the ongoing effects of slavery. Such harms are relatively easy to identify. They include all the continuing and pernicious social indignities that structure race relations in America. They are in part traceable to the institution of slavery and the racial stigmas and stereotypes it created, enforced, and yet perpetuates. Many of these stigmas and stereotypes have an oppressive impact upon African Americans today. Accordingly, as far as the relational structure of standing is concerned, the institution of slavery may be important only insofar as it exists as a continuing cause of present-day harms, and irrelevant until particularized into concrete relations between individuals or groups.³⁷

Although some might object to requiring that the United States suffer loss as a result of a private actor's conduct, I argue that to an overwhelming extent, the United States is the *original* wrongdoer. It protected a nefarious institution in its formative documents, and thereby directly authorized the subjugation and oppression of a specific group. Simultaneously, it created a public mindset in which the default setting was subjugation and oppression of the group, the vast majority of which are physically identifiable. Thus, even when a private actor is involved, a successful present-day plaintiff does, indeed, suffer a present-day injury attributable to how the United States

victim and the possible claimant or beneficiary of reparations. The claimant must show that each relationship is of the proper type.”)

³⁴ See Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705, 706 (1970) (noting the similarity between various tax incentives and direct government expenditures (or similar items)).

³⁵ See Wenger, *supra* note 8, at 282 (noting that attenuation arguments can be generally categorized as victim attenuation, wrongdoer attenuation, and act attenuation).

³⁶ Miller, *supra* note 7, at 96 n.17.

³⁷ *Id.* at 97.

treated the plaintiff's ancestors and their progeny. Further, there is support from the traditional reparations literature for broadening rather than narrowing the blanket of responsibility in this context because of participation in particularly noxious collective behavior³⁸ or participating in behavior that was a substantial factor leading to the specific harm.³⁹ In this connection, I would argue that ratification of a Constitution protecting slavery qualifies,⁴⁰ as do sex- and orientation-based discrimination.

The unclean hands theory of exclusion also solves the problem of victim identification, which plagues the traditional reparations approach. Notes one commentator,

Descendants will not have a problem establishing that they are the proper recipient of a remedy—if they can first establish a harm done to them. But the descendant-based theory suffers from the difficult question of establishing harm—how are modern slave descendants harmed by slavery? Ultimately, [ancestor-based and descendant-based theories depend] on the resolution of the same difficult questions of causation, such as how slaves can be connected to modern claimants.⁴¹

Given the unclean hands theory's focus on presently-inflicted harm as the result of a chronically-oppressive, federally-constructed social milieu, the difficulty of establishing a causative link between specific harms to ancestors and a modern claimant simply evaporates. One might argue that lingering institutional racism is weak support for making payments to large segments of the population (some of whom may not have been affected by the phenomenon). Yet, one can more readily justify relief with respect to proven

³⁸ Wenger, *supra* note 8, at 310–11 (suggesting that, *inter alia*, group liability might be one means of overcoming attenuation problems where individual actors acted similarly (despite the specter of harm) or participated in a particularly noxious behavior).

³⁹ *Id.* at 311–12 (suggesting that, *inter alia*, a court might circumvent attenuation problems by applying a “substantial factor” test (i.e., “allowing liability in cases where a defendant’s actions were a substantial factor leading to the plaintiff’s harm”).

⁴⁰ *Cf.* Wenger, *supra* note 8, at 325 (reasoning that market share liability under an unjust enrichment theory of reparations is appropriate because “all defendants contributed to the formation of the nationwide system of enslavement”).

⁴¹ *Id.* at 286; *see also* Miller, *supra* note 7, at 91 (pointing out that identification of the proper recipient and the proper form of compensation are problems that have to be addressed in the reparations context).

incidents of redressable harm,⁴² especially when the proposal on the table merely ensures that the reparative relief touches *all* perpetrators (including the United States) and not merely the final actor; as was recently acknowledged with respect to race,⁴³ the final actor has been influenced by the larger societal backdrop, and the same is true with respect to sex and sexual orientation. Such an approach should have the added merit of being perceived as neither inherently overinclusive nor inherently underinclusive.⁴⁴

In addition to the various problems the unclean hands theory of exclusion avoids, it also has the benefit of being more politically palatable than a direct reparations payment and substantially more amenable to attractive packaging (i.e., as a modest, logical change in the tax law (applicable to a wide range of individuals) that reflects a partial return to that prior law). Those benefits notwithstanding, some may feel that reparational relief for slavery and discrimination should have a far broader base,⁴⁵ that

⁴² Cf. *McClesky v. Kemp*, 481 U.S. 279 (1987) (holding that institutional racism in the courts cannot justify overturning a conviction and that racism has to be established as that cause of a specific conviction).

⁴³ Apology, *supra* note 5 (stating that “the system of slavery and the visceral racism against people of African descent upon which it depended became enmeshed in the social fabric of the United States”).

⁴⁴ These problems plague the traditional reparations mechanism. One commentator notes the following:

The “traditional” reparations suit appears to present a gap in the relationship between plaintiff, defendant, and harm. Such suits seek some form of “public welfare” relief. The proposed remedy is some type of payout that will address the needs of those African Americans who are “bottom stuck,” in the words of one of the leading reparations advocates, Professor Charles Ogletree. Thus, the redress sought is under-inclusive, in that it excludes a large portion of the individuals entitled to receive relief (rich former [*sic*] descendants of slaves). It is also over-inclusive to the extent that it includes with the public welfare programs those who are not descendants of African American slaves and who, therefore, have no right to receive compensation from the defendants.

Miller, *supra* note 7, at 94 (footnote omitted). Note that a given damage recipient’s exclusion flows from harm inflicted by the United States which may be visited on any number of individuals, regardless of whether they happen, for example, to be a descendant of African slaves or merely happen to look like such a descendant.

⁴⁵ Joe R. Feagin, *Documenting the Costs of Slavery, Segregation, and Contemporary Racism: Why Reparations Are in Order for African Americans*, 20 HARV. BLACKLETTER L.J. 49, 74–75 (2004) (suggesting that reparations take the form of collective compensation rather than individual compensation, given that the harm was inflicted broadly and the solution should focus on group rehabilitation over time); Charles J. Ogletree, Jr., excerpt from *All Deliberate Speed: “Addressing the Racial Divide: Reparations,”* 20 HARV. BLACKLETTER L.J. 115, 133–34 (2004) (concluding that to the extent reparations are paid, they

corrective measures have already been taken (which have proven effective), and that reparational relief of any form has no logical end point. These problems present wholly aside from issues of revenue loss and constitutionality. These issues are certainly ripe for discussion, and some are more capable of effective resolution than others. At the same time, the gravity of historical harms inflicted and the persistence of negative ramifications present a compelling case for some form of reparational relief. Today.

II. RACE⁴⁶

A. Historical Harms

1. Formative Document Accommodations of Slavery

Although the Declaration of Independence opens by announcing the equality of all men and the like, it is not long before the document sets forth a string of complaints directed at the reigning British monarch. Among the complaints in the original draft was the following attack on slavery: “Determined to keep open a market where men should be bought and sold, [the Christian King of Great Britain] has prostituted his negative for suppressing every legislative attempt to prohibit or restrain this execrable commerce.”⁴⁷ To appease South Carolina and Georgia, however, this

should not be paid in the form of a check to individual citizens but instead be placed in a trust fund and used to benefit those who have not managed to attain the American Dream (i.e., the “bottom stuck”); Carlton Waterhouse, *The Good, The Bad, and The Ugly: Moral Agency and the Role of Victims in Reparations Programs*, 31 U. PA. J. INT’L L. 257 (2009) (arguing that victims should have a key role in the design and implementation of reparations programs and articulating the merits of an institution-based approach to reparations). Of course, there are those who feel that no direct payments should be made.

The danger with any outside assistance—whether public or private, monetary or in-kind—is that it invites a focus on doing things *to* people and *for* people. Efforts directed at accomplishing what people can only do for themselves run the risk of engendering passivity and distracting from the needed emphasis on self-help. Because others’ contributions can never substitute for victims’ doing their part, private interventions, like public ones, are often doomed to disappointment and failure.

AMY L. WAX, RACE, WRONGS, AND REMEDIES: GROUP JUSTICE IN THE 21ST CENTURY 130 (2009).

⁴⁶ Given the extraordinarily voluminous history of African-Americans in the United States, this section of the Article borrows heavily from CHARLES M. CHRISTIAN, *BLACK SAGA: THE AFRICAN AMERICAN EXPERIENCE* (1995).

⁴⁷ *Id.* at 52.

language was taken out.⁴⁸ Thus, even before the drafting of the Constitution, the founding fathers saw fit to accommodate the institution of slavery, even though several colonies had taken steps to abolish it.⁴⁹ Odd as it may seem in retrospect, the colony of Georgia initially barred slaves.⁵⁰ However, with white settlers failing at almost every effort to turn a profit and migrating colonists from South Carolina aggressively seeking repeal of the prohibition, the notion of using slave labor in Georgia gained gradual acceptance; with the repeal of the act prohibiting slavery, thousands of blacks were brought in.⁵¹

While many states were taking steps to abolish slavery before, during, and after the drafting of the Constitution, other states were, at the same time, taking steps to augment and enforce the institution by migrating indentured servants to slave status⁵² and prohibiting manumission (to reduce or eliminate the free black population in a given state).⁵³ Of course, several states were

⁴⁸ *Id.*

⁴⁹ *See id.* at 53.

⁵⁰ *Id.* at 34.

⁵¹ *Id.* at 39–40.

⁵² Africans sold from a Dutch ship (a man-of-war) at Jamestown, Virginia in 1619 were probably indentured servants. *Id.* at 6–7. For some time, blacks surviving their indenture ultimately became part of society (buying property, voting, etc.); things changed as the slave trade picked up and became immensely profitable. *Id.* at 6–8. Various steps were taken at different times to strip blacks of indentured servitude status and migrate them to a condition of perpetual servitude. To enforce and maintain the status of slaves as slaves, the English colonies ultimately embraced a fairly uniform set of rules governing the institution (i.e., the slave codes). South Carolina’s code (which became the model adopted by other colonies) provided, *inter alia*, the following:

Baptism in the Christian faith does not alter the status of the slave.

Slaves are forbidden to leave the owner’s property without written permission, unless accompanied by a white person.

Any person enticing a slave to run away and any slave attempting to leave the province receives the death penalty as punishment.

No owner shall be punished if a slave dies under punishment; intentional killing of a slave shall cost the owner a fifty-pound fine.

Id. at 27–28. Slave Codes grew more restrictive after Nat Turner’s rebellion in August of 1831. *Id.* at 108–09.

⁵³ *Id.* at 88. Georgia enacted legislation to prohibit manumission. *Id.* In fact, one court, rejecting a trust that would have resulted in the emancipation of slaves, regarded slavery as a “Divine decree” and

heavily dependent on slaves because certain crops were labor-intensive.⁵⁴ Slaves were regarded as “money-making machines,”⁵⁵ and it remains likely that certain families can trace their wealth to the exploitation of slave labor; this reality also suggests that prevailing economic inequalities (including pronounced severity in certain demographics) have some of their deepest roots in the gross economic exploitation that was slavery.⁵⁶ Shakespeare’s truth bears repeating: “The evil that men do lives after them.”⁵⁷

The Constitution itself accomplished a great deal with respect to slavery. In addition to giving states with substantial slave populations a boost in the House of Representatives⁵⁸ (and in the electoral college),⁵⁹ the Constitution formally extended the legal slave trade for twenty years, providing, in pertinent part, as follows:

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.⁶⁰

Thus, although the United States took aim at slavery from the beginning, the Constitution’s sunset did more than merely extend the institution for two

attempts at emancipation a “fight against the Almighty.” Alfred L. Brophy, *What Should Inheritance Law Be? Reparations and Intergenerational Wealth Transfers*, 20 LAW & LITERATURE 197, 204–05 (2008) (citing *Am. Colonization Soc’y v. Gartrell*, 23 Ga. 448, 464–65 (1897)).

⁵⁴ CHRISTIAN, *supra* note 46, at 4–5. Given that tobacco was particularly important in certain American colonies and required considerable labor, the importing of slaves increased. *Id.* at 8.

⁵⁵ *Id.* at 6.

⁵⁶ *Id.* at 24.

⁵⁷ WILLIAM SHAKESPEARE, THE TRAGEDY OF JULIUS CAESAR act 3, sc. 2.

⁵⁸ The Constitution provides, in pertinent part, as follows:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. CONST. amends. 14, § 2, 16.

⁵⁹ *Id.* at art. II, § 1.

⁶⁰ *Id.* at art. I, § 9, cl. 1.

decades⁶¹ for the sake of creating the Union. By extending the slave trade for twenty years, the Constitution also extended the horrors of the Middle Passage⁶² and the brutality of the breaking-in process.⁶³ By putting no sunset on slavery itself, it also gave a green light to the regular abuses of everyday slavery. Various slave narratives dictated during the 1930s (often recorded in and faithfully preserved in the original dialect) paint a very ugly picture of the times.

Although slaves were often sent to the fields at a very early age (even if only to carry water for the adults),⁶⁴ their early lives were ordinarily spent in domestic quarters⁶⁵ alongside those charged with domestic tasks.⁶⁶ The relative youth and innocence of the children notwithstanding, they did not always enjoy proper care and nourishment; neglect was not uncommon.⁶⁷ As

⁶¹ Even though Congress abolished the importation of slaves on March 2, 1807 (effective January 1, 1808), lax enforcement allowed illegal importation to continue. CHRISTIAN, *supra* note 46, at 80–81. In fact, “[t]rade in African slaves continued until the Civil War The profits and thus the motive for the business remained extremely high, and a relatively brisk illegal trade continued” *Id.* at 170. It is also true that the slave trade ban resulted in a shift, in some sectors, from agriculture to slave breeding, given the soaring need for slave labor in certain states. *Id.* at 103–05. The internal slave trade was robust and profitable. *Id.* at 148.

⁶² *Id.* at 12 (“It is estimated that between 15 and 20% of the slaves [aboard a ship] died en route to the colonies, mostly from diseases associated with overcrowding, spoiled and poisoned food, contaminated water, starvation and thirst, and suicide. Others were thrown overboard, shot, or beaten to death for various reasons.”).

⁶³ *Id.* at 15.

⁶⁴ I WAS A SLAVE: TRUE LIFE STORIES DICTATED BY FORMER AMERICAN SLAVES IN THE 1930’S, BOOK 5: THE LIVES OF SLAVE CHILDREN 35 (Donna Wyant Howell, compil. American Legacy Books, 1st rev. ed., 1st prtng. 1998) [hereinafter I WAS A SLAVE (BOOK 5)] (commentary of Campbell Armstrong) (“I wasn’t doin’ nothin’ but totin’ water. I toted water for a whole year when I was a boy about eight years old. I was the water boy for the field hands. Later I worked out in the fields myself.” (dialect preserved)).

⁶⁵ *Id.* at 23–24 (commentary of Josie Brown) (“When us little, dey hab to keep us in de house ’cause de bald eagle pick up chillen jus’ like de hawk pick up chicken. Dey was lots a catamoun’ [mountain cats in Texas = cougars] and bears and deer in de woods. Us never ’lowed play ‘lone in de woods.” (dialect preserved)).

⁶⁶ I WAS A SLAVE (BOOK 5), *supra* note 64 (commentary of Adeline Grey) (“My Ma used to belong to ole man Dave Warner. I remember how she used to wash, an’ iron, an’ cook for de white folks durin’ slavery time.” (dialect preserved)). *Id.* at 15 (commentary of Fannie Griffin) (“I was de youngest slave, so Missy Grace, dat’s Massa Joe’s wife, keep me in de house most of de time to cook and keep de house cleaned up. I milked de cow and worked in de garden, too.” (dialect preserved)).

⁶⁷ I WAS A SLAVE (Book 5), *supra* note 64, at 24 (commentary of Hilliard Yellerday) (“Some owners gave their slaves the same kind of food served on their own tables and allowed the slaves the same

they approached their teenage years, slaves were transitioned to field labor.⁶⁸ Throughout their lives, work started at sunrise and continued to sunset under generally oppressive conditions (i.e., constant threat of whippings).⁶⁹ Even old slaves could be whipped for failing to work hard enough. As one individual recounted, “I ‘member one time dey strops [whipped with a leather strap] old Beans what’s so old he can’t work good no more. In de mornin’, dey find him hangin’ from a tree back of de quarters. He done hang himself to ‘scape he mis’ry!” [dialect preserved].⁷⁰ Whippings, of course, were a constant threat for any type of misconduct. One former slave commentator noted as follows:

My master was named Tom Ashbie, a meaner man was never born in Virginia—brutal, wicked and hard. He always carried a cowhide [whip] with him. If he saw anyone doing something that did not suit his taste, he would have the slave tied to a tree, man or woman, and then would cowhide the victim until he got tired, or sometimes the slave would faint.⁷¹

privileges enjoyed by their own children. Other masters fed their slave children from troughs made very much like those from which the hogs of the plantation were fed.”); *see also id.* at 15 (commentary of Bud Jones) (“I growed up in the house of Old Master. He had a big, log house. I slep’ in a little side room built on the Big House. I had a carpet on the floor to sleep on and one to cover up with. It was a fine, good enough bed in warm weather, but I used to near freeze to death when it was cold.” (dialect preserved)).

⁶⁸ I WAS A SLAVE: TRUE LIFE STORIES TOLD BY FORMER AMERICAN SLAVES IN THE 1930’S, CHAPTER 2: THE LIVES OF SLAVE MEN 13 (Donna Wyant Howell, compil. American Legacy Books, 4th prt. 1997) [hereinafter I WAS A SLAVE (CHAPTER 2)] (commentary of Simon Gallman) (“I was about twelve years old when dey made me go to de field to work. Befo’ dat and after dat, too, I worked around de barn and took care of de stock” (dialect preserved)).

⁶⁹ *Id.* at 14 (commentary of Silas Jackson) (“They were awakened by blowing of the horn before sunrise by the overseer, started work at sunrise and worked all day to sundown, with not time to go to the cabin for dinner [lunch]. You carried your dinner with you. The slaves were driven at top speed and whipped at the snap of the finger by the overseers.”); *see also* I WAS A SLAVE (BOOK 5), *supra* note 64, at 19 (commentary of Anna Miller) (“Marster Loyed makes [made] us work from day-light to dark in de fiel’s and make cloth at night.” (dialect preserved)).

⁷⁰ I WAS A SLAVE: TRUE LIFE STORIES TOLD BY FORMER AMERICAN SLAVES IN THE 1930’S, CHAPTER 1: DESCRIPTIONS OF PLANTATION LIFE 42 (Donna Wyant Howell, compil. American Legacy Books, 6th prt. 1997) [hereinafter I WAS A SLAVE (CHAPTER 1)] (commentary of Adeline Marshall).

⁷¹ *Id.* at 31 (commentary of Silas Jackson). Some professionals believe that specific forms of corporal punishment inflicted on African-American children have their roots in the treatment of slaves. *See* Michael E. Dyson, *Punishment or Child Abuse?*, N.Y. TIMES, Sept. 18, 2014, at A33 (pointing out that in the opinion of two black psychiatrists, the beating of African-American children by their parents is a practice rooted in slavery (i.e., the need to instill fear of and obedience with respect to whites)).

Of course, any form of disobedience or refusal to surrender could result in severe punishment. One former slave told of the following:

De worst whuppin' I's ever see am given to Clarinda. She hit de Marster over de head wid a hoe. I's tell yous why she hit de Marster. 'Twas 'cause him tries to interfere [sexually] wid her an' she tries to stop him. She am put on de log an' given 500 lashes. [dialect preserved]⁷²

In addition to being required to surrender to their master's sexual advances, slave women were also part of forced breeding with male slaves of the master's choosing.⁷³ According to one commentator, such breeding was rigidly selective. He noted, "A lot of de slaveowners had certain strong healthy slave men to serve [service] de slave women. Generally, dey give one man four women an' dat man better not have nuttin' to do wid de udder women an' de women better not have nuttin' to do wid udder men." [dialect preserved].⁷⁴ If a breeding female slave was to be sold, her fertility/productivity was often touted so as to draw as high a price for her as possible;⁷⁵ such women might also be valuable as wet nurses⁷⁶ or midwives (i.e., hired out to others to produce skilled labor revenue for the master).⁷⁷

⁷² I WAS A SLAVE (CHAPTER 2), *supra* note 68, at 35 (commentary of John Finnely).

⁷³ I WAS A SLAVE: TRUE LIFE STORIES TOLD BY FORMER AMERICAN SLAVES IN THE 1930'S, CHAPTER 4: THE BREEDING OF SLAVES 9 (Donna Wyant Howell, compil. American Legacy Books, 4th prt. 1997) [hereinafter I WAS A SLAVE (CHAPTER 4)] (commentary of Sarah Ford) ("She [my mother] say de white folks don't let de slaves what works in de field marry none. Dey jus' puts a man and breedin' woman together like mules. Iffen the woman don't like the man, it don't make no diff'rence. She better go or dey gives her a hidin' [a whipping with a bullwhip which would cut into her bare back]." (dialect preserved)).

⁷⁴ *Id.* at 11 (commentary of Jacob Manson).

⁷⁵ I WAS A SLAVE (BOOK 5), *supra* note 64, at 36 (commentary of Fannie Moore) ("Den sometime dey take 'em an' sell 'em on de block. De breed [breeding] woman always bring mo' money den de res', ebben de men. When dey put her on de block, dey put all her chillun aroun' her to show fo'ks how fas' she can hab chillun." (dialect preserved)).

⁷⁶ *Id.* at 27 (commentary of Jeff Calhoun) ("My massa had 15 chillun and my mamma suckled every one of dem, 'cause his wife was no good to give milk." (dialect preserved)).

⁷⁷ *Id.* at 28 (commentary of Mildred Graves) ("You know in dem days, dey didn't have many doctors. Well, I was always good when it come to de sick, so dat was mostly my job. I was also what you call a midwife, too. Whenever any o' de white folks 'roun' Hanover [Virginia] was goin' to have babies, dey always got word to Mr. Tinsley dat dey want to hire me fer dat time. Sho', he let me go. 'Twas money fer him, you know. He would give me only a few cents, but dat was kinda good o' him to do dat." (dialect preserved)).

The regular abuses of slavery have long given rise to abolitionist sentiment. Indeed, George Mason, so offended by the accommodation of slavery (though a lifelong slaveholder himself), refused to sign the Constitution⁷⁸ and made it clear that he would prefer that the southern states not be admitted to the Union unless they agreed to stop slavery.⁷⁹ Adoption of George Mason's position might very well have spared the country its Civil War, but to the extent the founding fathers opted to accommodate the slave states at all, they could have used the constitutional provision for adding new states⁸⁰ to ban the extension of the institution to states not in existence at the time of the Constitution's ratification, especially in light of the following provision requiring the return of fugitive slaves:

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.⁸¹

And, as if ensuring the existence of a healthy slave trade and the return of any fugitives was not enough, the Constitution itself prohibited any amendment (before 1808), which would affect the twenty-year sunset provision.⁸² Further, it should be emphasized, at this juncture, that the Constitution itself ensured that the slave trade could be a source of federal tax revenue.⁸³

2. Congressional Accommodation and Enforcement of Slavery

Notwithstanding the existence of various constitutional provisions, Congress repeatedly took steps that ultimately resulted in the expansion and active enforcement of slavery. By resolution of March 23, 1790, Congress left the question of slavery up to the individual states and thereby clarified that it could not interfere with the emancipation of slaves or the treatment of

⁷⁸ CHRISTIAN, *supra* note 46, at 53.

⁷⁹ *Id.* at 60.

⁸⁰ *See* U.S. CONST. art. IV, § 3, cl. 1.

⁸¹ *Id.* at art. IV, § 2, cl. 3.

⁸² *Id.* at art. V.

⁸³ *Id.* at art. I, § 9, cl. 1.

any of them.⁸⁴ Wholly aside from announcing an official *laissez-faire* policy with respect to the inhumane treatment of slaves,⁸⁵ this act set the stage for the Civil War and various notable slave-state/free-state compromises (e.g., the Missouri Compromise of 1820).⁸⁶ Congress was also particularly fond of enacting and enforcing Fugitive Slave Acts. On February 12, 1793, Congress passed the Fugitive Slave Act,⁸⁷ which criminalized harboring fugitive slaves (or any act interfering with the slave's capture or arrest) and thereby gave teeth to Article IV, § 2 of the Constitution.⁸⁸ With the Fugitive Slave Act (Compromise) of 1850, the federal government took jurisdiction over runaway slaves and their return.⁸⁹ The gesture was not legislative busywork. Although abolitionists and their supporters would occasionally purchase the

⁸⁴ CHRISTIAN, *supra* note 46, at 68. The Calhoun Resolutions passed the Senate in 1838, essentially affirming the legality of slavery and triumphing the notion that states alone had the right to control the domestic institution of slavery. *Id.* at 125.

⁸⁵ One slave, apparently by letter to his former master, stated the following:

You may perhaps think hard of us for running away from slavery, but as to myself, I have but one apology to make, which is this: I have only to regret that I did not start at an earlier period. . . . To be compelled to stand by and see you whip and slash my wife without mercy when I could afford her no protection, not even by offering myself to suffer the lash in her place, was more than I felt it to be the duty of a slave husband to endure, while the way was open to Canada. My infant child was also frequently flogged by Mrs. Gatewood, for crying, until its skin was bruised literally purple. This kind of treatment was what drove me from home and family to seek a better home for them.

CHRISTIAN, *supra* note 46, at 151 (quoting HENRY W. BIBB, NARRATIVE OF THE LIFE AND ADVENTURE OF HENRY BIBB, AN AMERICAN SLAVE IN 1849, at 177 (1849)).

⁸⁶ On March 3, 1820, Congress adopted the Missouri Compromise which allowed the entry of Missouri as a slave state and Maine as a free state; the southern politicians conditioned Maine's admission on Missouri's admission. *Id.* at 90. On May 26, 1854, Congress passed the Kansas-Nebraska Act (allowing "popular sovereignty" (i.e., settlers choose whether to be a slave state or a free state)). By doing so, Congress repealed the Missouri Compromise of 1820 (prohibiting slavery north of the southern border of the state of Missouri with the exception of Missouri itself) and thereby opened the northern territories to slavery. *Id.* at 159. There was a further Congressional Resolution in 1860 which provided, in pertinent part, that "[s]lavery is lawful in all territories under the Constitution; neither Congress nor a local legislature can abolish it there; the federal government is in duty bound to protect slave owners as well as the holders of other forms of property in the territories . . ." *Id.* at 182.

⁸⁷ *Id.* at 71.

⁸⁸ *Id.*

⁸⁹ *Id.* at 149.

freedom of a fugitive slave⁹⁰ or storm jails/courthouses to rescue them,⁹¹ federal and state officials were known to incur substantial expense in protecting slaves from rescue and taking active steps to assure their return to their master.⁹² The case of Anthony Burns is particularly noteworthy. Thousands of federal troops were used to thwart mob violence, President Pierce told federal officials to spare no expense in enforcing the Fugitive Slave Law, and an entire regiment (and most of the Boston police force) was called on to escort the slave to a waiting ship for return to his master.⁹³

3. Other Harms

Although there is much pre-emancipation history with which to condemn the United States in the Constitution, in the halls of Congress, and in the United States Supreme Court,⁹⁴ the nation's post-emancipation conduct is disturbing in many respects, such as the failure to aggressively counter *de facto* slavery via sharecropping.⁹⁵ The convict lease system⁹⁶ was also problematic. The convict-lease system was used as a means of accomplishing “legalized” slavery. Tennessee law, for example, authorized the arrest of individuals for “vagrancy,” and forced labor became a ready means of having someone pay off the fine attending the charge of vagrancy.⁹⁷

⁹⁰ *See id.* at 133.

⁹¹ *Id.* at 152.

⁹² *See id.* (discussing the return of a 17-year-old black male to his master who had traveled from Georgia to Boston to retrieve him).

⁹³ *Id.* at 157.

⁹⁴ *See, e.g.,* Scott v. Sanford (*Dred Scott*), 60 U.S. 393 (1857) (holding that blacks were not citizens of the United States and that Congress could not prohibit slavery in the territories); *see also* CHRISTIAN, *supra* note 46, at 163–64 (providing additional background information on *Dred Scott*).

⁹⁵ *See* CHRISTIAN, *supra* note 46, at 215. Evidence indicates that sharecropping simply replaced slavery. *Id.* Further, migration to greener pastures could not be counted on as a readily-available option. Blacks seeking to migrate away to better conditions might face a blockade. *See id.* at 255 (discussing a terrorist white mob's blockade of the Mississippi River to prevent black migration and thereby forcibly retain a cheap labor supply).

⁹⁶ *See id.* at 257. For a discussion of the convict lease system, see Scott W. Howe, *Slavery as Punishment: Original Public Meaning, Cruel and Unusual Punishment, and the Neglected Clause in the Thirteenth Amendment*, 51 ARIZ. L. REV. 983, 1008–19 (2009) (discussing the convict lease system circa 1865 as a disturbing reflection of the original public meaning of slavery as used in the Thirteenth Amendment).

⁹⁷ *Id.* at 248.

White planters profited immensely⁹⁸ and so did States; by leasing convicts, the State of Georgia made approximately \$355,000.⁹⁹ An investigation initiated by a federal judge concluded that “a widespread pattern of peonage existed, involving the collaboration of wealthy landowners, local constables, justices of the peace, and plantation overseers.”¹⁰⁰

Ranking high on the list of the deplorable acts at the federal level is the judicial branch’s endorsement of the separate but equal doctrine in *Plessy v. Ferguson*¹⁰¹ which branded the notion of racial difference and the propriety of official segregation onto the national psyche for several generations by placing a *federal imprimatur* on the entire Jim Crow edifice;¹⁰² state legislatures readily took larger steps in effecting official segregation. In 1912, “[t]he Virginia legislature gave its cities the right to designate neighborhoods as Black or [W]hite, thereby approving residential segregation of races.”¹⁰³ In 1914, “[t]he Louisiana legislature passed a law requiring segregated amusement activities. Specifically, it required separate entrances, exits, and ticket windows, twenty-five feet apart, at recreational facilities.”¹⁰⁴ In 1915, “[t]he Oklahoma legislature authorized segregation of telephone booths by requiring telephone companies to provide separate booths for ‘whites and colored patrons.’”¹⁰⁵ The list goes on, and yet, official segregation was not the worst of it. Arguably, the federal government’s most spectacular post-emancipation failure was its flaccid and lethargic response to lynching.

In the wake of the Civil War, certain white southerners resorted to terrorism and other tactics to oppress and exploit blacks¹⁰⁶ or alleviate

⁹⁸ *Id.* at 283.

⁹⁹ *Id.* at 288.

¹⁰⁰ *Id.* at 293.

¹⁰¹ 163 U.S. 537 (1896). “The decision allowed racism to be institutionalized and marked the beginning of Jim Crow laws and acceptance of overt racist behavior.” CHRISTIAN, *supra* note 46, at 282.

¹⁰² Despite ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments, Tennessee passed the first Jim Crow law segregating public transportation in 1875. *See* CHRISTIAN, *supra* note 46, at 248.

¹⁰³ *Id.* at 305.

¹⁰⁴ *Id.* at 307.

¹⁰⁵ *Id.* at 308.

¹⁰⁶ Feagin, *supra* note 45, at 54.

displaced aggression.¹⁰⁷ As the following data indicate, lynchings were common:

Lynching in the United States 1882–1950¹⁰⁸

Period	Avg. # of Lynchings Per Year	Total of Period
1882–1900	150.4	2,857.6
1901–10	84.6	846
1911–20	60.6	606
1921–30	27.5	275
1931–40	11.4	114
1941–50	3	30
Total		4,728.6

The first anti-lynching bill introduced in Congress (by George White of North Carolina) was supported but never brought to a vote.¹⁰⁹ In 1921, southern Democrats in the U.S. House of Representatives filibustered an anti-lynching bill introduced by L.C. Dyer.¹¹⁰ Although the House passed the bill in 1922, a southern filibuster in the Senate defeated it, even though the bill called for mild punishment.¹¹¹ Specifically, it called for the fining of local law officials for allowing it to happen because in many instances, the lynchings occurred after mobs descended on jails to retrieve prisoners.¹¹² In fact, one of the worst race riots in American history occurred in the Greenwood district of Tulsa, Oklahoma due to the fear that a young black man being held in custody would be lynched for assaulting (i.e., accidentally

¹⁰⁷ See DOUGLAS P. CROWNE, PERSONALITY THEORY 319 (2007) (There “was an inverse relation between cotton prices in the southern US and lynchings of blacks during a forty-two-year period from 1882 to 1930. The poorer the year’s cotton prices, the greater the number of lynchings, a statistic that reflected a violent aggression displaced from a remote and untouchable target to a helpless and innocent minority.”).

¹⁰⁸ CHRISTIAN, *supra* note 46, at 262.

¹⁰⁹ *Id.* at 289.

¹¹⁰ *Id.* at 325.

¹¹¹ *Id.* at 331.

¹¹² *Id.*

stepping on the foot of) a white female elevator operator.¹¹³ A noted psychologist confirms not only that the mob mentality, which would allow such events to happen, is fueled over time, but also that gradual discrimination has a clear hand in the matter:

Violence is always an outgrowth of milder states of mind. * * * In cases where violence breaks out we can be fairly certain that the following steps have prepared the way.

- (1) There has been a long period of categorical prejudgment. The victim group has long been typed. People have begun to lose the power to think of the members of an out-group as individuals.
- (2) There has been a long period of verbal complaint against the victimized minority. The habits of suspicion and blaming have become firmly rooted.
- (3) There has been growing discrimination

* * *

- (8) Some precipitating incident occurs. What previously might have been passed over as a trivial provocation now causes an explosion.¹¹⁴

Thousands of human lives were snuffed out by frenzied mobs over pleas of innocence, despite prayers for mercy, and without due process of law while southern congressmen filibustered over the imposition of fines. Of course, the federal government's slow response to lynching was only one of the more egregious instances of federal foot-dragging. In addition to allowing the doctrine of separate but equal to stand as the law of the land for several decades (i.e., 1896–1954),¹¹⁵ Congress stood idle (for some amount of time)

¹¹³ Eddie Faye Gates, *The Oklahoma Commission to Study the Tulsa Race Riot of 1921*, 20 HARV. BLACKLETTER L.J. 83 (2004); see also Alfred L. Brophy, *Norms, Law, and Reparations: The Case of the Ku Klux Klan in 1920s Oklahoma*, 20 HARV. BLACKLETTER L.J. 17 (2004) (exploring the domination of the State of Oklahoma by the Ku Klux Klan in the 1920s).

¹¹⁴ GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 57–58 (1954).

¹¹⁵ See *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

in the face of educational inequalities,¹¹⁶ the disfranchisement of blacks,¹¹⁷ restrictive covenants,¹¹⁸ and human testing.¹¹⁹

The United States' shameful history notwithstanding, one cannot dismiss the reality that the country we live in today is far better, in many respects, than the country as it existed in centuries past. The United States, however, can lay claim to only part of the credit; thousands have shed blood and given their lives for this "more perfect Union." To the extent, however, that the conduct of the United States is under examination, credit must be granted, to the extent due, for steps taken in the right direction.

B. Remedial Measures

1. Attempts to Prevent Proliferation of Slavery

Although the Constitution itself contained many provisions protecting the slave trade and the institution of slavery, slave importing was eventually banned in 1808.¹²⁰ Further, on March 3, 1819, Congress enacted the Anti-Slave Trade Act to prevent smuggling of slaves,¹²¹ and illegal slave trading became punishable by death as an act of piracy.¹²² With respect to the domestic slavery, steps were taken, at least early on, to prevent its proliferation. The Ordinance of 1787 barred the extension of slavery (except as punishment for criminal conduct) to the Northwest Territory (i.e., regions

¹¹⁶ Opponents defeated an 1882 bill to equalize educational opportunities for whites and blacks, citing fears with respect to race mixing and federal involvement in schools. CHRISTIAN, *supra* note 46, at 261. Much later in the post-*Brown* era, we see the United States Supreme Court embracing a "go slow" approach with respect to school desegregation. *Id.* at 390.

¹¹⁷ Immediately after the Civil War, southern states took aggressive steps to restrict or eliminate black voting, including the introduction of poll taxes. *Id.* at 257–58. The states also used literacy tests and grandfather clauses. *Id.* at 274–75.

¹¹⁸ See, e.g., *Corrigan v. Buckley*, 271 U.S. 323, 329 (1926) (noting that "it is our duty to decline jurisdiction").

¹¹⁹ From 1932–72, the U.S. Public Health Service used 300 black men (in Alabama) as guinea pigs in a syphilis experiment. CHRISTIAN, *supra* note 46, at 458–59.

¹²⁰ *Id.* at 81.

¹²¹ *Id.* at 89.

¹²² *Id.* at 90.

northwest of the Ohio River),¹²³ although its enforcement was somewhat erratic.¹²⁴ Likewise, some effort was made, per the Wilmot Proviso, to prohibit slavery in territory acquired from Mexico after the Mexican War. As was noted above, however, these efforts were later rendered nugatory by congressional resolutions, which left the question of slavery to the individual states.

2. Constitutional Amendments and Civil Rights Legislation

Though many would argue that the Civil War was not a war fought to eradicate slavery, the question of slavery had given rise to enormous national strife. Its limits notwithstanding, the Emancipation Proclamation served effectively as slavery's death warrant, the Thirteenth Amendment¹²⁵ finished the job, and the Fourteenth¹²⁶ and Fifteenth¹²⁷ Amendments put blacks on the path to full citizenship, complete with all its rights, protections, and privileges. As history amply demonstrates, however, the journey has been a long and difficult one. For example, with respect to voting, terroristic efforts to prevent blacks from voting prompted Congress to pass the first Enforcement Act on May 31, 1870.¹²⁸ Ku Klux Klan activities made it

¹²³ *Id.* at 62–63.

¹²⁴ *See id.* at 78 (discussing the importation of slaves purchased elsewhere into Indiana for a period of indentured servitude).

¹²⁵ The Thirteenth Amendment provides, in pertinent part, as follows: “Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” U.S. CONST. amend. XIII, § 1.

¹²⁶ The Fourteenth Amendment provides, in pertinent part, as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

¹²⁷ The Fifteenth Amendment provides, in pertinent part, as follows: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” U.S. CONST. amend. XV, § 1.

¹²⁸ CHRISTIAN, *supra* note 46, at 235.

necessary for Congress to pass a second Enforcement Act¹²⁹ and a third Enforcement Act¹³⁰ in 1871. Sadly, the pattern is a familiar one. Congress may have passed and secured the ratification of the post-war amendments, but undoing the sins of its past makes for backbreaking penance. Accordingly, it has been necessary over the years for Congress to pass multiple civil rights acts.¹³¹ With respect to voting, for example, Congress had to wage battle after battle, despite the ratification of the Fifteenth Amendment approximately 100 years earlier (e.g., the Civil Rights Act of 1957, the Voting Rights Act of 1960, the Voting Rights Act of 1965, and the Voting Rights Act of 1975). The significance of each piece of civil rights legislation cannot be minimized even slightly, but the laws (dealing with various rights and privileges) also have to be understood in the aggregate. They represent a persistent struggle to navigate the national conscience and steer it in the right direction, but this is to be expected of a captain substantially responsible for the original, erroneous course heading.

3. Judicial Activity

If any branch of the federal government merits praise for the post-Emancipation reconstruction of the American conscience with respect to race, it is the judicial branch. Although the United States Supreme Court has been active in many arenas of significance,¹³² surely many would agree that

¹²⁹ *Id.* at 238 (putting federal officers/courts in charge of voter registration and voting with respect to congressional elections).

¹³⁰ *Id.* (defining Klan conspiracy as “rebellion against the United States . . .”).

¹³¹ Congress passed the Civil Rights Bill of 1866 (giving blacks certain basic rights of citizenship (e.g., contract, hold property, testify in court) after securing passage over President Andrew Johnson’s veto), the Civil Rights Act in 1875 (prohibiting discrimination in public accommodations), the Civil Rights Act of 1957 (deeming it illegal to disfranchise blacks and prohibiting interference with the right to vote), the Civil Rights Act of 1960 (enhancing protections for blacks seeking to exercise their right to vote), the Civil Rights Act of 1964 (addressing discrimination in employment and places of public accommodation), the Voting Rights Act of 1965 (requiring that certain states with history of depriving blacks of the right to vote submit any voting procedure changes to the U.S. attorney), the Civil Rights Act of 1968 (Fair Housing Act) (prohibiting discrimination in the renting and sale of apartments and housing), the Voting Rights Act of 1975 (eliminating literacy requirements for voting), and the Civil Rights Restoration Act (requiring that institutions receiving federal funds comply with civil rights statutes (after securing passage over President Ronald Reagan’s veto)). CHRISTIAN, *supra* note 46, at 216, 248, 399, 405, 420, 440–41, 463, 468, 512.

¹³² The U.S. Supreme Court has taken steps (or, in fact, managed) to eradicate discrimination with respect to jury duty service, election primaries, marriage, employment tests, affirmative action, minority set-asides, and jury selection. *Id.* at 264, 340, 437, 456, 477, 484, 505, 508, 536; *see also* Guinn v. United

the pillars of its jurisprudence take the form of its desegregation mandates. The Court eliminated residential districting by race,¹³³ discrimination in places of public accommodation,¹³⁴ and segregation on interstate bus travel.¹³⁵ By those acts, the court made it possible for blacks to do things as simple as purchase and eat a sandwich at a public lunch counter or travel without being refused access to hotel accommodations and restrooms. Those were major accomplishments achieved after considerable private pain and in the wake of truly heroic, non-violent private action, but it was with the desegregation of public schools in *Brown v. Board of Education*¹³⁶ that the Court took its first bold step towards ensuring equality of educational opportunity for all. Despite considerable delay¹³⁷ and occasionally violent¹³⁸ and overwhelming public resistance¹³⁹ (including vows of “segregation now,

States, 238 U.S. 347 (1915) (holding that grandfather clauses are unconstitutional); *Furman v. Georgia*, 408 U.S. 238 (1972) (prohibiting the imposition of the death penalty without guiding standards for the jury); *United States v. Paradise*, 480 U.S. 149 (1987) (ordering state trooper promotion parity in the State of Alabama (one black for each white) to make up for prior discrimination); *Bakke v. Regents of the University of California*, 438 U.S. 265 (1978) (striking down a quota system but allowing consideration of race as one of many admissions factors).

¹³³ *Buchanan v. Warley*, 245 U.S. 60 (1917) (holding that statutes requiring that blacks live in certain residential areas were unconstitutional); see also CHRISTIAN, *supra* note 46, at 310 (providing additional information on *Buchanan v. Warley*). The Court also held in *Hansberry v. Lee*, 311 U.S. 32 (1940), “that it was illegal for whites to bar African Americans from white neighborhoods.” CHRISTIAN, *supra* note 46, at 362.

¹³⁴ The Court upheld public accommodations provision of Civil Rights Act of 1964 in *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964). Christian, *supra* note 46, at 423. The Court also held in *District of Columbia v. John R. Thompson Co., Inc.*, 346 U.S. 100 (1953), that racial discrimination in restaurants in D.C. was illegal. CHRISTIAN, *supra* note 46, at 389.

¹³⁵ CHRISTIAN, *supra* note 46, at 275, 393.

¹³⁶ 347 U.S. 483 (1954).

¹³⁷ The U.S. Supreme Court, in *Alexander v. Holmes*, rejected the Nixon administration’s appeals for delays and held that the “all deliberate speed” desegregation rationale for operating a segregated school system was unconstitutional. CHRISTIAN, *supra* note 46, at 445.

¹³⁸ Integration efforts often sparked mob violence. *Id.* at 396. There were, of course, multiple displays of resistance, including defiance of busing plans ordered by the federal government. *Id.* at 449. On November 13, 1960, “the [Louisiana] legislature acted to prevent integration and took control of [New Orleans’s] schools, fired the school superintendent, and ordered all schools closed on November 14.” *Id.* at 406. Segregation academies also sprang up in response to desegregation mandates. *Id.* at 447.

¹³⁹ The Justice Department sued the State of Georgia for refusing to desegregate its schools, marking the first time the federal government sued an entire state for failing to desegregate. *Id.* at 445.

segregation tomorrow, segregation forever”),¹⁴⁰ the Supreme Court’s mandates were ultimately enforced. President Eisenhower ordered federal troops and National Guardsmen to Little Rock, Arkansas to force the integration of Central High School,¹⁴¹ and President Kennedy sent in thousands of federal troops to quell racial violence in the wake of James Meredith’s enrollment at the University of Mississippi.¹⁴² The executive branch, it should be noted, also deserves credit for dismantling discrimination by federal contractors¹⁴³ and desegregating the military.

Although President Truman signed Executive Order 9981 in 1948, calling for an end to discrimination in the armed forces “as rapidly as possible,”¹⁴⁴ the military segregation mandate was strong enough to persist during World War II. Noted one commentator, “Despite a growing chorus of protests by Black citizens, outraged at the idea of fighting bigotry abroad while it was tolerated at home, the military continued to insist on segregating African-American service-men into all-Black units. Even blood supplies for saving the lives of the wounded were kept separate.”¹⁴⁵

Indeed, military segregation stretches back even further than World War II, apparently depending on prevailing exigencies. In July of 1775, George Washington stopped blacks from serving in the Continental Army in 1775.¹⁴⁶ Thereafter, the British offered freedom to slaves willing to assist them.¹⁴⁷ Washington soon rescinded the prior order and allowed free blacks to serve in the Continental Army, and Service units were integrated.¹⁴⁸ By 1798,

¹⁴⁰ *Id.* at 416 (quoting George Wallace, former governor of Alabama).

¹⁴¹ *Id.* at 395.

¹⁴² *Id.* at 412–13.

¹⁴³ JOAN HOFF, LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN 395 (1991) (“Executive Order No. 11246 prohibited employment discrimination by federal contractors on the same grounds as Title VII, except sex was not included.”).

¹⁴⁴ CHRISTIAN, *supra* note 46, at 378. Even after the inefficiencies of segregation were noted, racism persisted in the segregation of on- and off-post housing and other facilities. *Id.* at 387–88.

¹⁴⁵ THE WAR: A KEN BURNS FILM, EPISODE ONE: “A NECESSARY WAR” (PBS Home Video 2007).

¹⁴⁶ CHRISTIAN, *supra* note 46, at 49.

¹⁴⁷ *Id.* at 49–50.

¹⁴⁸ *Id.* at 53.

however, blacks were not allowed to serve in the Navy or the Marines,¹⁴⁹ and as of 1820, “Negroes and Mulattoes” could not enlist in the Army.¹⁵⁰ Interestingly, the course of human events has resulted in an African-American holding the position of Commander-in-Chief, and that reality surely would shock George Washington and the other founding fathers of the nation if they were able to perceive it. Moreover, in addition to historic achievements in the political arena, African-Americans have made considerable and unprecedented advancement in a host of arenas. In business, for example, Kenneth Chenault served as President and Chief Operating Officer of American Express Company before taking the helm as Chief Executive Officer and Chairman of that company. Likewise, Marvin Ellison became the first African-American to be named CEO of J.C. Penney.¹⁵¹ These successes notwithstanding, diversity issues, even in the business arena, abound.¹⁵² Lamenting the scarcity of African-Americans in the tech industry, one commentator noted that “the low number of African-American tech workers is particularly acute, worse than even the dearth of women and Hispanics in the industry.”¹⁵³ Fortunately, some businesses in the industry have been proactive in addressing racial and other disparities.¹⁵⁴

C. Persistence of Negative Impact

As history itself makes clear, the United States is guilty of many sins with respect to African slaves and their descendants. At the same time, much

¹⁴⁹ *Id.* at 74.

¹⁵⁰ *Id.* at 90.

¹⁵¹ Hadley Malcolm, *J.C. Penney up as it names Home Depot exec CEO*, USA TODAY, Oct. 13, 2014, <http://www.usatoday.com/story/money/business/2014/10/13/jc-penney-marvin-ellison-ceo/17182891/>.

¹⁵² See Jessica Guynn, *Diversity Gets Googled*, USA TODAY, May 7, 2015, at 1B (indicating that as of January 2014, Google’s work force was 70% male and 30% female while also being 61% white, 3% Hispanic, and 2% black); see also Jessica Guynn, *Next for Microsoft: Diversity*, USA TODAY, Dec. 4, 2014, at B1 (discussing a recent Microsoft shareholder meeting and Jesse Jackson’s exhortation that Microsoft enhance diversity in its leadership and work force).

¹⁵³ Patricia L. Brown, *Playing Catch-Up, Tech Courts Blacks*, N.Y. TIMES, Sept. 4, 2015, at B1 & B3.

¹⁵⁴ See Guynn, *supra* note 152, at 1B (discussing Google’s investment in diversity initiatives to attract more women and minorities).

remedial work has been done at the federal level with respect to issues of race, yet there remains a real question as to whether those acts alone do (or even can) compensate for the train of egregious abuses suffered by blacks. Although one commentator author readily acknowledges that “the overwhelming consensus is that current racial inequalities are the result of historical oppression,”¹⁵⁵ she concludes her work by emphasizing that “[s]ocial science evidence shows that dysfunctional behaviors and the inadequate development of human capital, not discrimination, are now the most important factors holding blacks back. * * * The future of black America is now in its own hands.”¹⁵⁶ With respect to the latter sentiments, I respectfully dissent.

The Senate Apology of June 2009 itself acknowledges not only that “visceral racism . . . became enmeshed in the social fabric of the United States”¹⁵⁷ but also “that African-Americans continue to suffer from the consequences of slavery and Jim Crow laws . . . through enormous damage and loss.”¹⁵⁸ Although Congress is silent on the matter, one commentator highlights the concomitant benefits enjoyed by whites:

Over several centuries, most whites, as individuals and families, have benefitted handsomely from anti-black oppression and the transmission of ill-gotten wealth and privilege from one generation to the next. Today, the relative prosperity, long life expectancies, and high standard of living of white Americans are significantly rooted in centuries of exploitation and impoverishment of African Americans and other Americans of color.¹⁵⁹

White privilege is ubiquitous and imbedded even where most whites cannot see it; it is the foundation of this society. It began in early white gains from slavery and has persisted under legal segregation and contemporary racism. Acceptance

¹⁵⁵ WAX, *supra* note 45, at 292; *see also* Wenger, *supra* note 8, at 292 (quoting one commentator who stated that “the shortcomings of Blacks, individually or as a group, are responsible for any present injury.”).

¹⁵⁶ WAX, *supra* note 45, at 140.

¹⁵⁷ Apology, *supra* note 5.

¹⁵⁸ *Id.*; *see also* Feagin, *supra* note 45, at 53 (noting that harms to African-Americans did not end with slavery and that post-emancipation discrimination was damaging (as is current discrimination)).

¹⁵⁹ Feagin, *supra* note 45, at 50.

of this system of white privileges and black disadvantages as normal has conferred advantages for whites now across some fifteen generations.¹⁶⁰

While African-Americans certainly cannot claim improper treatment in the wake of poor individual choices,¹⁶¹ time and history reveal that racism and discrimination have enduring force. With a decidedly federal push from the outset, both have momentum, which has proven difficult, in many spheres, to stop. Consider a central root of modern-day educational disparities. There were numerous measures directed at preventing the education of slaves, among others. In 1824, Virginia made teaching a *free* black to read or write an offense drawing a \$50 fine and two months imprisonment,¹⁶² and in 1829, Georgia prohibited the education of slaves or free blacks.¹⁶³ *Plessy v. Ferguson*¹⁶⁴ legalized across-the-board racial segregation, but even 25 years after *Brown v. Board of Education*,¹⁶⁵ the U.S. Civil Rights Commission reported that school segregation was still widespread.¹⁶⁶ Wholly aside from the education context, inequalities abound in unemployment,¹⁶⁷ credit

¹⁶⁰ *Id.* at 51–52.

¹⁶¹ See WILLIAM H. COSBY, JR. & ALVIN F. POUSSAINT, M.D., *COME ON, PEOPLE: ON THE PATH FROM VICTIMS TO VICTORS* 6 (2007) (noting that “too many of our sons deserve to be [in the prison system]”).

¹⁶² CHRISTIAN, *supra* note 46, at 94.

¹⁶³ *Id.* at 97. Other states soon followed suit. *See id.*

¹⁶⁴ 163 U.S. 537 (1896).

¹⁶⁵ 347 U.S. 483 (1954).

¹⁶⁶ CHRISTIAN, *supra* note 46, at 477.

¹⁶⁷ Black unemployment was disproportionately high as of 1971. *Id.* at 454.

access,¹⁶⁸ housing,¹⁶⁹ neighborhood treatment,¹⁷⁰ and health.¹⁷¹ Employment discrimination is not uncommon,¹⁷² regardless of educational level.¹⁷³ Further, hate crime statistics confirm that in 2012, 48.5% of hate crime victims were targeted on the basis of race,¹⁷⁴ and of this group, 66.2% were victims of anti-black bias, and 22% were victims of anti-white bias.¹⁷⁵ Even when convicted as perpetrators of crimes generally, African-Americans suffer disproportionately with respect to imprisonment.¹⁷⁶ Yet, in one

¹⁶⁸ Toyota Motor Corporation recently entered into a \$21.9 million settlement with federal regulators regarding alleged overcharging of minority buyers on their auto loans. Yuka Hayashi, *Toyota Unit Enters \$21.9 Million Settlement over Alleged Auto Loan Racial Bias*, WALL ST. J., Feb. 2, 2016, <http://wsj.com/articles/toyota-unit-enters-21-9m-settlement-over-alleged-auto-loan-racial-bias-1454455788>. In 1980, Amoco made settlement payment for alleged violation of the Equal Credit Opportunity Act (using zip codes to deny credit). CHRISTIAN, *supra* note 46, at 483.

¹⁶⁹ See CHRISTIAN, *supra* note 46, at 550 (discussing a report of the Federal Reserve on lending discrimination). Shawmut Mortgage Co. paid \$960,000 to settle federal charges of race discrimination in making loans. *Id.* at 565.

¹⁷⁰ See *id.* at 528, 547 (pointing to evidence indicating that toxic waste sites tend to be located where racial minorities live).

¹⁷¹ See *id.* at 481 (discussing a CDC report issued in 1980, “Being Black in America,” which indicated that racial discrimination caused various ills (e.g., higher mortality rates, lower incomes)). A study with similar findings was conducted at Johns Hopkins University (revealing hypertension to be associated with stress of racism, poverty, etc. and not genes). See *id.* at 536.

¹⁷² Those required to pay substantial sums as a result of prior discrimination include AT&T, *The New York Times*, the Los Angeles Police Department, and Honda. CHRISTIAN, *supra* note 46, at 463, 485, 486, 515.

¹⁷³ U.S. Civil Rights Commission “found job bias ‘virtually everywhere, at every age level, at every educational level, at every skill level.’” CHRISTIAN, *supra* note 46, at 497. In addition to overt discrimination, some commentators contend that the work (i.e. various acts) performed by workplace “outsiders” to counteract negative stereotypes is a form of employment discrimination. See Devon W. Carbado & Mitu Gulati, Symposium: *Discrimination and Inequality Emerging Issues Working Identity*, 85 CORNELL L. REV. 1259, 1262 (2000).

¹⁷⁴ *Hate Crime Statistics, 2012*, U.S. DEP’T OF JUSTICE (FBI), http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2012/topic-pages/victims/victims_final (last visited July 8, 2016) [hereinafter *Hate Crime Statistics*].

¹⁷⁵ *Id.*

¹⁷⁶ One commentator noted the following:

African Americans constitute 13% of the general population, but nearly half of the record-high prison population. The 2010 imprisonment rate for Latino males is almost triple the rate for white males; black men are locked up at nearly seven times the rate of their white counterparts. The differentials in drug punishment are even larger: of every 100,000 black Americans, 359 are imprisoned on drug charges; the analogous figure for whites is 28. . . .

relatively recent and infamous case involving an Hispanic perpetrator and an African-American victim, conviction itself was evaded. After racially-profiling, shooting, and killing Trayvon Martin (an unarmed seventeen-year-old youth), George Zimmerman was acquitted of second-degree murder by a jury in Florida.¹⁷⁷ Regarding the profiling done by bona fide police officers, the empirical evidence is alarming. Commentators note that racial profiling “is publicly disavowed but remains widely practiced.”¹⁷⁸ They go on to note the following:

In New York City, a program called stop and frisk, which Mayor Bloomberg credits with major crime reductions, allowed police to temporarily detain and search **685,724** people in 2011 without clear evidence of a crime. In a city that is 44% white, **more than 90%** of those stopped were minorities.¹⁷⁹

Worsening matters is the recent spate of what many in the nation consider instances of outright police brutality and senseless murder of African-Americans. Although Officer Michael Slager was charged with murder after the privately videotaped¹⁸⁰ shooting and killing of Walter Scott, an unarmed African-American,¹⁸¹ deplorable and arguably illegal police treatment of African-Americans often goes unpunished. Officer Darren Wilson shot and killed Michael Brown, an African-American, but after a federal investigation, no criminal charges were filed;¹⁸² the resulting public outrage and protest

Those data suggest a justice system hard-wired for punitive racism. The truth is more complex.

William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1970–71 (2008) (footnote omitted). The author goes on to argue that racial disparities in punishment arose not from official racism but from the de-localization of control with respect to criminal justice outcomes. *Id.* at 1972–73.

¹⁷⁷ See Michael Scherer et al., *After Trayvon*, TIME (July 29, 2013), at 28, 30.

¹⁷⁸ *Id.* at 33.

¹⁷⁹ *Id.* at 33–34 (emphasis added).

¹⁸⁰ For commentary regarding the use of cameras by citizens and the police, see Matt Apuzzo & Timothy Williams, *Citizens’ Videos Raise Questions on Police Claims*, N.Y. TIMES, Apr. 9, 2015, at A1, A17 (discussing the impact of videotaping of police by citizens and the issues surrounding the use of body-cameras and other video recording technology by police officers).

¹⁸¹ Frances Robles & Alan Blinder, *A Stark Image of a Shooting Carries Impact*, N.Y. TIMES, Apr. 9, 2015, at A1, A16.

¹⁸² Kevin Johnson & Yamiche Alcindor, *Probe Finds Insufficient Evidence to Charge Darren Wilson*, USA TODAY, Jan. 22, 2015, at 1A.

prompted what some consider a disproportionate police response.¹⁸³ Accosted by police officers, Eric Garner famously pleaded, “I can’t breathe,”¹⁸⁴ and even though the chokehold used by the police officer to subdue him was prohibited by the New York Police Department,¹⁸⁵ the offending officer was not charged in Mr. Garner’s death.¹⁸⁶

At this juncture, fundamental change is needed in the national mindset at both individual and societal levels. Commentators wisely emphasize the following:

One sign that Lawrence’s analysis of racism and discrimination is socially and psychologically apt is the fact that he sees racism as a problem at two interrelated levels of analysis. First, racism is an individually based phenomenon that expresses a personal set of beliefs and behaviors. From this perspective, racism resides in the mind of the individual and manifests itself behaviorally as discrimination. Individuals, in other words, are the carriers and, ultimately, the perpetrators of racism. The eradication of discrimination, it follows, can be achieved only by changing the belief systems of individuals who hold prejudicial attitudes.

Second, Lawrence’s analysis acknowledged that these individual outbreaks of racism are always linked to a broader societal (and therefore ideological) context. He noted, for example, that for members of his generation: ‘We were all victims of our culture’s racism. We had all grown up on Little Black Sambo and Amos and Andy.’ On this conception, racial inequality is a manifestation of something larger, a commonly held belief system that is part of the collective cultural repertoire. In this sense, our racial attitudes are almost inevitably grounded in aspects of the social system, and one nefarious consequence of these attitudes is that, more often than not, they tend to (both consciously and unconsciously) perpetuate the very social system that created the disparities in the first place.¹⁸⁷

¹⁸³ See Kevin Johnson, *DOJ: Lack of Leadership Plagued Ferguson Response*, USA TODAY, Sept. 4, 2015, at 3A (highlight the belief of the Department of Justice that the use of military-style vehicles and weapons (as well as canine teams for crowd control) was inappropriate).

¹⁸⁴ See J. David Goodman & Al Baker, *New York Officer Won’t Be Charged in Chokehold Case*, N.Y. TIMES, Dec. 3, 2015, at A1.

¹⁸⁵ See Melanie Eversley & Mike James, *Outrage After No Charges for NYC Cop*, USA TODAY, Dec. 4, 2014, at A1.

¹⁸⁶ Goodman & Baker, *supra* note 184, at A1 (reporting that Officer Daniel Pantaleo would not be charged in connection with the death of Eric Garner).

¹⁸⁷ Avital Mentovich & John T. Jost, *The Ideological “Id”? System Justification and the Unconscious Perpetuation of Inequality*, 40 CONN. L. REV. 1095, 1099 (2008).

As a nation, we continue to struggle daily with issues of race, and there are many indicators that we are not on the right path and that the stage is set to get worse. Just recently, it was discovered that the citizens of Flint, Michigan (a very poor, majority African-American city) were consuming water with unacceptably high levels of lead, resulting in lead poisoning.¹⁸⁸ One commentator argues that the incident “was a racial crime. If it were happening in another country, we’d call it an ethnic cleansing.”¹⁸⁹ It’s no surprise that evolution may have wired us to like those who are similar to us and to assign complex meaning to things like skin color,¹⁹⁰ but if some commentators are to be believed, our prejudices and stereotypes may regularly be fed by popular media and the like.¹⁹¹ In fact, regarding popular media, recurring issues of race continue to surface. To the considerable ire of many, the most recent slate of Academy Award acting nominees includes no persons of color,¹⁹² the situation was no better during the prior year (during which the hashtag “#oscarsowhite” came to life).¹⁹³ If one can readily assume that prejudices and stereotypes can be enhanced by popular media, then consider how profound and intractable the effect of segregation and discrimination sanctioned by (or, indeed, practiced by) the federal

¹⁸⁸ See Josh Sanburn, *The Toxic Tap*, TIME (Feb. 1, 2016), at 32, 34.

¹⁸⁹ Michael Moore, *This is a Racial Crime*, TIME (Feb. 1, 2016), at 39.

¹⁹⁰ See JEFFREY KLUGER, *Race and the Raging Brain*, in YOUR BRAIN: A USER’S GUIDE 90, 90 (2009) (suggesting that humans evolved in such a way that “[w]e’re wired to like people who look like us” and that “we have a complex brain that allows us to assign complex meanings to [skin] colors. White skin is good, brown skin is worse, and black skin is worst of all—unless, of course, you’re black or brown, in which case things run the other way.”); see also Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1493–94 (2005) (noting that various social cognition studies “demonstrate[] that most of us have implicit biases in the form of negative beliefs (stereotypes) and attitudes (prejudice) against racial minorities.”).

¹⁹¹ See Kang, *supra* note 190, at 1554 (arguing that when we do something like watch the evening news, we may unwittingly take in information which will ultimately alter our perceptions with respect to race). These encounters may fundamentally alter the way we perceive various racial interactions. See also Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1101 (2008) (arguing that “perceptual segregation” exists because, according to empirical evidence, a reasonable minority might perceive discrimination under a given factual scenario when a reasonable non-minority (with the same facts) might not).

¹⁹² See Eliza Berman, *The Unbearable Whiteness of the Oscar Nominations*, TIME (Feb. 1, 2016), at 53. She also points out that “[a]ccording to a 2012 study by the *Los Angeles Times*, Academy membership is 94% white and 77% male.”

¹⁹³ *Id.*

government can be. One can certainly make the rational argument corrective federal measures should have just as much psychological force as the prior bad acts. I would argue that such actions are akin to unringing a psychological bell and that in any event, it is far harder (and takes far more time) to correct a long-established psychosocial message than to amend an existing statute. Such is particularly the case when the corrective measures themselves suffer challenges.¹⁹⁴

As corrective and palliative measures go, embracing the unclean hands theory of exclusion is a very small first step in the right direction. Indeed, it is exceedingly little to ask in light of the harms suffered at the hands of the United States and those individuals it so profoundly influenced over time (and continues to influence). At the same time, the approach effectively renders identical wrongdoer and financial punishment as well as victim and financial beneficiary.

III. SEX¹⁹⁵

A. Historical Harms

Relative to the considerable debate and strife surrounding the pre-Emancipation treatment of blacks, women received little federal attention before the ratification of the Constitution. Although as early as 1777, states had taken steps to prevent women from voting,¹⁹⁶ the Constitution itself was ratified in gender-neutral terms.¹⁹⁷ Abigail Adams, in a letter to her husband, warned that “[i]f particular care and attention is not paid to the ladies [in the

¹⁹⁴ CHRISTIAN, *supra* note 46, at 489 (noting the Justice Department’s backing away from use of mandatory busing and racial quotas). *Id.* at 531 (noting that the Senate and the House passed the Civil Rights Bill of 1990, that it was vetoed by George H.W. Bush (criticizing it as a “quota” bill), and that the Senate failed to override the veto by a single vote). *Id.* at 564 (referring to a study which indicated that indicates that racial isolation is increasing).

¹⁹⁵ Many of the authorities referenced in this Part were collected in and drawn from HOFF, *supra* note 143, and *Timeline of Legal History of Women in the United States*, NAT’L WOMEN’S HISTORY PROJECT, <http://www.nwhp.org/resources/womens-rights-movement/detailed-timeline/> (last visited Feb. 12, 2016) [hereinafter *Timeline*].

¹⁹⁶ *Timeline*, *supra* note 195.

¹⁹⁷ *See, e.g.*, U.S. CONST. art. I, § 2 (stating that “No Person shall be a Representative who shall not have attained to the age of twenty five Years . . .”).

Constitution], we are determined to foment a rebellion, and will not hold ourselves bound by any laws in which we have no voice or representation,”¹⁹⁸ but her protestations were presumably met with guffaws if nothing else.¹⁹⁹ In much the same way that references to “three fifths of all other Persons”²⁰⁰ and “the Importation of such Persons”²⁰¹ are packed with unstated meaning with respect to blacks, the same can be said with respect to references to each “Person”²⁰² destined to be a Representative or Senator; it was simply understood at the time, with no need of verbal clarification, that women need not apply. The ratification of the Fourteenth and Fifteenth Amendments, however, made gender discrimination constitutionally explicit. The Fourteenth Amendment made clear reference to the consequences of interfering with the voting rights of “male inhabitants,”²⁰³ and the Fifteenth Amendment prohibited the denial or abridgment of the right to vote on the basis of “race, color, or previous condition of servitude” but made no mention of sex.²⁰⁴ Soon after the ratification of these amendments, the United States Supreme Court swung into action and thereby endorsed and enforced the prevailing paternalistic order of society.²⁰⁵

During eighteenth and nineteenth century America, women could not vote, hold office, or serve on juries, and they were excluded from most

¹⁹⁸ EVE CARY & KATHLEEN W. PERATIS, *WOMAN AND THE LAW* 1–2 (1977).

¹⁹⁹ *Id.* at 2.

²⁰⁰ U.S. CONST. art. I, § 2, cl. 3.

²⁰¹ U.S. CONST. art. I, § 9, cl. 1.

²⁰² U.S. CONST. art. I, § 2, cl. 2; U.S. CONST. art. I, § 3, cl. 3.

²⁰³ U.S. CONST. amend. XIV, § 2; *see also* Ruth B. Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 3 (1975) (noting that the Constitution used “male” for the first time in the 14th Amendment, causing some concern that its guarantees would have, at best, limited application to women).

²⁰⁴ U.S. CONST. amend. XV, § 1.

²⁰⁵ *See* Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232, 234 (1965) (noting that “the similarity of [racial inequalities and gender inequalities] was not accidental, but originated in the paternalistic order of society”).

educational institutions and professions.²⁰⁶ In *Bradwell v. Illinois*,²⁰⁷ for example, the Court held that the State of Illinois could lawfully bar women from the practice of law because the Privileges and Immunities Clause of the Fourteenth Amendment did not govern or guarantee the right of a person to conduct a specific trade or business.²⁰⁸ For paternalistic emphasis, Justice Bradley famously indicated that a woman's role in society was to be subservient to men and to attend to matters of the home.²⁰⁹ Not long thereafter, in *Strauder v. West Virginia*,²¹⁰ the Court noted in dicta that women could be excluded from serving on juries without running afoul of the Constitution because, according to traditional rationale, they were needed to perform the more important task of tending to the home and the family.²¹¹

Paired comfortably and logically with prevailing notions of romantic paternalism was the well-entrenched reality of coverture. Under that system, on marriage, a woman's legal identity was subsumed by that of her husband, thereby depriving her of the ability, among other things, to enter contracts, make wills, or own property (e.g., money).²¹² Women were also vulnerable to sexual subjugation by their husbands (i.e., forced sexual intercourse) because the definition of rape excluded husbands and wives;²¹³ in the event of divorce, custody of any children was automatically granted to the husband.²¹⁴

In the realm of voting, established notions of paternalism were also present. Some politicians and judges apparently feared that giving women

²⁰⁶ See SUPREME COURT DECISIONS AND WOMEN'S RIGHTS 1 (Clare Cushman ed., 2011) [hereinafter WOMEN'S RIGHTS] (discussing the notion of "romantic paternalism"). The author notes that a number of the U.S. Supreme Court decisions cited were first noted as part of this textual collection.

²⁰⁷ 83 U.S. 130 (1873).

²⁰⁸ See WOMEN'S RIGHTS, *supra* note 206, at 2–4.

²⁰⁹ *Id.* at 6 (highlighting a concurring opinion in *Bradwell v. Illinois* in which the Justice Bradley "defined in the most paternalistic terms a woman's role in society as one that should be subservient to men, relegated to the home").

²¹⁰ 100 U.S. 303, 310 (1880).

²¹¹ See WOMEN'S RIGHTS, *supra* note 206, at 27.

²¹² *Id.* at 1.

²¹³ *Id.*

²¹⁴ *Id.* at 1–2.

the right to vote would somehow harm the family.²¹⁵ Other perspectives were even more offensive. Noted one commentator, “Opposition to women’s suffrage was fierce and vociferous. Anti-suffrage groups claimed that women, by nature, were incapable of making political decisions and would not know how to choose a candidate or cast a ballot.”²¹⁶ Although various states enfranchised women in the late 1800s (e.g., Wyoming, Colorado, Utah, and Idaho), progress in other states (e.g., Washington, California, Arizona, Kansas, Oregon, Montana, Nevada, and New York) was slower. The U.S. Supreme Court’s official position was reflected in *Minor v. Happersett*,²¹⁷ which held that the Privileges and Immunities Clause of the Fourteenth Amendment did not guarantee women the right to vote. Of course, after a hard-fought battle for women’s suffrage, women secured the right to vote with the ratification of the Nineteenth Amendment in 1920,²¹⁸ but that event clearly did not mark the end of their struggle. Poll taxes were often used to discourage women from voting before such taxes were effectively dispatched by the ratification of the 24th Amendment in 1964.²¹⁹

Over time, notions of romantic paternalism began to wither away, but progress was halting and occasionally irrational. In *Muller v. Oregon*,²²⁰ the Court, emphasizing the differences between the sexes, upheld an Oregon law which limited a woman’s work day to ten hours, even though the practical reality was that such protective laws could also harm women by resulting in their displacement by men and by limiting the women’s employment choices (and thus their ability to compete for and assume certain lucrative positions).²²¹ Under Michigan law, women could serve as bartenders, but

²¹⁵ WILLIAM N. ESKRIDGE, JR., *DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861-2003*, at 25–26 (Viking 2008) [hereinafter *DISHONORABLE PASSIONS*].

²¹⁶ See *WOMEN’S RIGHTS*, *supra* note 206, at 14.

²¹⁷ 88 U.S. 162 (1875).

²¹⁸ See *WOMEN’S RIGHTS*, *supra* note 206, at 15. Note that Mississippi did not ratify the Nineteenth Amendment until 1984. Richard Adams, *The 19th Amendment That Gave Women the Right to Vote, 90 Years On*, *THE GUARDIAN* (Aug. 18, 2010), <http://www.theguardian.com/world/richard-adams-blog/2010/aug/18/19th-amendment-women-right-to-vote-90-years>.

²¹⁹ See *WOMEN’S RIGHTS*, *supra* note 206, at 16.

²²⁰ 208 U.S. 412 (1908).

²²¹ *Id.*

under *Goesaert v. Cleary*,²²² this was the case only if they were the wife or daughter of the male owner. And although women began to serve on juries, a given jurisdiction might require that they register in order to be called; the Court upheld a Florida law imposing such a requirement in *Hoyt v. Florida*.²²³

Fortunately, in modern times, current law does not draw many of the aforementioned unnecessary distinctions between men and women.²²⁴ Even in the military context, women have been allowed entry into the service academies since the 1970s,²²⁵ and they now serve in some combat roles. That reality is a far cry from prior policies which excluded women from military service altogether²²⁶ or required that women serve only in certain roles (e.g., nurses, clerks, etc.) or only in all-woman, non-combat units.²²⁷ It is also true that even though considerable progress has been made, the United States bears considerable responsibility for foot-dragging, and there remains a great deal to be done.

B. Remedial Measures

Effectively capturing the longstanding dissonant treatment of women and their fundamental rights, one commentator noted the following:

When the United States was founded, the law made married women the subjects and servants of their husbands. He was the head and master of his wife and children under both common law rules imported from England and civil-law rules from France and Spain. While women were citizens, their subordinate status in the family could not be reconciled with equal and full citizenship rights.²²⁸

The past century has borne witness to remarkable changes with respect to the treatment of women. In addition to considerable progress at the state level, all three branches of the federal government have been active in the effort.

²²² 335 U.S. 464 (1948).

²²³ 368 U.S. 57 (1961).

²²⁴ To get a sense of the extraordinary number of state laws, circa 1950, treating men and women inequitably, see Note, *Sex, Discrimination, and the Constitution*, 2 STAN. L. REV. 691 (1950).

²²⁵ See WOMEN'S RIGHTS, *supra* note 206, at 86.

²²⁶ See *id.* at 96.

²²⁷ See *id.* at 96–97.

²²⁸ *Id.* at 68.

1. Judicial Activity

Although the U.S. Supreme Court and other federal courts have some degree of guilt to bear with respect to prior discriminatory decisions,²²⁹ their work on balance has been considerably remedial and beneficial to the causes of women. The jurisprudence ranges in its diversity from jury duty,²³⁰ benefits,²³¹ and property rights²³² to business community participation,²³³ affirmative action,²³⁴ education,²³⁵ and participation in athletic programs.²³⁶ Perhaps the most notable developments in the Court's women's rights jurisprudence, however, are (i) the establishment of an intermediate level of scrutiny for the use of gender-based classifications; and (ii) the generally active protection of women in the arenas of privacy and employment.

Given the reality of certain biological differences between men and women, courts are not obligated to treat men and women in precisely the

²²⁹ See, e.g., *Hoyt v. Florida*, 368 U.S. 57 (1961) (upholding a Florida law which did not allow the calling of women for jury duty unless they registered for such); *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding a Michigan statute allowing women to be waitresses but not bartenders (except wives and daughters of the bar owner)); *Breedlove v. Suttles*, 302 U.S. 277 (1937) (upholding a statute which appeared to give women a financial incentive to fail to register to vote); *Muller v. Oregon*, 208 U.S. 412 (1908) (limiting the number of hours per day a woman could work because she was a woman).

²³⁰ See, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (holding that the Equal Protection Clause prohibits discrimination in the jury selection context on the basis of sex); *Taylor v. Louisiana*, 419 U.S. 522 (1975) (banning laws limiting jury duty on the basis of gender); *Fay v. New York*, 332 U.S. 261 (1947) (holding that women are just as qualified as men to serve on juries); *Ballard v. United States*, 329 U.S. 187 (1946) (holding that a law excluding women from jury service in federal cases runs afoul of Sixth Amendment guarantees because such a law results in a jury pool that is not a fair cross-section of the community).

²³¹ See, e.g., *Frontiero v. Richardson*, 411 U.S. 677 (1973) (striking down regulation which deprived women of the dependents' benefits enjoyed by men).

²³² See, e.g., *Kirchberg v. Feenstra*, 450 U.S. 455 (1981) (striking down law naming husband as "head and master" and allowing him unilateral control of joint property).

²³³ See, e.g., *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) (holding that sex discrimination by certain business organizations is unconstitutional and thereby opening many previously all-male organizations to women).

²³⁴ See, e.g., *Metro Broad. v. FCC*, 497 U.S. 547 (1990) (holding that affirmative action programs aimed at minority ownership of broadcast licenses were constitutional as benign race-conscious measures and restating its support of *Fullilove v. Klutznick* and its endorsement of set-aside programs).

²³⁵ See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996) (holding that VMI's male-only admissions policy violated the Fourteenth Amendment). *But see, e.g., Mississippi Univ. for Women v.*

same manner in all circumstances. There remains the risk, however, that a given statute or ordinance will seek to discriminate against women for invidious reasons but cite inherent biological differences as justification. The governing intermediate level of scrutiny helps courts differentiate legitimate gender classifications from illegitimate and illegal gender discrimination. Arriving at the intermediate level of scrutiny, however, took at least three Supreme Court opinions, and it may well be the case that a fourth has altered the landscape.

In *Reed v. Reed*,²³⁷ the U.S. Supreme Court struck down a state law that discriminated against women by preferring fathers over mothers when both sought appointment as administrator over a given person's estate. The Court concluded that such legislation violated the Equal Protection Clause, but it did so by applying so-called rational basis scrutiny under which legislation must only be rationally related to some legitimate governmental objective. Moving completely to the other end of the spectrum, the Court (via plurality opinion) applied strict scrutiny in *Frontiero v. Richardson*²³⁸ to invalidate a U.S. Air Force policy that discriminated against women by automatically providing certain benefits to servicemen upon their marriage but offering those same benefits to servicewomen upon their marriage only after they satisfied an entitlement standard.²³⁹ Justifying its approach, the Court reasoned as follows:

Hogan, 458 U.S. 718 (1982) (holding that School of Nursing's policy of denying men admission violated the Equal Protection Clause).

²³⁶ See, e.g., *Cohen v. Brown Univ.*, 991 F.2d 888, 893–94 (1st Cir. 1993) (discussing Title IX's gender discrimination prohibitions in the context of collegiate athletics).

²³⁷ 404 U.S. 71 (1971). For a brief discussion of this case, see *WOMEN'S RIGHTS*, *supra* note 206, at 41–44.

²³⁸ 411 U.S. 677 (1973).

²³⁹ *Id.* Interestingly enough, it used to be the case that Social Security survivors' benefits were not equally available. If a man died, his wife and children automatically received the benefit, but if a woman died, her husband was not entitled to the benefit, notwithstanding the fact that the wife had paid Social Security taxes in the same manner as male workers. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643–44 (1975). The U.S. Supreme Court held that such discrimination was unconstitutional. *Id.* at 653; see also *Califano v. Goldfarb*, 430 U.S. 199 (1977) (declaring unconstitutional a policy under which the survivors' benefits of a deceased husband were payable to his widow, but where such benefits of a deceased wife were payable only if the widower was receiving at least half of his support from his deceased wife). For a more detailed discussion of *Frontiero v. Richardson*, *Weinberger v. Wiesenfeld*, and *Califano v. Goldfarb*, see *WOMEN'S RIGHTS*, *supra* note 206, at 44–49, 70–79.

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. Indeed, this paternalistic attitude became . . . firmly rooted in our national consciousness . . .²⁴⁰

The Court arrived at the classic intermediate scrutiny standard for gender discrimination cases with its decision in *Craig v. Boren*,²⁴¹ under which a measure will survive only if it is “substantially-related” to an “important” governmental objective. That standard held for decades, yet there is room to argue that in *United States v. Virginia*,²⁴² the Court moved closer to strict scrutiny in gender discrimination cases by requiring that discriminatory measures have “exceedingly persuasive justification” in order to survive constitutional muster.²⁴³

In the privacy arena, to the extent fundamental rights are at issue, strict judicial scrutiny is the order of the day. To the credit of the judicial branch, the U.S. Supreme Court has soaring precedent here, benefiting men as well as women. In *Griswold v. Connecticut*,²⁴⁴ the Court struck down a law banning prescription of birth control pills for married couples and soon followed up with *Eisenstadt v. Baird*²⁴⁵ in which it held that privacy included an *unmarried* couple’s right to use birth control. Various U.S. Supreme Court decisions essentially protect a woman’s right to choose in the abortion context,²⁴⁶ but they are all the unmistakable progeny of the landmark, *Roe v. Wade*.²⁴⁷ The Court confirmed in that decision that a woman has the

²⁴⁰ *Frontiero*, 411 U.S. at 684.

²⁴¹ 429 U.S. 190 (1976).

²⁴² 518 U.S. 515 (1996).

²⁴³ *See id.* at 524 (citing *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982)).

²⁴⁴ 381 U.S. 479 (1965).

²⁴⁵ 405 U.S. 438 (1972).

²⁴⁶ *See, e.g.*, *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990) (holding that state law requiring one-parent notification was constitutional); *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (holding two-parent notification law constitutional so long as judicial hearing was available in lieu of parental consent); *Thornburgh v. Am. College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (striking down law viewed as discouraging abortions and risking the lives of women needing late-term abortions).

²⁴⁷ 410 U.S. 113 (1973).

constitutional right to terminate an early pregnancy as a matter of personal privacy.

The Court's employment arena jurisprudence protecting women is voluminous, and an exhaustive review of that body of precedent is beyond the scope of this Article. It bears noting, however, that the Court has been an active participant in eliminating long-entrenched workplace barriers whether relating to basic labor restrictions,²⁴⁸ pregnancy and maternity leave,²⁴⁹ child rearing,²⁵⁰ retirement benefits,²⁵¹ compensation,²⁵² promotions,²⁵³ workplace discrimination,²⁵⁴ affirmative action,²⁵⁵ hostile work environments,²⁵⁶ and

²⁴⁸ See, e.g., *Weeks v. S. Bell*, 408 F.2d 228 (5th Cir. 1969) (defeating restrictive labor laws and thereby opening the door for women to previously all-male jobs).

²⁴⁹ See, e.g., *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (requiring that pregnant women be granted unpaid maternity leave); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (holding that forced maternity leave, where women were deemed unable to work while pregnant, is illegal).

²⁵⁰ See, e.g., *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (banning the practice of not hiring women with pre-school age children).

²⁵¹ See, e.g., *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978) (prohibiting sex discrimination in retirement benefit contribution requirements).

²⁵² See, e.g., *County of Washington v. Gunther*, 452 U.S. 161 (1981) (acknowledging the validity of the comparable worth theory). The ruling confirms that Title VII claims need not be restricted to comparable worth claims and may be based solely on sex discrimination.

²⁵³ See, e.g., *Hishon v. King & Spalding*, 467 U.S. 69 (1984) (involving a successful Title VII claim brought by a woman at a large law firm who was fired after the firm decided not to invite her to become a partner). Years later in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the plaintiff's admission to the partnership was delayed, and she was told, in essence, to walk, talk, and dress in a more feminine manner and to give due regard to the wearing of make-up, the styling of her hair, and the wearing of jewelry. After subsequent proceedings, she prevailed. *See id.*

²⁵⁴ See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that in some alleged instances of intentional discrimination, the employer must establish the existence of legitimate grounds for not hiring or promoting someone); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982) (holding that Title IX bars sex discrimination with respect to employees as well as with respect to students); *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979) (holding that a private right of action was available under Title VI and Title IX for those alleging discrimination by an educational institution).

²⁵⁵ See, e.g., *Johnson v. Santa Clara Cty.*, 480 U.S. 616 (1987) (allowing the consideration of gender in employment decisions even in the absence of proven historical discrimination if manifest imbalances exist).

²⁵⁶ See, e.g., *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 73 (1986) (holding that "a claim of 'hostile environment' sex discrimination is actionable under Title VII.").

sexual harassment.²⁵⁷

2. Congressional and Executive Activity

The U.S. Supreme Court's jurisprudence relating to specific issues regarding women reflects considerable variety, yet when viewed holistically, congressional and executive action in this arena tends to focus on ensuring that women are paid fairly for the work they do and eradicating sex-based discrimination in specific contexts. Thus, the Fair Labor Standards Act ensured that women were protected by minimum wage laws,²⁵⁸ and later the Equal Pay Act directed that equitable wages be paid to men and women doing the same work. Title VII of the Civil Rights Act of 1964 (hereinafter Title VII) is, of course, central, given that it prohibits discrimination in employment on the basis of sex²⁵⁹ or various other specific traits/classifications²⁶⁰ and created the Equal Employment Opportunity Commission.²⁶¹ Indeed, it was only after passage of Title VII that legislation limiting women's work hours, work times, and their ability to engage in bartending, mining, and jobs requiring heavy lifting were successfully challenged as discriminatory and not protective.²⁶²

Other significant legislation addresses sex discrimination by educational institutions receiving federal funds,²⁶³ credit access,²⁶⁴ pregnancy

²⁵⁷ See, e.g., *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993) (allowing the assertion of a sex harassment claim, even in the absence of proven psychological injury).

²⁵⁸ See *WOMEN'S RIGHTS*, *supra* note 206, at 21 (noting that the Fair Labor Standards Act of 1938 established a national minimum wage for all workers and mandated the payment of overtime for work in excess of eight hours in a given day).

²⁵⁹ For a discussion of the rather fortuitous manner in which discrimination on the basis of sex was added to Title VII of the Civil Rights Act of 1964, see *WOMEN'S RIGHTS*, *supra* note 206, at 119.

²⁶⁰ See *HOFF*, *supra* note 143, at 236. Title VII of the Civil Rights Act of 1964 covers three different types of employment discrimination: "disparate treatment," facial," and "discriminatory impact." See *WOMEN'S RIGHTS*, *supra* note 206, at 120–21. Depending on the prevailing facts and circumstances, the employment practice may be deemed to violate Title VII. See *id.*

²⁶¹ See *WOMEN'S RIGHTS*, *supra* note 206, at 119.

²⁶² See *id.* at 21.

²⁶³ See generally Title IX, Education Amendments of 1972, 20 U.S.C. § 1681(a) (2006).

²⁶⁴ See generally Equal Credit Opportunity Act, 15 U.S.C. § 1691 (1976) (prohibiting discrimination against women in the extension of credit).

discrimination,²⁶⁵ retirement,²⁶⁶ child support,²⁶⁷ gender equity in education,²⁶⁸ and violence against women.²⁶⁹ To its credit, Congress also passed the Equal Rights Amendment in 1972 and sent it to the states for ratification,²⁷⁰ but the amendment failed to secure the necessary state approvals. Executive orders have, at least, prohibited gender discrimination with respect to government contracts over a certain dollar amount,²⁷¹ and federal agencies have been required to establish and maintain affirmative action programs.²⁷² Executive appointments have also put a number of women on the federal bench, including U.S. Supreme Court Justices Sandra Day O'Connor, Ruth Bader Ginsburg, Sonia Maria Sotomayor, and Elena Kagan.²⁷³

C. Persistence of Negative Impact

As recently proposed, the Equal Rights Amendment speaks in basic and clear terms:

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

²⁶⁵ See generally Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2006) (banning employment discrimination against pregnant women).

²⁶⁶ See generally Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426.

²⁶⁷ See generally Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305.

²⁶⁸ See generally Gender Equity in Education Amendment of 1993, S. 1465, 103d Cong. (1993).

²⁶⁹ See generally Violence Against Women Act of 2000, H.R. REP. NO. 106-891 (2000) (providing various protections and resources for raped, battered, and abused women).

²⁷⁰ See HOFF, *supra* note 143, at 397.

²⁷¹ Executive Order 11246 failed to prohibit sex discrimination, but this oversight was later corrected by Executive Order 11375. See HOFF, *supra* note 143, at 395–96.

²⁷² See *id.* at 396.

²⁷³ See Sanford Levinson, *Supreme Court of the United States*, 18 WORLD BOOK ENCYCLOPEDIA 998, 1000 (World Book 2013).

Section 3. This amendment shall take effect two years after the date of ratification.²⁷⁴

Although much progress has been made with respect to the equal treatment of women, the nation has yet to make a firm constitutional commitment to the equal treatment of women. In fact, it has affirmatively refused to do so. Twice. In 1972, Congress passed the Equal Rights Amendment, but it failed to secure ratification by the states, even after the ratification deadline was extended. When the amendment was introduced in Congress again in 1983, it failed to secure a two-thirds vote in the House of Representatives. Both failures are deeply perplexing given ready congressional approval of laws prohibiting discrimination on the basis of sex. Perhaps they reflect the fact that certain segments of society (or at least those in certain geographic areas) refuse to acknowledge the fundamental equality of men and women. No logical explanation exists for such a mindset, but several facts are beyond conjecture. With the ratification of the Fourteenth and Fifteenth Amendments, the United States made gender discrimination a part of its formative documents, and longstanding U.S. Supreme Court precedent from the era stamped a federal imprimatur on notions of romantic paternalism. Accordingly, its hands are manifestly unclean with respect to the status of women in this society.

Women regularly encounter discrimination in the workplace. In fact, several household name companies have paid millions of dollars because of their historical treatment of women and minorities. Mitsubishi paid eight million dollars to settle an EEOC suit alleging sexual harassment in 1998, CBS agreed to pay eight million dollars to settle sex discrimination suit brought on behalf of 200 women in 2000, and after a litigation battle, the State Department was found guilty of sex discrimination in 1989. Thus, even after substantial federal activity both in the courts and via legislation, women still suffer discrimination and mistreatment in the workplace. Those challenges aside, women have also suffered judicial setbacks along with various victories achieved.

²⁷⁴ H.R.J. Res. 208, 92d Cong. (1971); S.J. Res. 8, 92d Cong. (1971).

With respect to abortion rights, *Beal v. Doe*²⁷⁵ held that state funds need not be used to fund abortions, *Harris v. McRae*²⁷⁶ exempted medically necessary abortions from Medicaid coverage, and *Webster v. Reproductive Health Services*²⁷⁷ allowed states to refuse the use of public funds for abortions, including the use of public hospitals. Setbacks have also been experienced in other cases.²⁷⁸

Although one cannot maintain that the United States' treatment of women parallels the treatment of blacks, it remains true that the United States, per the face of the Constitution itself, is responsible for overt sex discrimination. Accordingly, it shoulders some measure of blame for a national mindset under which women continue to suffer discrimination. Without question, remedial measures have substantially advanced the wheels of progress. The elimination of workplace barriers has allowed women to rise to leadership positions in business; Abigail Johnson, to take a single example, was recently made Chief Executive Officer of Fidelity Investments, making her, at the time, the "wealthiest and most powerful woman in finance."²⁷⁹ Opening the political arena to women has made former Secretary of State Hillary Rodham Clinton a truly formidable candidate for President of the United States.²⁸⁰ These successes notwithstanding, time has yet to undo considerable historical damage. Embracing the unclean hands theory of

²⁷⁵ 432 U.S. 438 (1977).

²⁷⁶ 448 U.S. 297 (1980).

²⁷⁷ 492 U.S. 490 (1989).

²⁷⁸ See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (holding that minority set-aside ordinance was unconstitutional); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (reversing *Griggs* and thereby requiring that the burden of proof fall on employees with respect to whether testing having a disparate impact on minorities or women is a business necessity); *Wimberly v. Labor and Indus. Dep't*, 479 U.S. 511 (1987) (ruling against woman requesting unemployment benefits after not receiving her old job back after maternity leave); *Personnel Admin. of Mass. v. Feeney*, 442 U.S. 256 (1979) (upholding preference for veterans in civil-service jobs, despite historical limit on women in the military); *Geduldig v. Aiello*, 417 U.S. 484 (1974) (holding that state program denying pregnancy-related disability benefits was constitutional); *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988) (holding that apparent disparities with respect to rank and salary (men v. women) were not the result of gender discrimination by Sears).

²⁷⁹ John Waggoner, *Abby Takes Charge at Fidelity*, USA TODAY, Oct. 14, 2014, at 1B.

²⁸⁰ See Joe Klein, *Do You See Her Now?*, TIME (Feb. 15, 2016), at 26. As this Article goes to press, Secretary Clinton is the presumptive Democratic nominee for President of the United States. See http://www.nytimes.com/2016/06/07/politics/hillary-clinton-presidential-race.html?_r=0.

exclusion is, once again, a very small price to pay for prior and ongoing harms regularly visited upon women here in the United States.

IV. SEXUAL ORIENTATION²⁸¹

A. Historical Harms

1. Harms Flowing from the Several States and the District of Columbia

In his ongoing attempt to weaken the Catholic Church by usurping ecclesiastical court authority and jurisdiction over “sins against God,” Henry VIII made the “detestable and abominable Vice of Buggery” a capital offense against the English state in 1533.²⁸² The crime soon appeared in handbooks for justices of the peace in England and remained a part of the legal framework for hundreds of years.²⁸³ The laws in colonial America naturally reflected substantial English influence if not wholesale adoption of identical provisions. Thus, for example, a handbook written for Virginia justices of the peace provided, in pertinent part, as follows:

Buggery is a detestable and abominable Sin, Among Christians not to be named, committed by carnal Knowledge, against the Ordinances of the Creator, and Order of Nature, by Mankind with Mankind, or with Brute Beast, or with Womankind with Brute Beast. 3 Inst. 58.

By the Statute of 25, Hen. VIII. Chap. 6, Buggery committed with Mankind, or Beast, is made Felony without Benefit of Clergy [punishable by death on the first offense] . . .²⁸⁴

Interestingly enough, both the English and the colonial Virginians considered homosexual conduct rare in their respective spheres but, for some bewildering reason, considered it common in Italy.²⁸⁵ Indeed, with the rise of homosexual conduct in eighteenth century England, blame was assigned to

²⁸¹ This section of the paper draws generously from a list of historical sources referenced in WALTER L. WILLIAMS & YOLANDA RETTER, *GAY AND LESBIAN RIGHTS IN THE UNITED STATES* (2003).

²⁸² See Robert Oaks, *Perceptions of Homosexuality by Justices of the Peace in Colonial Virginia*, 5 J. HOMOSEXUALITY (SPECIAL ISSUE) 36 (1980).

²⁸³ See *id.* at 36–37.

²⁸⁴ See *id.* at 37.

²⁸⁵ See *id.* at 38.

“the drinking of tea and the pernicious influence of Italian opera.”²⁸⁶ The apparent rarity of homosexual conduct in the colonies notwithstanding, the Laws of Yale College (circa 1787) opted to err on the side of explicit warning with respect to certain forms of student sexual conduct and dress, among other things. The rules provided, in pertinent part, as follows:

If any Scholar fhall be guilty of Blafphemy, Curfing, Robbery, Fornication, Forgery, or any fuch atrocious Crime, he fhall be immediately expelled.²⁸⁷

* * *

If any Scholar fhall be guilty of a profane Oath or Vow, of profaning the Name, Word, or Ordinances of God; of contemptuous refractory Carriage towards his Superiors; of Fighting, Striking, Quarreling, Challenging, turbulent Words or Behaviour, Drunkennefs, Lafcivioufnefs, wearing Womens’ Apparel, Fraud, Injuftice, Idlenefs, Lying, Defamation, or any fuch like Crime, he fhall be punished by Fine, Admonition, Ruftication, or even Expulfion, as the Nature and Circumftances of the Crime may require.²⁸⁸

Although the laws in colonial America provided harsh (though rarely-enforced)²⁸⁹ punishment for “buggery,” “sodomy,” the “crime against nature,” and the like, these terms were not well-defined as an initial matter.²⁹⁰ In the mid-seventeenth century, the colony of New Haven “prohibited under pain of death men lying with men, women lying with women, masturbation, and any other ‘carnal knowledge,’”²⁹¹ but it was only in the late 1800s that sodomy was defined in many jurisdictions to include fellatio, even though oral sex was not originally classified as sodomy.²⁹² Gradually and somewhat haphazardly, the parameters of prohibited conduct in the form of “sodomy” and the like became more discernable, and although sodomy would eventually be transitioned to a non-capital offense, it would take decades

²⁸⁶ *Id.*

²⁸⁷ MARTIN GRIFFIN, *THE UNCOMMONPLACE BOOK OF MARTIN GRIFFIN* 6 (1988) (quoting the LAWS OF YALE COLLEGE, 1787); *see generally* GEORGE W. PIERSON, *YALE: A SHORT HISTORY* 41 (2d ed. 1976), available at <http://www.library.yale.edu/mssa/YHO/Piersons/collegeSystem.html>.

²⁸⁸ GRIFFIN, *supra* note 287, at 6.

²⁸⁹ *See* DISHONORABLE PASSIONS, *supra* note 215, at 18.

²⁹⁰ *See id.* at 16 (stating that “[f]rom colonial days up until the nineteenth century, American law decreed sodomy, buggery, or ‘the crime against nature’ a capital crime.”).

²⁹¹ *Id.* at 18.

²⁹² *See id.* at 50.

before sodomy itself was decriminalized. Before then, criminal sanction, barbaric treatment,²⁹³ and severe punishment at the behest of the several states and the federal government remained the order of the day.

Sodomy became a crime in the District of Columbia per congressional mandate with the passage of the Miller Act in 1948,²⁹⁴ and as of 1951, consensual sodomy was punishable in the United States by up to twenty years in prison in most states and over twenty years in at least ten.²⁹⁵ California, in fact, took the step of amending its habitual offender law to include sodomy, making it possible for an individual to receive an automatic life sentence for a second offense.²⁹⁶ As time passed, aggressive policing and discouraging of homosexual conduct continued. In 1953, for example, Congress decided to go a step further by amending the indecent exposure law of the District of Columbia to criminalize any “‘obscene or indecent’ exposure, sexual proposal, or act anywhere in the District,” thus making it possible to prosecute both private homosexual acts as well as private *solicitation* of homosexual conduct.²⁹⁷ The Miller Act also allowed the civil commitment of so-called “sexual psychopaths” even *without* a criminal conviction or charge,²⁹⁸ although it was customary (elsewhere) to require civil commitment of such individuals only if they were convicted of sexual offenses (occasionally, but not always, limited to offenses against children).²⁹⁹ Beyond criminal sanction and civil commitment, there were efforts, in essence, to effect penalty for the mere status of being homosexual. In the 1950s and 1960s, there were state-level measures to effect the removal of public school teachers, public school professors, and college students

²⁹³ In the early 1900s, California law provided for the sterilization of those exhibiting moral or sexual perversion, and by 1930, roughly 7,000 individuals had suffered sterilization, including many prostitutes and homosexuals. *See id.* at 55.

²⁹⁴ Note also that under The Miller Act, “a single act of sodomy could lead to ten years in prison, twenty years if an adult committed the crime with a minor (under age sixteen.”) *Id.* at 91.

²⁹⁵ *See id.* at 93.

²⁹⁶ *See id.* at 91.

²⁹⁷ *See id.* at 94.

²⁹⁸ *Id.* at 95.

²⁹⁹ *See id.* at 94–95.

because of their homosexuality,³⁰⁰ and any number of professionals stood to lose their licenses to practice and/or be disciplined for “gross immorality” if they were convicted of a “crime involving moral turpitude.”³⁰¹ To attempt and secure enforcement of these measures, any number of aggressive tactics were employed during this era. “Vice” or “Morals” squads were often used to flush out and punish homosexuals by the use of police stakeouts of homosexual hangouts, the use of decoys/sting operations to prompt sexual solicitation, and police raids of gay/lesbian establishments.³⁰²

2. Harms Flowing from the Federal Government

Although historically the states played a significant role in the regulation and punishment of homosexual conduct, the policies, practices, and edicts of each branch of the federal government worked hand in hand with those of the several states, the clear and common goal being the suppression of homosexual conduct and the harsh punishment of those actually participating in it or demonstrating the proclivity to do so. Relative to its regular pronouncements regarding race, and sex, the U.S. Supreme Court has had (until very recently) little occasion to address issues touching directly on sexual orientation, but the Court has certainly not been silent. In the late 1980s, the Court confirmed the constitutionality of a Georgia statute criminalizing consensual homosexual sodomy in *Bowers v. Hardwick*,³⁰³ and only a few years later, with its decision in *Boy Scouts of America v. Dale*,³⁰⁴ the Court allowed the exclusion of an avowed homosexual on First Amendment grounds. Years later when the issue of gay marriage reached the Court, it opted for delay and deliberate speed by refusing, for the moment at least, to do anything.³⁰⁵ Though there are those who would certainly like to ban gay marriage explicitly at the highest possible level, Congress has yet to amend the Constitution so as to incorporate any language, which specifically

³⁰⁰ *See id.* at 103–04.

³⁰¹ *See id.* at 104.

³⁰² *See id.* at 96–97.

³⁰³ 478 U.S. 186 (1986).

³⁰⁴ 530 U.S. 640 (2000).

³⁰⁵ *See* Richard Wolf, *High Court Steps Aside*, USA TODAY, Oct. 7, 2014, at A1 (reporting the U.S. Supreme Court’s decision to allow rulings from lower courts striking down same-sex marriage bans to stand rather than issuing any ruling).

touches on the issue of sexual orientation. Congress has, however, taken steps which unmistakably soil the hands of the United States with sexual orientation discrimination.

In 1996, the Senate voted on a bill which would have banned discrimination in the workplace on the basis of sexual orientation.³⁰⁶ By a single vote, the bill failed to pass.³⁰⁷ Other legislation, with a decidedly heterosexist slant, managed, however, to make it through, namely the Defense of Marriage Act (“DOMA”), which restricted the definition of “marriage” to a union of one man and one woman.³⁰⁸ Accordingly a host of privileges and conveniences enjoyed by opposite-sex married couples³⁰⁹ were expressly denied to those in same-sex unions. With DOMA alone, the United States re-identified itself as a stalwart enemy of equality on the sexual orientation front. History reveals that the federal government’s negative treatment of homosexuals extends far beyond the matrimonial context³¹⁰ and well pre-dates the passage of DOMA.

By executive order, President Eisenhower required that government workers guilty of “sexual perversion” be fired.³¹¹ In fact, it has been noted that the Eisenhower Administration was relatively more anti-homosexual than the predecessor administration and his executive order was, at least

³⁰⁶ See WILLIAMS & RETTER, *supra* note 281, at xlii; see also Margaret M. Russell, *Lesbian, Gay and Bisexual Rights and “The Civil Rights Agenda,”* 1 AFR.-AM. L. & POL’Y REP. 33 (1994) (discussing the Employment Non-Discrimination Act).

³⁰⁷ See WILLIAMS & RETTER, *supra* note 281, at xlii.

³⁰⁸ Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

³⁰⁹ See generally Anthony C. Infanti, *Inequitable Administration: Documenting Family for Tax Purposes*, 22 COLUM. J. GENDER & L. 329 (2011) (highlighting the fact that a host of endemic privileges along a host of axes including race, ethnicity, marital status, sexual orientation, and class have influenced Code-based and administrative provisions to the notable detriment of those outside the endemic privilege groups); see also Anthony C. Infanti, *Special Concerns of Lesbian and Gay Couples*, in AMERICAN BAR ASSOCIATION, THE ABA PRACTICAL GUIDE TO ESTATE PLANNING 417 (Jay A. Soled ed., 2011) (highlighting the need for lesbian and gay couples to plan their estates and other affairs because laws governing intestate succession and other critical matters (e.g., health care decision-making) often fail to protect (or may be hostile to) the interests of those not in heterosexual unions).

³¹⁰ See Anthony C. Infanti, *Bringing Sexual Orientation and Gender Identity into the Tax Classroom*, 59 J. LEGAL. EDUC. 3 (2009) (discussing various areas in which the tax laws discriminate on the basis of sexual orientation).

³¹¹ See WILLIAMS & RETTER, *supra* note 281, at xxxvii.

ostensibly, part of the so-called federal loyalty-security program.³¹² During the 1940s, 1950s, and 1960s, the federal government sought to identify and investigate homosexuals in order that they be excluded from civil and military government service or terminated from such service.³¹³ One commentator noted that although Communists were the supposed targets of heightened sensitivity/hostility during the McCarthy era, the real and ultimate victims were homosexuals.³¹⁴ From January of 1947 to April of 1950, there was administrative investigation of 192 cases of “sexual perversion” in civil government; most victims were fired or resigned.³¹⁵ The program was aggressive and comprehensive. In 1954, the U.S. Post Office confiscated *ONE Magazine* deeming it to be “obscene, lewd, lascivious and filthy,”³¹⁶ although in the end, the U.S. Post Office was sued and lost.³¹⁷

Even before the issuance of Eisenhower’s executive order, military regulations issued in 1943 barred service by homosexuals.³¹⁸ The dire need for manpower during World War II was not enough to relax the rule.³¹⁹ Army doctors examined approximately eighteen million draft registrants, and rejected some five and half million on medical, dental, or moral grounds (i.e., because they failed to respond properly to the question “Do you like girls?”)³²⁰ After the war, the military purges continued with over 3,200 discharges from 1947–50³²¹ and between 2,000 and 5,000 persons form

³¹² See DISHONORABLE PASSIONS, *supra* note 215, at 102.

³¹³ See *id.* at 100–02.

³¹⁴ See *id.* at 102.

³¹⁵ *Id.* at 100.

³¹⁶ See DISHONORABLE PASSIONS, *supra* note 215, at 26 (noting that the Comstock Act of 1873 made it illegal to send obscene material through the federal mail).

³¹⁷ See WILLIAMS & RETTER, *supra* note 281, at xxxviii; see also Tony Mauro, *High Court’s First Gay-Issues Ruling*, NAT’L L.J. (Dec. 1, 2014) (discussing *One Inc. v. Olesen*, a case in which the U.S. Supreme Court held that a Los Angeles-based magazine did not constitute “obscenity” and should be delivered by the U.S. Post Office).

³¹⁸ See WILLIAMS & RETTER, *supra* note 281, at xxxvii.

³¹⁹ See UNITED STATES GENERAL ACCOUNTING OFFICE, DEFENSE FORCE MANAGEMENT: DOD’S POLICY ON HOMOSEXUALITY 2 (1992) [hereinafter DOD POLICY] (indicating that since the beginning of World War II, the United States military had formal policies prohibiting homosexuals from serving).

³²⁰ THE WAR: EPISODE ONE: “A NECESSARY WAR” (PBS Home Video 2007).

³²¹ See DISHONORABLE PASSIONS, *supra* note 215, at 100.

1950–65.³²² Anecdotally, at least one serviceman established that he was inducted into the Army in 1967 even though he truthfully noted that he had homosexual tendencies.³²³ He was of the belief, however, that he was allowed to enlist, despite his avowed homosexual tendencies, because he was black and would likely be a Vietnam War fatality.³²⁴

Situational anomalies aside, during fiscal years 1980–90, the military separated approximately 17,000 individuals under the category “homosexuality,”³²⁵ and “[n]o determination that their behavior had adversely affected the ability of the military services to perform their missions was required.”³²⁶ For the military, mere homosexual status was enough to merit exclusion, notwithstanding exemplary service records³²⁷ and veteran status.³²⁸ Department of Defense directives provided as follows:

Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission. The presence of such members adversely affects the ability of the Military Services to maintain discipline, good order, and morale; to foster mutual trust and confidence among servicemembers [sic]; to ensure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of service members who frequently must live and work under close conditions affording minimal privacy;

³²² See *id.* at 101.

³²³ William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607, 611 (1994) [hereinafter *Gaylegal Narratives*].

³²⁴ See *id.* at 618.

³²⁵ See DOD POLICY, *supra* note 319, at 4.

³²⁶ *Id.* Note further that several federal courts held the DOD’s exclusionary policy to be constitutional as rationally related to some legitimate governmental interest without requiring that the DOD provide scientific evidence that its policy was legitimate. See *id.* at 28. See also *Dronenburg v. Zech*, 741 F.2d 1388, *reh’g den.*, 746 F.2d 1579 (D.C. Cir. 1984) (applying a rational basis standard of review with respect to asserted constitutional claims and noting that common sense and experience negated the need for scientific proof to establish the legitimacy of state interests).

³²⁷ See *id.* at 16–17 (indicating that approximately 17,000 service men and women had been discharged for “homosexuality” between fiscal years 1980 and 1990 and citing specific examples of those discharged despite exemplary service records).

³²⁸ See *id.*

to recruit and retain members of the Military Services; to maintain public acceptability of military service; and to prevent breaches of security.³²⁹

Those in the psychiatric and psychological professions considered the DOD's policy to be "factually unsupported, unfair, and counterproductive."³³⁰ What is more, the government's own investigation confirms this view. In 1957, the Navy commissioned a study to investigate military homosexuality.³³¹ The work product, the Crittenden Report, found no sound basis for barring homosexuals from military service.³³² Not surprisingly, the Secretary of Defense and the Chairman of the Joint Chiefs of Staff eventually found themselves backing away from security-based justifications in testimony before the House Budget Committee in the early 1990s, but they continued to press the need for the policy "to maintain good order and discipline."³³³ The rationale was thin. Even though police officers and firemen need rigid adherence to protocol, discipline, and the like, a number of police and fire departments had adopted policies prohibiting sexual orientation discrimination without adverse consequence since the 1970s.³³⁴ As it turns out, having gays and lesbians in the military was not disruptive (i.e., did not destroy unit cohesion and morale); rather, it was the military's exclusionary policy that caused disruption.³³⁵ Similar "disruption" arguments were advanced in an effort to prevent racial integration of the armed forces, even though President Truman's military desegregation mandate proceeded without incident.³³⁶ It only worsens matters in the military exclusion context to note that as of 1992, the approximate cost of recruiting and training a new service member to replace one discharged on the basis of homosexuality was \$28,226 for each enlisted troop and \$120,772

³²⁹ *Id.* at 11.

³³⁰ *Id.* at 3.

³³¹ See WILLIAMS & RETTER, *supra* note 281, at xxxviii.

³³² See *id.*

³³³ DOD POLICY, *supra* note 319, at 5.

³³⁴ See *id.* at 6.

³³⁵ See *Gaylegal Narratives*, *supra* note 323, at 616.

³³⁶ See *id.* at 619 n.57.

for each officer.³³⁷ These financial realities and aggregate statistics aside, it is critically important to bear in mind and appreciate the gross injustice visited on the lives of each of these dedicated public servants and the courage they summoned to fight back.

Leonard P. Matlovich, a former Technical Sergeant in the Air Force, admitted his sexual orientation and the fact that he had engaged in homosexual activity.³³⁸ Although he was a twelve-year veteran who had served three tours of duty in Vietnam³³⁹ and was the recipient of a Bronze Star and a Purple Heart, he was administratively processed for separation from the Air Force after his revelations.³⁴⁰ Subsequently, Matlovich was honorably discharged, although he waged a legal battle to avoid separation.³⁴¹ The litigation ended after Matlovich and the Air Force agreed to a court-approved settlement.³⁴²

Perry Watkins, a former Staff Sergeant in the Army, was completely candid about his homosexuality from the very start of his military career.³⁴³ In fact, he reenlisted three times and served tours of duty in both Vietnam and Korea.³⁴⁴ Although he was consistently rated an outstanding soldier, he eventually faced discharge under regulations mandating the separation of all homosexuals.³⁴⁵ Time and again, the federal courts ruled in his favor, noting that Watkins' candor regarding his sexual orientation estopped the government from relying on its mandatory discharge regulations.³⁴⁶ Ultimately, the U.S. Supreme Court denied the Army's petition for review,

³³⁷ See DOD POLICY, *supra* note 319, at 4.

³³⁸ See *id.* at 46.

³³⁹ See *The Sexes: The Sergeant v. The Air Force*, TIME (Sept. 8, 1975), at 34 (noting that Sergeant Matlovich had served three tours of duty in Vietnam).

³⁴⁰ See DOD POLICY, *supra* note 319, at 46.

³⁴¹ See *id.*

³⁴² See *id.*

³⁴³ See *id.* at 47.

³⁴⁴ See *id.*

³⁴⁵ See *id.*

³⁴⁶ See *id.* at 47–48.

and Watkins retired after having been promoted to the rank of sergeant first class and receiving appropriate monetary compensation.³⁴⁷

Joseph C. Steffan, a former midshipman, was only a few weeks from graduating first in his class at the U.S. Naval Academy when he was administratively processed for separation due to his admission that he was a homosexual. Although he resigned with an honorable discharge, he challenged the Department of Defense's policy in court and sought reinstatement, his Bachelor of Science degree, and commission as an ensign. Steffan refused to answer deposition questions concerning his participation in homosexual activities while at the Academy, prompting several procedural battles. Steffan managed to secure several legal victories, but ultimately, the U.S. Court of Appeals for the D.C. Circuit (sitting en banc) concluded that the military's ban was constitutional and thus that Steffan's expulsion from the Naval Academy was justifiable.³⁴⁸

Over time, the government's outright ban on gays in the military morphed into the infamous "Don't Ask, Don't Tell" policy, but even that measure brought about thousands of dismissals,³⁴⁹ and it was only during the Obama Administration that the military's ban on gays terminated. But the federal government's prior acts, whether from the executive, legislative, or judicial branch, played a major role in shaping public attitudes. In the same way that collective action sought to preserve the ability to discriminate on the basis of race in prior years,³⁵⁰ collective anti-gay measures are as common today as they were in the recent past. Colorado's [Constitutional]

³⁴⁷ See *id.* at 48.

³⁴⁸ See *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994).

³⁴⁹ Over 10,000 service members have been dismissed under the "Don't Ask, Don't Tell" policy. See Gregg Zoroya, *Top Military Officer Backs Repeal of "Don't Ask, Don't Tell,"* USA TODAY, Feb. 3, 2010, at 6A (indicating that the Chairman of the Joint Chiefs of Staff opposes the policy because it forces service members to lie).

³⁵⁰ See Russell, *supra* note 306, at 56 (discussing California's Proposition Fourteen, which would have had the effect of repealing relevant state prohibitions and permitting racial discrimination in housing); see also *id.* at 57 ("Proposition 14 accorded state support and ratification to private biases such that racial discriminators could now invoke the mantle of constitutional authority—and not simply private choice—in support of their biased decision-making."). The U.S. Supreme Court invalidated Proposition Fourteen in *Reitman v. Mulkey*, 387 U.S. 369 (1967). The Court later emphasized that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

Amendment Two is a well-known example. Prior to the passage of Amendment Two by voters, the State of Colorado and various cities within the jurisdiction had adopted a host of measures prohibiting discrimination (in various contexts) on the basis of sexual orientation.³⁵¹ By referendum, Colorado voters approved Amendment Two, which effectively repealed existing anti-discrimination laws and measures protecting lesbians, gays, and bisexuals and prohibited the future adoption of such protections.³⁵² Colorado was not the only jurisdiction in which analogous repeal efforts took root,³⁵³ but voters in at least some other jurisdictions rejected the attempt,³⁵⁴ even the efforts in Colorado were stymied. A Colorado state trial court entered a permanent injunction against Amendment Two because the approved amendment violated the Equal Protection Clause of the Fourteenth Amendment by depriving lesbians, gays, and bisexuals from participating in the political process.³⁵⁵ In recent years, the collective action battleground shifted to the same-sex marriage arena. In California, voters approved Proposition Eight, briefly restricting the definition of marriage to one man and one woman. With the establishment of same-sex marriage as a fundamental right in *Obergefell v. Hodges*,³⁵⁶ Proposition Eight and similar measures, statutes, etc. were swept aside, but in some circles, that development merely heightened the fervor for enactment of religious liberty measures.³⁵⁷

³⁵¹ See Russell, *supra* note 306, at 42.

³⁵² See *id.* at 33–34.

³⁵³ See Judith M. Hedgpeth, *Employment Discrimination Law and the Rights of Gay Persons*, 5 J. HOMOSEXUALITY (SPECIAL ISSUE) 68 (1980) (noting the passage of local ordinances protecting the employment, housing, and public accommodations rights of homosexuals and the attempts in various jurisdictions to repeal various protections).

³⁵⁴ See Russell, *supra* note 306, at 46 (indicating that Oregon Measure Nine was defeated).

³⁵⁵ See *id.* at 33–34.

³⁵⁶ 135 S. Ct. 2584 (2015).

³⁵⁷ See generally Aaron G. Sheinin & Kristina Torres, 'Religious Liberty' Bills Gain Momentum in Georgia, ATLANTA JOURNAL-CONSTITUTION (Feb. 9, 2016), <http://www.myajc.com/news/news/state-regional-govt-politics/religious-liberty-bills-gain-momentum-in-georgia/nqMct/>.

B. Remedial Measures

Progress with respect to the treatment of sexual minorities has been made on several fronts over time, albeit somewhat gradually in most instances. Remedial measures rarely, however, self-generate. Instead, change frequently starts with one or a few individuals whose personal experiences³⁵⁸ often lead to and can ultimately have a profound impact on the evolution of prevailing public policy and law. Scholars have noted and discussed multiple strategies for effecting change. In his seminal work on the importance and impact of personal gaylegal narratives, Professor Eskridge discusses several approaches to modifying opinions and bringing about lasting change, including conservative pragmatism and prophetic pragmatism.³⁵⁹ He emphasizes that gaylegal narratives have value, even in a conservative pragmatist framework (i.e., persuasive yet accommodating), because they provide information useful in contradicting preconceived notions, in evaluating policies on the basis of concrete cases, and in exposing parallel fallacies.³⁶⁰ He goes on to note that in a prophetic pragmatist framework (i.e., persuasive yet non-accommodating), gaylegal narratives have value in that they seek to modify opinion in a more aggressive manner relative to (accommodating) conservative pragmatism.³⁶¹ Ultimately, however, he gives full endorsement to a social constructionist approach whereby one employs defiance and agitation as a means of attaining lasting change. Gaylegal narratives, he reasons, may be most useful in that context because the personal narratives help galvanize those harmed by socially constructed dividing practices.³⁶² Describing law as a “redescription” of a just and protective Constitution, he notes the value of the gaylegal narrative as follows: “The more people for whom these stories resonate, and the more intensely and openly they express their feelings, the greater the chance that a minority redescription will displace what the majority had previously considered to be law.”³⁶³

Logically, it would appear that a social constructionist approach would enjoy an enhanced likelihood of success if those agitating for change could

³⁵⁸ See *Gaylegal Narratives*, *supra* note 323, at 609–10 (lamenting the virtual disregard of gaylegal narratives by Professors Farber and Sherry in their discussion and analysis of “outsider” scholarship).

³⁵⁹ See *Gaylegal Narratives*, *supra* note 323, at 610–11.

³⁶⁰ See *id.* at 614–17.

easily draw substantive parallels between what they seek and what others have (often successfully) sought in the past by employing such tactics. But it is not always easy to attempt to travel the same road. At the advent of the struggle for gay rights, there was debate over whether the struggle for rights with respect to sexual minorities should be included in the larger struggle for civil rights,³⁶⁴ some were hostile to the notion of gay rights as civil rights because sexual orientation was viewed not a matter of immutable status but conduct or behavior (and thus rightly subject to social opprobrium).³⁶⁵ Indeed, attempts to analogize race and sexual orientation in a civil rights struggle context gave rise to animosity and “controversy bordering on enmity,”³⁶⁶ due, at least in part, to the fear that arguments attempting to analogize race and sexual orientation would ultimately lead to diminished attention to race discrimination.³⁶⁷ The adamant refusal of others to categorize gay rights as civil and human rights at that juncture caused lesbians, gays, and bisexuals to suffer daily and grievously.³⁶⁸ Proponents of collective anti-gay measures (like Colorado’s Amendment Two) touted the non-comparability argument to advance their agenda.³⁶⁹

Even in the face of difficulty and very real personal risk, conscious agitation is usually a necessary first step in effecting lasting change. The pains and frustrations of private experience mount and mix quietly along with the courage to defy an infuriating status quo, like a flammable gas seeping into an atmosphere heavy and rich with volatile elements. Then comes the spark. A woman, long excluded by law from the voting polls, seethes in fury and finally decides to put her foot down and stake her claim to what she

³⁶¹ *See id.* at 626.

³⁶² *See id.* at 635.

³⁶³ *Id.* at 641.

³⁶⁴ *See* Russell, *supra* note 306, at 36.

³⁶⁵ *See id.* at 39. The same arguments, of course, were made by proponents of collective anti-gay measures. *See id.* at 45.

³⁶⁶ *See id.* at 37.

³⁶⁷ *See id.* at 39.

³⁶⁸ *See id.* at 40.

³⁶⁹ *See id.* at 45.

knows *is* her *fundamental* right. A black woman in Montgomery, Alabama pays her bus fare, disembarks, walks to the rear entrance, and eventually takes her seat in the “black passenger section.” Having been ordered to give up that seat to accommodate a white man, she refuses to allow the assault to her dignity. In that instant, she decides that she *will not* accept yet *another* dose of racial oppression. A gay man seeks out a space he and like-minded consenting adults have managed to carve out for themselves. The police descend in yet another pointless raid,³⁷⁰ but what the police do not realize at the outset is that the accumulation of physical batteries, extortions, and psychological assaults they have dispensed have reached critical and explosive mass. In a blinding flash of personal redemption, the man decides that he will no longer quietly part with his personal dignity. He will *not surrender* his basic human right to be left alone as he pursues personal happiness.

Many years and many hard-fought battles later, positive change with respect to the treatment of sexual minorities has come at the private, local, state, and federal levels. In 1981, Wisconsin became the first of many states to pass a “comprehensive gay rights law,”³⁷¹ and shortly thereafter in 1984, the U.S. Conference of Mayors passed a resolution calling for an end to antigay discrimination. More recently, the changes have been swift and often shocking.

- A relatively recent poll of citizens found that 55% indicated support of same-sex marriage, 36% voiced opposition, and 9% were not sure.³⁷² Only two years later, the U.S. Supreme Court established same-sex marriage as a fundamental right.
- Companies have begun to offer domestic partner benefits and taking steps to counteract the federal government’s tax treatment of such benefits.³⁷³

³⁷⁰ Such raids on gay establishments were common in the mid-20th century. *See* DISHONORABLE PASSIONS, *supra* note 215, at 96–97 (discussing the aggressive effort in the 1940s and 1950s (via vice or morals squads) to flesh out and punish homosexuals by the use of police stakeouts of homosexual hangouts, the use of decoys/sting operations to prompt sexual solicitation, and police raids of gay/lesbian establishments).

³⁷¹ *See* WILLIAMS & RETTER, *supra* note 281, at xl.

³⁷² *Id.*

³⁷³ *See* Scott Jaschik, ‘Grossing Up’: Equity or Bias?, INSIDE HIGHER ED. (Jan. 29, 2010), <https://www.insidehighered.com/news/2010/0129/syracuse> (discussing Syracuse University’s plan to

- Even at a time when it was counter to national organization policy, a gay Eagle Scout was hired to work at a summer camp,³⁷⁴ the change in national policy itself came only a few months later.³⁷⁵
- To the astonishment of many, the Catholic Church recently announced enhanced tolerance with respect to gays,³⁷⁶ “calling for the [Catholic] church to welcome and accept gay people, unmarried couples and those who have divorced, as well as the children of these less traditional families.”³⁷⁷
- In 2014, it was decided that gay groups could march in New York City’s St. Patrick’s Day parade.³⁷⁸

Although the pace of change has quickened in recent years, it remains true that there were decades of stasis. With the decriminalization of consensual private sodomy in the Model Penal Code by the American Law Institute in the mid-1950s,³⁷⁹ change was afoot. In 1961, Illinois repealed its consensual sodomy law by adopting the new Model Penal Code, and interestingly enough, the work on human sexuality by noted sexologist Alfred Kinsey proved influential.³⁸⁰ Perhaps the more eyebrow-raising influence was the routine tendency of corrupt Chicago police officers to harass homosexuals and demand payoffs from them in exchange for leaving them alone and thereby relieving them (temporarily at least) of the threat of

gross up the pay of employees whose domestic partners enjoy health insurance benefits under the university’s plan).

³⁷⁴ See James Barron, *With Hire, Scouts Affiliate in City Defies Ban on Gays*, N.Y. TIMES, Apr. 3, 2015, at A17.

³⁷⁵ See Todd Leopold, *Boy Scouts Change Policy on Gay Leaders*, CNN.COM (July 28, 2015), <http://www.cnn.com/2015/07/27/us/boy-scouts-gay-leaders-feat/>.

³⁷⁶ See Eric J. Lyman, *Church Expresses New Acceptance of Gays, Divorce*, USA TODAY, Oct. 14, 2014, at A1 (reporting the astonishing reality of the Catholic church’s enhanced tolerance with respect to gays and divorce).

³⁷⁷ Elisabetta Povoledo & Laurie Goodstein, *At the Vatican, A Shift in Tone Toward Gays*, N.Y. TIMES, Oct. 14, 2014, at A1 (reporting the issuance of a document released by a synod).

³⁷⁸ See John Bacon, *Gay Group OK’d for St. Paddy’s Day Parade*, USA TODAY, Sept. 4, 2014, at 3A (reporting that gay groups would no longer be banned from participating in the New York City’s St. Patrick’s Day parade).

³⁷⁹ See DISHONORABLE PASSIONS, *supra* note 215, at 121–24 (discussing the various considerations and arguments which ultimately resulted in the decriminalization of consensual private sodomy in the Model Penal Code by the American Law Institute in the mid-1950s).

³⁸⁰ See *id.* at 125.

criminal prosecution and all the ramifications that could flow from arrest, indictment, and/or conviction.³⁸¹ Although there is no record of corrupt officers extorting homosexuals in Hartford or nearby cities, Connecticut became the second state to decriminalize consensual private sodomy, and several other states followed. As of January 1, 1979, approximately fourteen states treated consensual sodomy as a felony whereas approximately 22 did not criminalize consensual sodomy.³⁸² In updating their criminal law statutes, states would often decriminalize other sex acts (e.g., fornication, cohabitation, etc.) and maintain the criminality of other acts (e.g., adultery or abortion) as a means of generating support for the larger legislative effort or sending a message regarding morality.³⁸³ Progress regarding sodomy statutes was gradual, but truly national change would come only later with the intervention of the federal judiciary, although the other branches of the federal government managed to attempt or bring about meaningful progress.

Although legislators have introduced bills in Congress which would ban sexual orientation discrimination more broadly, those bills have not passed.³⁸⁴ So, Congress may be dragging its feet in the employment and public accommodations context, but at the least, there is some minimal cognizance of the need to give due regard to the plight of specific discrete and insular minorities. Congress can be credited with enacting the Hate Crimes Act in 1990;³⁸⁵ the collection of hate crime data is now a federal mandate.³⁸⁶

At the executive level, President Clinton attempted to lift the ban on gays serving in the military, but compromised with the “Don’t Ask, Don’t

³⁸¹ *See id.*

³⁸² *See id.* at 202.

³⁸³ *See id.* at 161–62.

³⁸⁴ *See* Lana Birbrair, *Beyond Obergefell: What’s Next?*, HARV. L. BULL., Fall 2015, at 32, 33. For example, the Employment Non-Discrimination Act has been repeatedly presented in Congress since 1994 and has yet to achieve passage. *Id.*

³⁸⁵ *See* WILLIAMS & RETTER, *supra* note 281, at xli.

³⁸⁶ *See* FEDERAL BUREAU OF INVESTIGATION, HATE CRIME DATA COLLECTION GUIDELINES AND TRAINING MANUAL 1.3.1 (2015).

Tell” policy.³⁸⁷ After calls from senior military officials to scrap the policy,³⁸⁸ President Obama was finally able to have it repealed. Indeed, after hemming, hawing, and soul-searching, the President eventually endorsed gay marriage. Thereafter, the U.S. Supreme Court moved the nation forward by several giant leaps.

As federal remedial measures go, gay and lesbians have scored a series of judicial victories in recent years. Expressly overruling *Bowers v. Hardwick*,³⁸⁹ the Supreme Court struck down a Texas law criminalizing specific same-sex intimate conduct with its decision in *Lawrence v. Texas*.³⁹⁰ And only a few years later, the Court handed down its pivotal and landmark decision in *United States v. Windsor*,³⁹¹ which held that Section Three of DOMA (defining “marriage” solely as a union of one man and one woman) could not survive constitutional muster because it violated the Due Process Clause of the Fifth Amendment. Given the clear opportunity to rule on same-sex marriage itself, the Court first opted for silence. In 2014, it allowed rulings from lower courts striking down same-sex marriage bans to stand rather than issuing any ruling of its own.³⁹² Finally, in 2015, the Court issued yet another gay rights landmark, *Obergefell v. Hodges*,³⁹³ ruling that same-sex marriage was a fundamental right.

C. Persistence of Negative Impact

The executive and judicial branches of the federal government deserve credit for gradually bringing about meaningful, corrective change to equalize the treatment of sexual minorities, but Congress continues to resist the larger effort. For example, the Employment Non-Discrimination Act (which would

³⁸⁷ See WILLIAMS & RETTER, *supra* note 281, at xli.

³⁸⁸ At the time, President Obama felt that the “Don’t ask, Don’t tell policy” should change, but some military leaders felt that immediate change would be premature. See *Military Chiefs Want Time to Lift “Don’t Ask, Don’t Tell,”* USA TODAY, Feb. 24, 2010, at 5A; see also Zoroya, *supra* note 349, at 6A.

³⁸⁹ 478 U.S. 186 (1986).

³⁹⁰ 539 U.S. 558 (2003).

³⁹¹ 133 S. Ct. 2675 (2013).

³⁹² See Wolf, *supra* note 305, at 1A.

³⁹³ 135 S. Ct. 2584 (2015).

prohibit discrimination on the basis of sexual orientation in the employment context) has been repeatedly presented in Congress since 1994 and has yet to achieve passage,³⁹⁴ and unlike the same-sex marriage or consensual private sodomy contexts, there is no protective federal case law of general applicability.³⁹⁵ Although there are some state and local protections against sexual orientation discrimination in employment, their applicability depends ultimately on the identity of the employer (public vs. private) and the employment location.³⁹⁶ There is very limited room for optimism. One commentator notes that the EEOC believes that Title VII protects transgender, gay, and bisexual employees against public and private discrimination because discrimination on such grounds constitutes sex discrimination.³⁹⁷ She notes, however, that courts resist extending Title VII protections³⁹⁸ and tend to emphasize the need for sweeping legislation to protect individuals from discrimination on the basis of sexual orientation and

³⁹⁴ See Birbrair, *supra* note 384, at 33; see also Sheryl Gay Stolberg, *Rights Bill Sought for Lesbian, Gay, Bisexual and Transgender Americans*, N.Y. TIMES, Dec. 5, 2014, at A16 (highlighting the need for comprehensive national anti-discrimination legislation that would protect lesbians, gays, bisexuals, and the transgendered from discrimination in “employment, housing, education, public accommodations, jury service, and lending”). The Employment Non-Discrimination Act (“ENDA”) was originally introduced in Congress by Bella Abzug and Edward I. Koch. See Stolberg, *supra*.

³⁹⁵ See Hedgpeth, *supra* note 353, at 68 (lamenting the fact that neither federal cases nor federal laws extend the right of equal employment opportunity to workers known or suspected of being homosexual). Note, however, that federal employees may enjoy some protection. See *id.* at 69 (discussing *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969)), which held that a qualified and competent employee could not be discharged from federal employment solely because the individual was homosexual). Not all courts follow the *Norton* decision. See *id.* (stating that “[c]ourts rejecting *Norton* have acted on the unacknowledged assumption that homosexuality is equivalent to unfitness and have seen no need to prove any relationship between the capabilities of the individual and the agency’s reason for disqualification.”). Other courts adhere to *Norton*’s spirit. See *id.* (discussing *Society for Individual Rights v. Hampton*, 63 F.R.D. 399 (N.D. Cal. 1973), *aff’d*, 528 F.2d 905 (9th Cir. 1975), which generally enjoined the Civil Service Commission from excluding homosexuals solely on that basis or on the reasoning that employing homosexuals would give rise to public contempt for the Commission).

³⁹⁶ See ANTHONY C. INFANTI, *EVERYDAY LAW FOR GAYS AND LESBIANS AND THOSE WHO CARE ABOUT THEM* 108 (2007).

³⁹⁷ See Birbrair, *supra* note 384, at 33; see also INFANTI, *supra* note 396, at 111–12 (discussing *Oncala v. Sundowner Offshore Services*, 523 U.S. 75 (1998), in which a man was able to assert a successful Title VII claim of sexual harassment by other men).

³⁹⁸ Another commentator’s view is consistent. See INFANTI, *supra* note 396, at 111–12 (noting that a Title VII claim must establish discrimination because of “sex” (i.e., gender) and that lesbians and gay men may have difficulty establishing that they were discriminated against on the basis of sex rather than sexual orientation).

gender identity.³⁹⁹ Even on the heels of substantial progress, the specter of overt or latent hostility looms large, even for some of the nation's most capable employee or job candidates.⁴⁰⁰ Lamenting prevailing realities in the 1980s, the following commentary remains true (in certain contexts) today:

While considerable progress has been achieved in this emerging struggle for constitutional guarantees, administrative and judicial protection for the employment opportunities of homosexual persons is generally sporadic and unreliable. Although modern research and practical experience show such opprobrium to be unwarranted and even detrimental to society, discriminatory treatment of the employment rights of gay people is still evident and still the major trend in case law.⁴⁰¹

There is every indication that resistance to change in employment and other contexts will take the form of religious liberty claims. Noted one commentator, "Religious accommodation and the balancing of First Amendment rights with principles of nondiscrimination pose two of the greatest challenges for the LGBT community."⁴⁰² Thus, barring substantial change in the composition of Congress, the federal legislative outlook is bleak; a bill to be introduced in Congress by Senator Jeff Merkley (prohibiting discrimination against the LGBT community in employment, housing, and public accommodations)⁴⁰³ would not likely secure passage

³⁹⁹ See Birbrair, *supra* note 384, at 33; see also Katy Steinmetz, *After the Altar*, TIME (Jan. 5, 2015), at 73 (noting that no federal law prohibits discrimination that would allow the use of sexual orientation as the grounds for firing someone, refusing to serve them, or refusing to rent property to them); Stolberg, *supra* note 394 (discussing the need for and likely difficulties associated with national legislation protecting lesbians, gays, bisexuals, and the transgendered from discrimination). Recent media reports indicate that issues regarding the treatment and accommodation of transgendered individuals, especially the matter of permissible public restroom use, have moved to the forefront. See Michael Scherer, *Battle of the Bathroom*, TIME (May 30, 2016), at 30.

⁴⁰⁰ See Birbrair, *supra* note 384, at 39 (recounting the hostility a Harvard Law School student faced, apparently as a result of listing membership in the Committee on Gay & Lesbian Legal Issues (COGLLI) as an extracurricular activity).

⁴⁰¹ Hedgpeth, *supra* note 353, at 77; see also INFANTI, *supra* note 396, at 108 (noting that no generally applicable federal law prohibits discrimination in employment on the basis of sexual orientation).

⁴⁰² *Id.* at 34. She also notes the belief of Professor Robert George that "the bigger battles in the coming years are likely to involve the tension between LGBT and religious rights." *Id.* at 36.

⁴⁰³ See generally INFANTI, *supra* note 396, at 27 (noting that although no federal law prohibits discrimination on the basis of sexual orientation in public accommodations, several states and the District of Columbia have enacted protective measures). Similarly, no federal law prohibits discrimination in

because Republicans would fear potential impingement on the religious freedom of others.⁴⁰⁴ Yet and still, some federal action will likely be necessary, given that states will respond differently to evolving changes. At least some states have taken renewed interest in religious liberty legislation, but they have generally been willing to bring forth amendments clarifying that religious freedom laws are not to be understood as authority to discriminate against sexual minorities.⁴⁰⁵ Then again, there are the spot fires of defiance.

Even if the federal government itself no longer discriminates overtly on the basis of sexual orientation and its administrative agencies are willing to read federal law broadly, the government's policies, laws, and decisions of the not-so-distant past have roots firmly planted in the collective conscience of the American citizenry. Thus, notwithstanding gay-friendly decisions from the United States Supreme Court (reflecting some degree of favorable evolution of the larger American psyche), defiance couched in terms of religious liberty and accommodation show no signs of abating.⁴⁰⁶ In the immediate wake of the *Obergefell* decision extending the right to marry to gays and lesbians, Kim Davis, the Clerk of Rowan County, Kentucky, famously defied (on religious grounds) a court order to issue marriage licenses to gay couples and was jailed for being in contempt of court.⁴⁰⁷ Ultimately, U.S. District Judge David Bunning promised to lift the contempt charge against Davis if deputies in the office of the county clerk issued

housing on the basis of sexual orientation, although several jurisdictions do prohibit such discrimination. *See id.* at 120.

⁴⁰⁴ *See* Steinmetz, *supra* note 399, at 76.

⁴⁰⁵ *See* Kevin Trager & Alyse Eady, *Revised Measure Also Becomes Law in Arkansas*, USA TODAY, Apr. 3, 2015, at 5A (“Arkansas governor signed a new religious freedom bill Thursday aimed at quelling criticism that its actions are targeting LGTB constituents for discrimination.”). Some in the state were concerned that unless amended, religious freedom laws could be used by private businesses to defend discrimination against gays and lesbians seeking services in connection with a same-sex marriage. *See id.* Similar concerns surfaced in other jurisdictions. *See* Tony Cook, Tom LoBianco & Doug Stanglin, *Indiana Lawmakers Agree to Amend ‘Religious Freedom’ Law*, USA TODAY, Apr. 3, 2015, at 5A (noting that Indiana had recently amended its Religious Freedom Restoration Act to clarify that the law was not meant to allow businesses to discriminate on the basis of sexual orientation or gender identity).

⁴⁰⁶ *See* Birbrair, *supra* note 384, at 36 (noting the belief of Professor Robert George that “the bigger battles in the coming years are likely to involve the tension between LGBT and religious rights”).

⁴⁰⁷ *See* Alan Blinder & Tamar Lewin, *Clerk Chooses Jail over Deal on Gay Unions*, N.Y. TIMES, Sept. 4, 2015, at A1.

marriage licenses to gay couples seeking to wed,⁴⁰⁸ but sadly enough, public official defiance of progressive U.S. Supreme Court mandates is not uncommon; Kim Davis' conduct parallels Governor George Wallace's attempt to prevent the racial integration of the University of Alabama.⁴⁰⁹

The federal government may well be able to point to longstanding enforcement of its edicts against discrimination on various grounds, but the fact that Congress, at precisely the same time, refuses to prohibit sexual orientation discrimination in certain contexts highlights the disparity of treatment, which again, fosters and perpetuates a sense of federally-acknowledged difference. Even if one is charitable enough to chalk up Congress' inactivity as mere hesitation and the judicial branch's halting steps as rational restraint, the biased mind can easily interpret such hesitation/restraint as confirmation of the validity of the biased mindset or even implicit sanctioning of differential treatment and violence.⁴¹⁰ In 2012, 19.2% of hate crime victims were targeted on the basis of sexual orientation.⁴¹¹ Of this group, 53.9% were victims of anti-male homosexual bias, and 12.7% were victims of anti-female homosexual bias.⁴¹² More recently, in the infamous Orlando Massacre of June 2016, a lone gunman killed 49 and injured over 50 at a gay nightclub in the worst mass shooting in United States history.⁴¹³ Can it be successfully maintained that the United

⁴⁰⁸ See Mike Wynn & Chris Kenning, *Ky. Officials Willing to Issue Licenses*, USA TODAY, Sept. 4, 2015, at 3A.

⁴⁰⁹ See Blinder & Lewin, *supra* note 407, at A13.

⁴¹⁰ See *Gaylegal Narratives*, *supra* note 323, at 639. "Professor Kendall Thomas suggests that the most lawless features of *Hardwick* are its explicit authorization for state police to commit violence against us and its implicit authorization for private individuals to do the same." *Id.*

⁴¹¹ See Hate Crime Statistics, *supra* note 174.

⁴¹² See *id.*

⁴¹³ See Lizette Alvarez & Richard Pérez-Peña, *Praising ISIS, Gunman Attacks Gay Nightclub Leaving [49 Victims] Dead in Worst Shooting on U.S. Soil*, N.Y. TIMES, June 13, 2016, at A1; see also Michelle Tauber et al., *Unspeakable Horror, Unending Heartbreak*, PEOPLE (June 27, 2016), at 40 (discussing the shooting which occurred at Pulse nightclub in Orlando on so-called Latin Night); Michael Scherer, *Why Did They Die?*, TIME (June 27, 2016), at 31. One commentator placed this horrific event in historical context, noting the following:

The scope of the violence is unprecedented, but the fact is not: Past incidents liked the burning of New Orleans' UpStairs Lounge, which killed 32 in June 1973, have only emphasized the importance of strongholds where gay people could socialize freely. The

States has no role in such private violence? Or are its hands decidedly unclean? The federal government's long history of discrimination against gays and lesbians and its long-belated response to sodomy statute challenges lends credence to the following perspective:

In assessing the constitutionality of these laws, I would argue that violence against gays and lesbians perpetrated by other citizens represents the states' *constructive delegation* of governmental power to these citizens. As a constitutional matter, the covert, unofficial character of this violence does not render it any less problematic than open, official attacks against gay men and lesbians. To state the point in slightly different terms, the fact that homophobic violence occurs within the context of "private" relations by no means implies that such violence is without "public" origins or consequence. The apparently private character of homophobic violence should not blind us to the reality of the state power that enables and underwrites it.⁴¹⁴

* * *

Turning to the question of the judicial role, we see that the Eighth Amendment may thus be interpreted as empowering constitutional courts to invalidate homosexual sodomy statutes on the grounds that the actual, concrete effect of these laws is to *legitimize* the lawless infliction of homophobic violence.⁴¹⁵

Troubling though it may be, violence against gays, lesbians, bisexuals, and the transgendered is only one of many alarming and disturbing problems. Sexual minorities continue to be at higher risk of self-inflicted harm, as was exemplified recently by the tragic death of Leelah Alcorn, a distraught transgendered youth who committed suicide by stepping into the path of an oncoming tractor-trailer after explaining in a note that "religious therapists had tried to convert her back to being a boy."⁴¹⁶

police raid on New York City's Stonewall Inn in June 1969 helped crystallize the challenges gay people faced—out of which came a movement. The incremental fight toward equality began at the bar.

Daniel D'Addario, *The Gay Bar as Safe Space Has Been Shattered*, TIME (June 27, 2016), at 38.

⁴¹⁴ Thomas, *supra* note 13, at 1481–82.

⁴¹⁵ *Id.* at 1487.

⁴¹⁶ See Michael D. Shear, *Obama to Ask for "Repairing" of Gays to End*, N.Y. TIMES, Apr. 9, 2015, at A1. President Obama plans to call for an end to psychiatric therapies seeking to "repair" gays, lesbians, and transgender youth. *See id.* Note also that California, New Jersey, and the District of Columbia ban the offering of various sexual activity/identity-related conversion therapies to minors. *See id.* at A18.

The situation may well get worse for any number of different reasons, at least one of which is the federal government's failure to treat sexual orientation discrimination the same way it treats other forms of discrimination. Consider also the views of one commentator who argues that members of the public may mentally incorporate information which confirms stereotypes and encourages prejudice simply by passively taking in public media.⁴¹⁷ Regarding gay men, he notes that the TV show *Queer Eye for the Straight Guy* may have a positive impact on gay men in terms of decreasing hate crimes (apparently because the show humanizes gay men or, at least, makes gay men more likeable) but "if the goal is to break through glass ceilings and walls for gay men pursuing professions seen as aggressively masculine, then the show may be a net negative."⁴¹⁸ He also notes that characters may "gay it up"⁴¹⁹ for entertainment value, by which he apparently means that the characters act in a manner that is effeminate. Of course, some forms of media capitalize on portraying gay men as effeminate.⁴²⁰ Moreover, when the public media portrays gays and lesbians as vehicles of comic relief and ridicule, it is able to do so because of the historical treatment of sexual minorities. At the same time, it subtly characterizes the ridicule and targeting of sexual minorities as acceptable. The social programming is thorough and apparently instilled at an early age. One commentator discussed an incident during which several elementary-school-aged boys called another boy's father a "faggot" merely because the father had gone on a business trip to San Francisco.⁴²¹ The commentator went on to note that notwithstanding their ignorance with respect to sexual activity in general and the realities of homosexual preferences/activities, children of even elementary school age have already absorbed sufficient social programming not only to attack on the basis of sexual orientation but also to appeal to such attacks when seeking to maximize potency.⁴²² What can be expected to happen when the boys grow

⁴¹⁷ See Kang, *supra* note 190, at 1553–54.

⁴¹⁸ *Id.* at 1569.

⁴¹⁹ *Id.*

⁴²⁰ See, e.g., BORAT (Universal Studios 2009); see also GENTLEMEN'S Q., July 2009, cover (featuring Sacha Baron Cohen in the nude and adopting an effeminate posture).

⁴²¹ See INFANTI, *supra* note 396, at 52–53.

⁴²² See *id.*

up? Recent positive legal developments notwithstanding (or perhaps in overt opposition to them), the following commentary may ring true for some time: “Pervasive antigay hostility in American society has the effect of dehumanizing lesbians and gay men. It paints a target upon each of us and creates an atmosphere in which violence can be inflicted upon us with little fear of legal repercussions.”⁴²³

These potential realities notwithstanding, it is important to acknowledge the gradual increase of balanced portrayals of gays, lesbians, and those in the transgender community. *Six Feet Under*⁴²⁴ portrayed a gay funeral home director and a gay police officer, neither with noticeably effeminate mannerisms, and a feature-length film garnering considerable critical praise, *Brokeback Mountain*,⁴²⁵ portrayed quintessentially masculine gay and/or bisexual cowboys. Netflix offers both *Empire*,⁴²⁶ a series featuring a gay, African-American rapper and *Orange is the New Black*,⁴²⁷ a series featuring a wide range of lesbian characters and a transgendered African-American. Caitlyn Jenner, who transitioned from male (Bruce Jenner) to female, made the cover of *Vanity Fair*.

With various states and cities banning discrimination on the basis of sexual orientation and federal law extending same-sex marriage rights to gays and lesbians, the strong likelihood is that damage awards on the basis of sexual orientation discrimination will be obtained in the future, at least in those jurisdictions with adequate legal protections in various contexts and citizens defiant enough to ignore the law. The federal government’s exclusionary grace may never extend to those receiving such damages, but in the face of the government’s overt discriminatory practices, fairness dictates that the government do some form of penance for its past acts. Again, allowing an exclusion for a successful litigant in this context is a modest gesture relative to the harms suffered by those who can justifiably claim victimization by private parties as well as by an overwhelmingly coercive public actor.

⁴²³ *Id.* at 44–45.

⁴²⁴ *SIX FEET UNDER* (HBO Home Video 2001–05).

⁴²⁵ *BROKEBACK MOUNTAIN* (Universal Studios 2005).

⁴²⁶ *EMPIRE* (20th Century Fox 2015).

⁴²⁷ *ORANGE IS THE NEW BLACK* (Lionsgate Television (2013–15)).

V. CONCLUSION

At least one commentator is of the belief that those participating in slavery might well be excused for doing so because under federal law in existence at the time, the conduct was not illegal. Others readily acknowledge the horrors of slavery but point to present day realities (e.g., the King Holiday and Barack Obama's rise to the Presidency) as proof that the nation has, indeed, overcome its past. Hard statistics confirm, however, that African-Americans and women continue to suffer disproportionately from prejudice, discrimination, and targeted violence. Gays and lesbians suffer in the same manner and remain the only group currently neglected by the federal government with respect to invidious discrimination in employment and public accommodations. History (and current practice) clarify that the federal government has unclean hands in the arenas of race, sex, and sexual orientation. Indeed, the federal government had constitutional authority to take in revenue in connection with the legal slave trade,⁴²⁸ and individual states lined their coffers with profits from the illegal slave trade. Does it not make a healthy amount of logical sense for Congress to force the United States to do penance by foregoing revenue? Even with its race-, sex-, and sexual orientation-conscious focus, reparational exclusion of discrimination damages offers narrowly-tailored relief that, properly-targeted, is necessarily conscious of race, sex, or sexual orientation and serves the compelling governmental interest in effecting reparational justice. Professor Bittker offers a concurring opinion. He notes, "If the Court extends its tolerance of school board action [to effect desegregation] to legislative efforts to foster a successful pluralistic society, it might well hold that a program of black reparations was within the discretionary authority of the people's representatives."⁴²⁹ However unlikely that proponents will see it come to pass, direct reparation payment is warranted with respect to each form of oppression. The unclean hands theory of exclusion avoids many of the issues associated with direct payment reparations and manages to reward current victims for current harms while forcing the United States to shoulder its fair share of the burden. The federal government is guilty of many discriminatory sins to date and is far from ready to sit down at the table in the company of righteousness. An exclusion for discrimination damages at least

⁴²⁸ See U.S. CONST. art. I, § 9.

⁴²⁹ BITTKER, *supra* note 12, at 122.

acknowledges that the United States is willing to start the process of cleaning its hands of its soiled history.