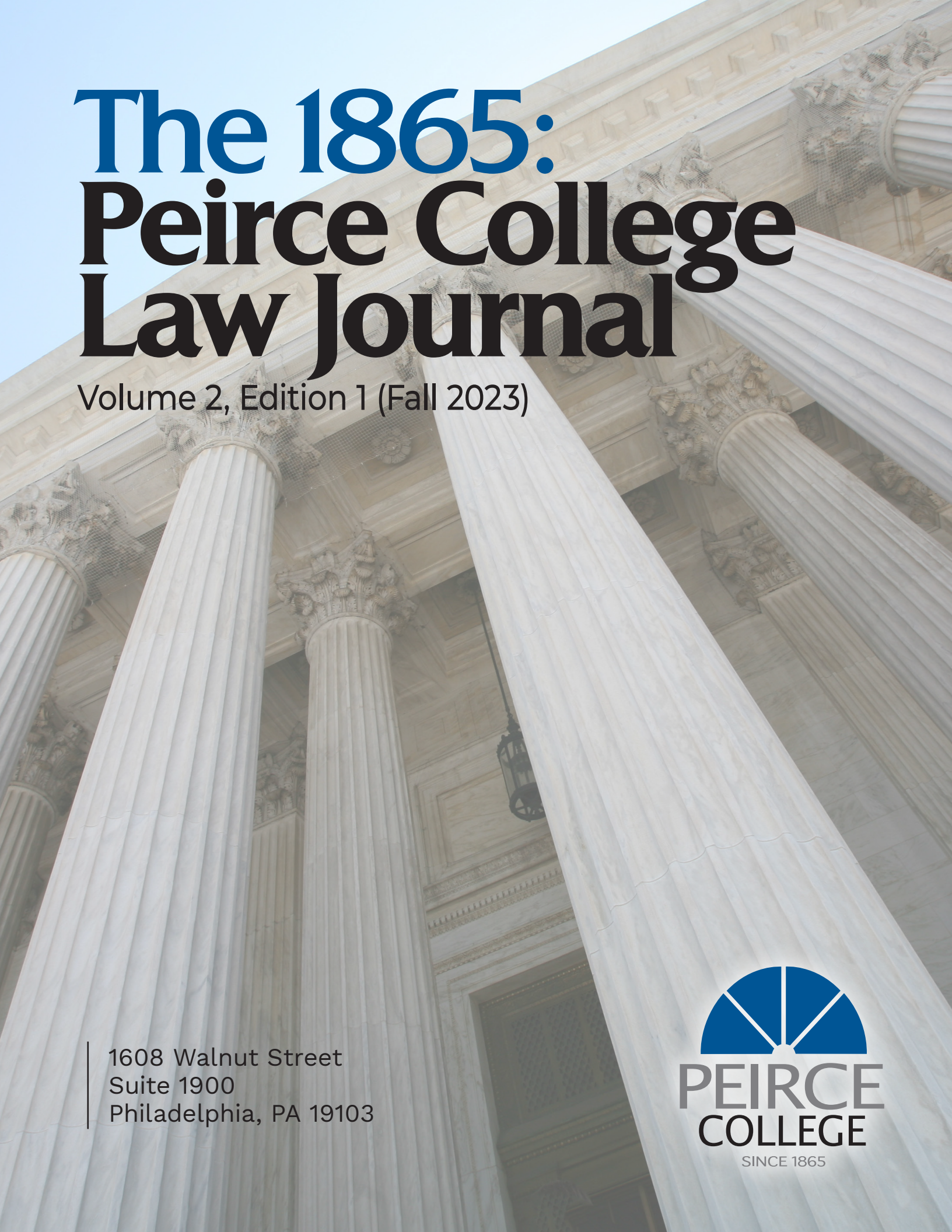

The 1865: Peirce College Law Journal

Volume 2, Edition 1 (Fall 2023)

1608 Walnut Street
Suite 1900
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PEIRCE COLLEGE
SINCE 1865

The 1865

Peirce College
1608 Walnut Street
19th Floor
Philadelphia, PA 19103

THE 1865
PEIRCE COLLEGE LAW JOURNAL *

* *The 1865: Peirce College Law Journal* uses outside editors (practicing attorneys) for the Journal's double-blind, peer-review process.

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PEIRCE COLLEGE
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TABLE OF CONTENTS

— HISTORY OF THE LEGAL STUDIES PROGRAM —

Peirce College was established in 1865 as Union Business College to provide career-focused education for soldiers returning from the Civil War and was one of the country's first schools to embrace women as students.[1]

As the College grew, it was renamed the Peirce College of Business and moved to larger facilities. Growth led to distinction with honors in the form of awards and well-known commencement speakers visiting Peirce for graduation ceremonies, like John Wanamaker, Andrew Carnegie, and ex-presidents, including Benjamin Harrison, Grover Cleveland, Theodore Roosevelt, and William Howard Taft.[2]

Through the 1970s and '80s, Peirce's success was fueled by interest in its practical business and technology programs. While Peirce continued to be a leader in business education, Peirce established a paralegal studies program in 1985—one of the first paralegal programs in the region. After the Paralegal Program gained approval from the American Bar Association (ABA), the Program quickly became one of Peirce's more popular offerings.

The ABA-approved Paralegal Program at Peirce—now part of Peirce's larger Legal Studies Program, which includes Criminal Justice—prepares students with critical, intellectual tools and practical application skills required to explore the intersections of law, business, and society.[3] The Paralegal Program currently offers associate's and bachelor's degrees as well as a post-bachelorette certificate. Peirce's Paralegal Program (and its Criminal Justice Program) can be completed entirely online. However, some of the foundational courses in the Paralegal Program must be completed with live, synchronous courses.

In keeping with its reputation as a leading legal studies educator in the region, Peirce College offers this publication—*The 1865: Peirce College Law Journal*. *The 1865,* now in its second volume, provides a forum for compelling issues, trends, and topics in the legal field as well as specific topics in the paralegal profession. *The 1865* also provides our student editors with invaluable education in legal research, legal writing, and legal citations.

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[1] Peirce is designated as a Minority Serving Institution (MSI) by the U.S. Department of Education and is the only college or university in Pennsylvania dedicated exclusively to serving working-adults.

[2] Taft was also Chief Justice of the United State Supreme Court.

[3] The ABA (the American Bar Association) is the preeminent organization for legal academic programs. *See* https://www.americanbar.org/.

In addition to the Journal, *The 1865* also has an online component.[4] The online component serves as a forum for the articles in the Journal and a host for short-form writings and discussions on issues, trends, and developments in the legal field. With these ventures, Peirce College will no doubt continue to be a leader in legal studies education in this region and beyond.

[4] *See*: https://www.peirce.edu/blog/2022/11/the-1865-peirce-college-law-journal/

— PEIRCE POCKET PART —

Peirce College's Health & Human Service Programs and its Legal Studies Division jointly presented a community engagement series to bring awareness to gun violence as a public health threat

In each edition of *The 1865*, the "Peirce Pocket Part" provides the latest news, advancements, and initiatives from Peirce College's Legal Studies Program. In this edition of *The 1865*, Peirce College proudly features its event on gun violence and public health.[5]

On November 29, 2022, Peirce College's Health & Human Service Programs and the Legal Studies Division presented an event—the first in a community engagement series—to bring awareness to gun violence as a public health threat in Philadelphia. At the time of the event, there were 1,594 nonfatal and 417 fatal shooting victims in Philadelphia in 2022. The well-attended online event featured an in-depth discussion and examination of the threat and impact of gun violence on public health and the criminal justice system in Philadelphia and the region.

The esteemed panelists included Dr. Myra Maxwell, Director of the Victim Support Services Division from the Philadelphia District Attorney's Office, and Mel Wells, the President of *One Day at a Time* (ODAAT). Dr. Maxwell works with neighborhood-based victim service providers, survivors of crime, and victim advocates to ensure they have a "voice at the tables where conversations are being held around policy and practices, community violence and victim impact."[6]

Mr. Wells and *One Day at a Time* are dedicated to serving low-income, the homeless, and their families in the Philadelphia area who are afflicted by addiction and HIV/AIDS.[7] The event was moderated by Terrence Jones, Director of Academic Enrichment, Center for Male Engagement at Peirce College.

As a community engagement series, Peirce College and its Health & Human Service Programs and Legal Studies Division will offer further events on this and related topics.[8]

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[5] The coordinators for this event included Mike Agnello, J.D., Frank Plunkett, MAT, MCJ, R. Christopher Campbell, J.D., Stephanie Donovan, Ed.D., Jamie Loggains, Ed.D., and Todd Nickelsberg, M.S.

[6] *See* "Our Mission," Victim Support Services Division, https://phillyda.org/victims-and-witnesses/.

[7] ODAAT's many program services include, but are not limited to, "case management, classes and workshops, HIV rapid testing, HIV Education and Prevention Services, Food Bank, outreach and special events." For more on ODAAT and its services, *see* https://odaat-philly.org/.

[8] For dates on events, *see* visit https://www.peirce.edu/home.

— ABOUT THE LAW JOURNAL —

The 1865: Peirce College Law Journal is a student-run, double-blind peer-reviewed law journal that provides a forum for original articles written by attorneys, paralegals, legal professionals, legal scholars, alumni, professors, and law enforcement. The Journal publishes once a year at the start of the fall semester. *The 1865* addresses compelling issues, trends, and topics in the legal field as well as specific topics in the paralegal profession.

The Journal staff consists of a faculty advisor, a technical advisor, and a handful of current Peirce College students. Each year, Peirce College's Legal Studies Department selects three to five students to run the Journal as staff editors. The students are selected based on their outstanding academic achievements and writing abilities. The staff editors elect an editor-in-chief. Students may also be admitted to the Journal by authoring an article suitable for publication (i.e., "writing on"). For the Journal's double-blind, peer-review process, the Journal uses "outside editors" (practicing attorneys).

SUBMITTING ARTICLES

Articles may be submitted each school year from September 1 through February 25. To submit an article, please forward the article as an email attachment to LawJournal@peirce.edu.[9] For the double-blind peer-review process, the author's name, email, credentials, and biographical information should be on a separate page from the article. After an article is submitted, all correspondence with the author will be via email.

JOURNAL GUIDELINES

All submitted articles will be carefully considered. However, articles must comply with Peirce College standards and the Journal guidelines. Articles that meet the standards and guidelines will be considered for publication through a double-blind peer-review process to ensure impartiality. All articles must be focused on or linked to a law-related topic. Submitted articles should be double-spaced, with one-inch margins in a word document. Articles should also be no fewer than 1,000 words and no more than 6,000 words. (Articles fewer than 1,000 words or larger than 6,000 words may be considered on a case-by-case basis.) Quotation marks and citations should be used for another author's language, and citations and references should also be used to support the article. For sources and references, please use footnotes rather than endnotes. For editing and citation checking, the Journal uses the *ALWD* citation manual (Associate of Legal Writing Directors). Ar-

[9] Note that articles sent by regular mail will not be accepted.

ticles formatted via *The Bluebook* are acceptable. Articles submitted in APA format may be considered if our staff editors can easily convert the citations and references to an *ALWD* format.

For more information about the Law Journal, please visit the Journal's home page[10], email the Journal at LawJournal@peirce.edu, or follow the Journal on Twitter: @1865Law.

REFERENCES

The recommended citations for articles, comments, or essays in *The 1865: Peirce College Law Journal* is: [Vol.] Peirce College L. J. [first page of article] ([semester] [year]).

DISCLAIMER FOR CONTENT OF ARTICLES, COMMENTS, & ESSAYS

The opinions expressed in the articles, comments, and essays in *The 1865: Peirce College Law Journal* are solely the opinions of the authors. The opinions do not reflect Peirce College, *The 1865,* or the staff and outside editors. Although *The 1865* was created as a forum for compelling issues, trends, topics in the legal field, and specific topics in the paralegal profession, *The 1865* was not created to offer legal advice. If seeking legal advice, please contact a legal professional.

LEGAL NOTICES

OUTSIDE EDITORS

If interested in reviewing articles as an outside editor for the Journal's double-blind, peer review process, please email LawJournal@peirce.edu. In the email, include a resume and the reasons for your interest.

[10] https://www.peirce.edu/degrees-programs/undergraduate/legal-studies/the-1865-peirce-college-law-journal

ARTICLES, COMMENTS, & ESSAYS

WHAT'S SO FUNNY ABOUT PEACE, LOVE, AND "ORDINARY EQUALITY": The Modern Case for the Equal Rights Amendment

Cynthia M. Gentile *

I. INTRODUCTION

The foundation of the American experiment is grounded in the principle that "all men are created equal."[1] This simple directive is, however, hardly simple in its legal, ethical, and social application. While many men have been subject to something far less than equal rights under the law, no class or group has been as consistently excluded from Constitutional equality as women. The Equal Rights Amendment (the "ERA"), drafted by suffragist, Alice Stokes Paul in 1923, aims to meet that legal need. Paul famously said, "I never doubted that equal rights was the right direction. Most reforms, most problems are complicated. But to me, there is nothing complicated about ordinary equality."[2] Alas, there is nothing simple about this fight for "ordinary equality" in modern America.

II. A HISTORY OF EXCLUSION

Our nation's forefathers knowingly created a division of rights and opportunities based principally on sex. In 1776, John Adams left his wife and family to join the Constitutional Convention convening in Philadelphia. His wife, the indomitable Abigail Adams, wrote John a letter with the simple instruction; "Remember the Ladies":

> I desire you would Remember the Ladies and be more generous and favourable [*sic*] to them than your ancestors. Do not put such unlimited power into the hands of the Husbands. Remember all Men would be tyrants if they could. If particular care and attention is not paid to the Ladies, we are de-

*Associate Professor of Management, American Public University. J.D. from Rutgers School of Law. Licensed to practice law in New Jersey and Pennsylvania. A Society for Human Resource Management Certified Professional.

[1] U.S. Congress, *Declaration of Independence: A Transcription*, U.S. Congress (July 4, 1776), https://www.archives.gov/founding-docs/declaration-transcript.

[2] Alice Paul, *Bill of Rights Institute,* (n.d.), https://billofrightsinstitute.org/activities/nothing-complicated-about-ordinary-equality-alice-paul-and-self-sacrifice-handout-a-narrative.

> termined to foment a Rebellion, and will not hold ourselves bound by any Laws in which we have no voice, or Representation.
>
> That your Sex is Naturally Tyrannical is a Truth so thoroughly established as to admit of no dispute, but such of you as wish to be happy willingly give up the harsh title of Master for the more tender and endearing one of Friend.[3]

While John Adams pondered this request, he ultimately decided against advocating for the inclusion of any language protecting women.

> Depend upon it, [w]e know better than to repeal our Masculine systems. Although they are in full Force, you know they are little more than Theory. We dare not exert our Power in its full Latitude. We are obliged to go fair, and softly, and in Practice you know We are the subjects. We have only the Name of Masters, and rather than give up this, which would completely subject Us to the Despotism of the Petticoat, I hope General Washington and all our brave Heroes would fight.[4]

Still today, the only Constitutional Amendment to specifically protect women[5] is the Nineteenth Amendment, granting women the right to vote.[6] The ERA seeks to fill that gap. The text

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[3] Abigail Adams, *"Remember the Ladies" Letter*, Hanover College (Mar. 31,1776), http://history.hanover.edu/courses/excerpts/165adams-rtl.html.

[4] John Adams, "*Remember the Ladies*" Letter, Hanover College (Apr. 14, 1776), https://history.hanover.edu/courses/excerpts/165adams-rtl.html.

[5] In this paper, the term "women" is used to indicate any female-presenting person. More research is needed to develop the data around discrimination against non-binary, gender-fluid, or other gender-non-conforming individuals.

[6] Although women's suffrage was codified in 1920, in reality, these legal protections extended only to white women. The same voter suppression tactics used to keep black men from voting—things like poll taxes and literacy tests were extended to black women. D.G. White, *The 1965 Voting Rights Act Made Voting a Reality for Black Women*, Rutgers School of Arts and Science, https://sas.rutgers.edu/news-a-events/news/newsroom/faculty/3355-the-1965-voting-rights-act-made-voting-a-reality-for-black-women (last visited June 2023). Indigenous women, who were not even considered citizens in 1920, did not have legal access to the ballot until 1924. (Not All Women Gained the Vote in 1920, 2020). Even as late as 1962, some states kept Native American women from voting by declaring residents of a reservation were not residents of the state. *Id.* In-

of the ERA is remarkably simple: "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex."[7] Although Paul hoped to capitalize on the momentum of the Nineteenth Amendment to pass the ERA and enshrine equal protection regardless of sex in the Constitution, it was not until the 1960s that ratification efforts gained momentum. In 1972, the ERA passed in both the House and the Senate and was sent to the states for ratification.[8] Although the Constitutional process for ratification of an Amendment makes no mention of a time limit,[9] Congress placed a seven-year deadline on the ratification of the ERA.[10] By 1977, thirty-five states had ratified the ERA, but anti-ERA efforts began to take hold across the country. Alice Paul died that same year in a nursing facility near her childhood home in New Jersey, never seeing the protections she fought so hard for to become law.

In 1979, Congress extended the deadline by three years, to June 30, 1982, but by that deadline, the Amendment was still three states short of the thirty-eight needed for ratification.[11] Although

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terestingly, New Jersey holds the unique honor of being the first state to explicitly enfranchise women, describing voters in 1790 as either "he or she." Museum of the American Revolution, *When Women Lost the Vote,* https://www.amrevmuseum.org/virtualexhibits/when-women-lost-the-vote-a-revolutionary-story/pages/how-did-the-vote-expand-new-jersey-s-revolutionary-decade (last visited June 20, 2023). The law read, in pertinent part: "[N]o person shall be entitled to vote in any other township or precinct, than that in which he or she doth actually reside at the time of the election." Museum of the American Revolution, *New Jersey Electoral Reform Enrolled Law,* (November 18, 1790), https://www.amrevmuseum.org/virtualexhibits/when-women-lost-the-vote-a-revolutionary-story/pages/how-did-the-vote-expand-new-jersey-s-revolutionary-decade. However, in 1807, the right to vote was specifically taken away from women. *Id.* Women were denied the vote in New Jersey until the passage of the Nineteenth Amendment in 1920.

[7] The original text of the ERA, drafted by Alice S. Paul in 1923 read, in pertinent part, "Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction." Paul revised the text in 1943 and this revised language was put up for ratification in 1972. ERA, *History of the Equal Rights Amendment*, ERA, https://www.equalrightsamendment.org/the-equal-rights-amendment (last visited June 4, 2023).

[8] Approval by a three-fourths majority or thirty-eight states is required to pass a Constitutional Amendment. (U.S. Const. art. V, §3).

[9] It is interesting to note the Twenty-Seventh Amendment, affecting compensation for US Senators and Representatives passed through Congress in 1789, but was not fully ratified for another 202 years, in May 1992. Jessie Krantz, *Pieces of History,* National Archives, (April 11, 2016), https://prologue.blogs.archives.gov/2016/04/11/a-record-setting-amendment/.

[10] The seven-year deadline was added to the Proposing Clause, not to the text of the Amendment itself.

[11] Associated Press, National Opinion Research Center (AP-NORC) survey results show seventy-two percent of Americans believe women are already explicitly guaranteed equal rights in the U.S. Constitution. Maryclaire Dale & Jocelyn Noveck, *AP-NORC Poll: Most Americans Support Equal Rights Amendment*, Associated

some ratification efforts continued into the 1980's through to the early 2000's, it was not until 2017 through the herculean efforts of Nevada's State Senator, Pat Spearman, that the ERA ratification fight was revived. Thirty-five years after the original deadline, Nevada became the thirty-sixth state to ratify the ERA. Illinois became the thirty-seventh state in 2018, and, finally, Virginia, in 2020, ironically thirty-eight years after the deadline, ed the two-third requirement.[12]

III. THE CASE FOR THE EQUAL RIGHTS AMENDMENT

Certainly, 2023 bears little resemblance to 1776, or even 1976, and it is reasonable to question whether we need a Constitutional Amendment to "Remember the Ladies." This author contends that the ERA is as relevant and necessary today, if not more so than it was at its inception one hundred years ago. As foretold by Abigail Adams, the "ladies" have been determined to "foment a rebellion" to gain constitutional equality for nearly two hundred and fifty years. This paper explores three specific reasons why the ratification of the ERA is still integral to guaranteeing women's equality.

The ERA Would Provide Constitutional Protections Against "Sex-based Discrimination"

If a woman experiences sex-based discrimination in the workplace or places of public accommodation, current legal protections are based on the Fourteenth Amendment. The Fourteenth Amendment, however, was not applied in a sex-based discrimination case until 1971,[13] and the judicial interpretation of the Fourteenth Amendment leaves many places where sex-based discrimination can exist untamed. In fact, the late Supreme Court Justice Antonin Scalia unequivocally stated, in his view, it was never the intent of the Fourteenth Amendment to protect against sex-based discrimination.

Press News (Feb. 24, 2020), https://apnews.com/article/nyc-wire-nc-state-wire-us-news-ap-top-news-politics-42b93fd7386089110543f4e1827ded67.
Many attribute the lack of momentum around the ratification of the ERA to this misbelief.

[12] Five states, Nebraska, Tennessee, Idaho, Kentucky, and South Dakota, attempted to rescind their ratification. This is legally questionable since Congress rejected efforts by two states, New Jersey and Ohio, to rescind ratification of the Fourteenth Amendment in 186. U.S. Congress, *Constitution Annotated*, U.S. Congress (2023), https://constitution.congress.gov/browse/essay/artV-4-2-2/ALDE_00013055/.

[13] *See Reed v. Reed*, 404 U.S. 71 (1971).

> You do not need the Constitution to reflect the wishes of the current society. . . . Certainly, the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn't. Nobody ever thought that that's what it meant. Nobody ever voted for that. If the current society wants to outlaw discrimination by sex . . . we have things called legislatures, and they enact things called laws.[14]

If the ERA is ratified, a tougher judicial standard for review would be codified. In any case involving sex-based discrimination, the ratification of the ERA would require a court to apply the highest level of scrutiny called "Strict scrutiny." Under that assessment, any law must be "narrowly tailored" to achieve a "compelling government interest" and be the "least restrictive means" of doing so.[15] When viewed through this lens, unless there is a narrowly tailored compelling state interest, and no possible way to accomplish that interest in a less discriminatory manner, a court must strike down the law.

A 2020 poll conducted by the Associated Press and NORC Center for Public Affairs Research found that forty-three percent of women report experiencing some type of job-related discrimination because of their gender, either in obtaining a job, growing within the company, or receiving equal pay for equal work.[16] [17]

The ERA Would Protect Women's Rights from Political Whims

Existing federal laws are consistently pointed to when the need for the ERA is questioned. These include the Equal Pay Act of 1963, Title VII and IX of the 1964 Civil Rights Act, and the 1978 Pregnancy Discrimination Act. These laws provide significant legal protections for women, but since their passage, the legal applicability of each has been eroded. They create a complicated history of courts applying and/or refusing to apply these laws in diverse circumstances. When a litigant brings a case under one of these laws, it is often hard to forecast an outcome. The cases are

[14] Stephanie Condon, *Scalia: Constitution Doesn't Protect Women or Gays from Discrimination*, CBS News (Jan. 4, 2011), https://www.cbsnews.com/news/scalia-constitution-doesnt-protect-women-or-gays-from-discrimination/.

[15] Cornell Law School, *Strict Scrutiny*, Legal Info. Inst., https://www.law.cornell.edu/wex/strict_scrutiny (last visited Aug. 5, 2023).

[16] *AP-NORC*, at the U. of Chi, *The Equal Rights Amendment and Discrimination Against Women*, apnorc.org, (Jan. 2020), https://apnorc.org/projects/the-equal-rights-amendment-and-discrimination-against-women/.

[17] Notably, nineteen male respondents reported similar discrimination.

costly and time-consuming; the impact on judicial efficiency needlessly complicates a citizen's access to justice. Further, Congress can pass a law with a simple majority to overturn any of these Acts. If the ERA was codified in the Constitution, it would be much harder for Congress to affect laws against discrimination based on sex.

The Failure to Specifically Address Gender Equality Leaves U.S. Workers Behind

It is clear that the failure to specifically address gender equality leaves U.S. women behind. Of the 193 U.N. Member States, eighty-five percent explicitly protect against discrimination based on sex or gender in their Constitutions.[18] There is good cause for such protections. Research shows that high-impact, gender-diverse teams have a twenty-one percent higher likelihood of profitability.[19] Further, when a new company has even just one woman on a founding team, there is a sixty-three percent likelihood that it will be successful.[20] Yet, women are statistically underrepresented in all levels of workplace leadership. 2022 was a record year for women in the workplace, with fifty-three Fortune 500 companies helmed by women for the first time in the list's sixty-eight-year history.[21] While this statistic demonstrates positive momentum for women leaders, a 2022 report from McKinsey found, women leaders are switching jobs at the highest rate ever recorded.[22] The report synthesized data from 333 organizations employing more than twelve million people and surveyed more than 40,000 employees. Their research showed that companies struggle to retain the few women leaders they do have. McKinsey reported forty-three percent of women leaders felt "burned out," compared to thirty-one percent of men at the same level.[23] There are a myriad of reasons for this, which include the mental and physical impact of the Covid-19 pandemic on women, the growing intolerance for workplace microaggressions, or the conscious rejec-

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[18] Equality Now, *ERA Explainer*, https://www.equalitynow.org/era_explainer/(last visited June 4, 2023).

[19] Patience Marime-Ball & Ruth Shaber, *The XX Edge: Unlocking Higher Returns and Lower Risk*, 90 (2022).

[20] *Id.* at 94.

[21] Emma Hinchliffe, *Women Run More Than Ten Percent of Fortune 500 Companies for the First Time*, SHRM Executive Network (Jan. 20, 2023), https://www.shrm.org/executive/resources
/articles/pages/women-run-ten-percent-fortune-500.aspx.

[22] Mckinsey & Co., *Women in the Workplace 2022*, Mckinsey (Oct. 18, 2022), https://www.mckinsey.com/featured-insights/diversity-and-inclusion/women-in-the-workplace.

[23] *Id.*

tion of copious amounts of uncompensated labor with which women in the workplace are often tasked.

Because of this, companies have a "pipeline problem," where fewer women are promoted to first-level managers, creating a dearth of eligible female candidates for higher-level leadership roles. This pipeline problem further complicates the impact of the "Great Resignation," a term coined by Professor Anthony Klotz to describe the trend of "mass voluntary exit of employees from their employment obligations."[24] McKinsey's opined that "for every woman at the director level who gets promoted to the next level, two women directors are choosing to leave their company."[25]

Women who leave their workplace are not always leaving the workforce entirely. Research shows that women often leave to work for companies that prioritize diversity, equity, and inclusion ("DEI"). This is particularly interesting when viewed with the finding that women spend more time on DEI efforts than their male manager counterparts.

Compared with men at their level, women leaders are up to twice as likely to spend substantial time on DEI work that falls outside their formal job responsibilities, such as supporting employee resource groups, organizing events, and recruiting employees from underrepresented groups. They are also more likely than men to take allyship actions such as mentoring women of color, advocating for new opportunities for them, and actively confronting discrimination.[26]

Of note, forty percent of female respondents feel these efforts are not acknowledged by their employers in their performance reviews.[27] So, in this way, DEI work becomes yet more uncompensated labor.

The Gender Pay Gap is Not Closing Fast Enough

The gender pay gap has been slowly closing since the 1980s,[28] but according to U.S. Census Bureau, women still make

[24] Dr. Simone Phipps, *What Exactly Is "The Great Resignation?"*, Middle Ga. State U. (Apr. 21, 2022), https://www.mga.edu/news/2022/04/what-is-the-great-resignation.php.

[25] Mckinsey & Co., *Women in the Workplace 2022*, Mckinsey (Oct. 18, 2022), https://www.mckinsey.com/featured-insights/diversity-and-inclusion/women-in-the-workplace.

[26] *Id.*

[27] *Id.*

[28] March 14, 2023, represented the earliest "Equal Pay Day" since this data was tracked. Stacey Vanek Smith, *It's Equal Pay Day. The Gender Pay Gap Has Hardly Budged in 20 years. What Gives?*, NPR (Mar. 14, 2023), https://www.npr.org/2023/03/14/1162776985/equal-pay-day-gender-pay-gap-discrimination.

$0.84 for every dollar earned by their male counterparts.[29] [30] At the current rate, it will take women until 2059 to achieve equal pay.[31]

Another surprising reality is that more education *widens* the wage gap between women and men. Women earn undergraduate and graduate degrees more frequently than the average American.[32] Although in general, earning a college or graduate degree equates to higher lifetime earnings, this assessment fails for women across the board. Some researchers estimate that women with a bachelor's degree earn approximately seventy-five percent of what a man holding that same degree earns in their lifetimes.[33]

Many people point to the Equal Pay Act of 1963 and ask why this disparity remains embedded in our economy. The goals of the Equal Pay Act were straightforward—"equal pay for equal work"— but in practice, this assessment is complicated. While the law requires that women and men doing substantially the same job be paid the same salary, the determination is based on the job description, not the job title. To prove a violation under the Equal Pay Act, women must provide evidence that a "specific employer intentionally discriminated against her in terms of pay (disparate treatment) or that a specific employer's actions disproportionately affected her by showing statistically significant differences in pay

[29] Am. Ass'n of U. Women, *Equal Pay Day Calendar*, Am. Ass'n of U. Women (2023), https://www.aauw.org/resources/article/equal-pay-day calendar/.

[30] This statistic represents the pay gap experienced by white women working full-time. White women working part-time or seasonally earn only $0.77 for every dollar paid to men. The gap varies and often worsens when race or national origin is considered: Asian American, Native Hawaiian, and Pacific Islander Women's Equal Pay Day is April 5. Asian American, Native Hawaiian, and Pacific Islander women working full-time, year-round are paid $0.92 cents, and all earners (including part-time and seasonal) are paid $0.80 for every dollar paid to non-Hispanic white men. Black Women's Equal Pay Day is July 27. Black women working full-time, year-round are paid $0.67 and all earners (including part-time and seasonal) are paid $0.64 for every dollar paid to non-Hispanic white men. Latina's Equal Pay Day is October 5. Latina women working full-time, year-round are paid $0.57 cents and all earners (including part-time and seasonal) are paid $0.54 for every dollar paid to non-Hispanic white men. Native Women's Equal Pay Day is November 30. Native women working full-time, year-round are paid $0.57 cents and all earners (including part-time and seasonal) are paid $0.51 for every dollar paid to non-Hispanic white men. *Id.*

[31] *Id.*

[32] Richard Fry, *Women Now Outnumber Men in the U.S. College-Educated Labor Force*, Pew Research Center (Sept. 26, 2022), https://www.pewresearch.org/short-reads/2022/09/26/women-now-outnumber-men-in-the-u-s-college-educated-labor-force/.

[33] Mary Leisenring, *Women Still Have to Work Three Months Longer to Equal What Men Earned in a Year,* US Census Bureau, (March 31, 2020), https://www.census.gov/library/stories/2020/03/equal-pay-day-is-march-31-earliest-since-1996.html.

between women and men (disparate impact)."[34] That "statistically significant" salary gap can be extremely hard to prove.[35]

Employers prohibit employees from sharing data on salaries, the government does not collect data on salaries, and employers are not required to disclose data on salaries. Thus, without publicly available data to show disparate treatment or impact by a specific employer, it is difficult for a woman to prove that she is receiving unequal pay compared with a man who is doing the same job for the same employer. Even when a woman can prove unequal pay due to disparate impact, an employer can prevail by showing a job-related or business-necessity justification.[36]

IV. CONCLUSION

At the local and state level, laws have been passed to address the gender pay gap at the inception point. As of this writing, thirteen states or localities[37] have advanced "Pay Transparency" legislation that requires public disclosure of pay ranges under certain circumstances. Disclosing pay ranges holds employers accountable to market rates and may put women in better negotiating positions. While pay transparency legislation is not a "silver bullet" to closing the gender pay gap, researchers opine that disclosing salary information could serve to expose more pervasive discriminatory factors when hiring and promoting.[38]

In the ensuing one hundred years, public support for the ERA has grown and is a rare issue that defies political party alliance.

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[34] Ruqaiijah Yearby, J. M., *When Equal Pay Is Not Enough: The Influence of Employment Discrimination on Health Disparities*. (May 21, 2019), Retrieved from National Library of Medicine: https://www.ncbi.nlm.nih.gov/pmc/articles /PMC6598139/.

[35] "A recent survey of US employers suggests 41% actively discourage their employees from simply sharing information about pay with their organizational peers, while 25% explicitly prohibit it." Tomasz Obloj & Todd Zenger, *The influence of pay transparency on (gender) inequity, inequality and the performance basis of pay*, Nature Human Behaviour. February 10, 2022.

[36] *See* Yearby, *supra*.

[37] California, effective January 1, 2023; Colorado, effective January 1, 2021; Connecticut, effective October 1, 2021; Maryland, effective October 1, 2020; Nevada, effective October 1, 2021; Jersey City, New Jersey, effective April 13, 2022; Ithaca, New York, effective September 1, 2022; New York City, effective November 1, 2022; Westchester County, New York, – effective November 6, 2022; Cincinnati, effective March 13, 2020; Toledo, Ohio, effective June 25, 2020; Rhode Island, effective January 1, 2023; and Washington, effective January 1, 2023 Kris Janish, *Pay Transparancy Laws*, GovDocs, https://www.govdocs.com/pay-transparency-laws/ (last updated Mar. 2023).

[38] Caroline Fairchild, *Pay Transparency Could Cut the Gender Pay Gap by Forty Percent*, LinkedIn (Feb. 7, 2020), https://www.linkedin.com/pulse/pay-transparency-could-cut-gender-gap-40-caroline-fairchild/.

> Seventy-three percent [of respondents] favor the ERA, including 70% of men and 76% of women. Democrats, regardless of gender, strongly favor the amendment. Among Republicans, 37% of men strongly favor, along with 50% of women.[39]

Ultimately, we know that the ERA is as critical to women's equality today as it was to Alice Stokes Paul and her fellow advocates in 1923. One hundred years later, progress has been made and it must be acknowledged, but the ERA is the constitutional bridge to better outcomes for women, girls, and society writ large.

[39] *AP-NORC* at the U. of Chi., *The Equal Rights Amendment and Discrimination Against Women*, (Jan. 2020), apnorc.org, https://apnorc.org/projects/the-equal-rights-amendment-and-discrimination-against-women/.

FATPHOBIA IN THE WORKPLACE AND HOW THE EEOC SHOULD INTERVENE

By Doris Hiegl *

I. INTRODUCTION

Should weight be a protected class under Title VII of the Civil Rights Act of 1964? Being fat[1] is highly stigmatized in Western culture, especially in the United States where 41.9 percent of adults are deemed "overweight."[2] This anti-fat stigma is called *fatphobia*, which is "the implicit and explicit bias of [fat] individuals that is rooted in a sense of blame and presumed moral failing."[3]

While fatphobia adversely impacts nearly every aspect of a fat person's life, one area that is rarely addressed with fatphobia is the "workplace." A recent study of twenty-eight hundred Americans found that sixty percent of them experienced weight discrimination in the workplace.[4] Weight discrimination can look like a fat person not being hired for a job, being fired from a job, being paid less than co-workers, or enduring inappropriate comments at work about their weight.[5]

This article will focus on the prevailing discrimination against fat people in the workplace and need for the U.S. Equal Employment Opportunity Commission (EEOC) to amend Title

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* Peirce College Paralegal Studies student (expected graduation, August 2023), Editor-in-Chief of *The 1865: Peirce College Law Journal*. Special thanks to Professor R. Christopher Campbell, J.D., for encouraging me to leave my comfort zone and write this article. Last but never least, thank you to my incredible boyfriend Randy for his amazing support.

[1] The word "fat" in this article is not used pejoratively, nor it is intended to be demeaning or insulting to any class of people. The word is used intentionally for two reasons: First, to diminish the word's stigma and impact. Second, any other term may be more demeaning or insulting. For example, "overweight" and "obese" imply that there is a specific limit one must weigh. As this article will articulate, such expectations further add to fatphobia, the implicit and explicit bias, and stigma toward fat people, in that being overweight or obese is presumed a moral failing.

[2] Boston Medical Center, *Fatphobia*, Boston Medical Center, https://www.bmc.org/glossary-culturetransformation/fatphobia#:~:text= Noun, highly %20stigmatized%20in%20Western%20Culture. (last visited Mar. 11, 2023)]. Centers for Disease Control and Prevention, *Adult Obesity Facts*, Centers for Disease Control and Prevention, https://www.cdc.gov/obesity /data/adult.html (last visited Mar. 11, 2023).

[3] Boston Medical Center, *Fatphobia*, Boston Medical Center, https://www.bmc.org/glossary-culturetransformation/fatphobia#:~:text= Noun,highly%20stigmatized%20in %20Western%20Culture. (last visited Mar. 11, 2023).

[4] Randon Herrera, *Weight-Based Discrimination: The State of the Law and Why It Should Be Rethought*, OnLabor (June 12, 2019), https://onlabor.org/weight-based-discrimination-the-state-of-the-law-and-why-it-should-be-rethought/.

[5] *Id.*

VII of the Civil Rights Act of 1964. This article will also outline the history of fatphobia and its effect in the workplace. Finally, this article will argue that Michigan's law on workplace discrimination should be the model used by the EEOC to amend Title VII.

II. THE HISTORY OF FATPHOBIA

Fatphobia is a relatively new concept. For most of human history, fatness signified prosperity, wealth, and well-being. Thinness signified "poverty, illness, and death."[6] Fatphobia is a product of diet culture, which originated in Ancient Greece.[7] Fitness and health were important to the Ancient Greeks as they thought that having a healthy body caused a healthy mind.[8] Per Ancient Greek philosopher Heraclitus, moderation or *sophrosyne* was "the greatest virtue." [9] It represented excellence while excess was problematic.[10] This included eating to excess. Food was strictly for fuel, not pleasure. Fatness was deemed a moral failure.[11] The Latin word *obesus* is the root word of the English term *obesity*—it translates to "made fat as if as a result of eating."[12]

After the fall of Rome, the demonization of fatness disappeared, and fatness returned to being desirable.[13] Fatphobia reemerged in the Western world during early modern colonialism.[14] In the eighteenth century during the transatlantic slave trade, white European colonists noticed that the African people they enslaved were sensuous and loved food.[15] Thus, colonists thought that this caused African people to become fat. The colonists thought that overeating meant that African people lacked self-control while Europeans had rational self-control, making Europeans the superior race of the world.[16] To separate themselves from the African people they enslaved, the colonists decided that they should be thin, and that fat people did not deserve freedom.[17]

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[6] Christy Harrison, *Anti-Diet* 17 (2019).

[7] Social and Health Research Center, Inc., *Diet Culture: A Brief History*, Social and Health Research Center, Inc. (Apr. 21, 2022), https://sahrc.org /2022/04/diet-culture-a-briefhistory/#:~:text=The%20first%20ideas%20o f%20 being,large%20part%20of%20their%20culture.

[8] *Id.*

[9] Anne-Laure Le Cunff, *Sophrosyne: The Art of Mindful Moderation*, Ness Labs, https://nesslabs.com/sophrosyne (last visited on June 18, 2023).

[10] *Id.*

[11] Christy Harrison, *Anti-Diet* 19 (2019).

[12] *Obese*, *Merriam-Webster Dictionary*, https://www.merriam-webster.com/ dictionary /obese (last visited June 18, 2023).

[13] Christy Harrison, *Anti-Diet* 20 (2019).

[14] Maddie Sofia, *Fat Phobia and Its Racist Past and Present* (NPR podcast July 21, 2020), https://www.npr.org/transcripts/893006538.

[15] *Id.*

[16] *Id.*

[17] *Id.*

In the 1830s, during the American Industrial Revolution, the concept that food impacted health became more mainstream after influential Presbyterian minister Sylvester Graham unofficially launched the diet reform movement.[18] Graham created a diet that demonized the consumption of alcohol and overly processed foods. Graham claimed that these foods were unhealthy and advocated for moderation in all areas of life.[19] Graham said that gluttony was not only unhealthy but immoral, and that overeating was "one of the greatest sources of evil to the human family."[20] Graham and his followers established a strong link between diet, health, and morality.[21]

Also, in the 1700s and early 1800s, white European scientists began to develop "race theories" based on the idea that humankind is divided into separate, unequal races.[22] At the top of the racial ladder were white Europeans while Africans (who were deemed "savages") were at the bottom. In 1795, German scientist Johann Friedrich Blumenbach stated that "Caucasians" were the "original" race and, thus, the most "beautiful."[23] In the mid-1800s, American anthropologist Samuel George Morton, stated that Europeans had larger skulls than all other races and, therefore, were "superior." Race theory was used to justify upholding white male supremacy.[24] Fatness was deemed "savage" because it appeared more often in people of color while thinness allegedly appeared more often in white people and men. Fatness was particularly associated with Blackness and was demonized.[25] It is important to note that scientists did not deem fatness to be unhealthy. In fact, doctors said that people in larger bodies were healthier. At this time, intentional weight loss went against science.[26]

A new beauty standard for women emerged in the 1920s when the slim Flapper dress was introduced, which required wom-

[18] Cindy Lobel, *Sylvester Graham and Antebellum Diet Reform*, The Gilder Lehrman Institute of American History, http://ap.gilderlehrman.org/history-by-era/first-age-reform/essays/sylvester-graham-and-antebellum-diet-reform (last visited June 24, 2023).

[19] *Id.*

[20] Sylvester Graham, *Lectures on the Science of Human Life* 581 (1839).

[21] Cindy Lobel, *Sylvester Graham and Antebellum Diet Reform*, The Gilder Lehrman Institute of American History, http://ap.gilderlehrman.org/history-by-era/first-age-reform/essays/sylvester-graham-and-antebellum-diet-reform (last visited June 24, 2023).

[22] Facing History and Ourselves, *The Science of Race*, Facing History and Ourselves, https://www.facinghistory.org/resource-library/science-race (last updated Nov. 15, 2017).

[23] *Id.*

[24] *Id.*

[25] Christy Harrison, *Anti-Diet* 26 (2019).

[26] *Id.* at 27.

en who wore it to be very thin.[27] With this new beauty standard came new dieting regimens. To achieve and maintain a slim figure, women followed the Hollywood Eighteen-Day Diet, which consisted of only oranges, grapefruit, toast, and eggs.[28] Feminist writer Naomi Wolf suggests that diet culture gained traction at this time to keep women focused on shrinking themselves rather than fighting for a better world.[29] The anti-suffrage movement used images of fat, angry women in their advertisements while women's rights activists fought back with images portraying suffragists as thin, white, and pretty.[30]

Feeling pressure from diet culture and patients, doctors in the early 1900s began to favor weight loss despite lack of scientific evidence of fatness being unhealthy.[31] Doctors also felt pressure from the life- and health-insurance industries who used Belgian astronomer and statistician Adolphe Quetlet's body mass index (BMI), which was never intended for clinical use and was developed solely using white men.[32] In 1899, the president of the Association of Life Insurance Medical Directors of America showed preliminary data that he claimed showed that "overweight" people had a higher mortality risk than normal and underweight people.[33] This data was based on wealthy white men. However, modern data from larger, more representative samples show that "overweight" people "have the lowest mortality risk of any group on the BMI chart."[34] Despite the data being unreliable and there being no cause-and-effect relationship between weight and health, insurance companies sent doctors tons of literature on the alleged risks of fatness. Due to fear of losing patients, doctors conformed and subscribed to the theory that fatness is unhealthy.[35]

Between the 1960s and 1990s, a variety of fad diets emerged, including the Atkins diet which argued that the best diet involved minimal carbohydrates consumption, causing the body to experience ketosis and use fat as its main fuel source.[36] This con-

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[27] Frank Q. Nuttall, *Body Mass Index Obesity, BMI, and Health: A Critical Review*, 50 Nutrition Today 117-28 (2015).

[28] Anne Ewbank, *Looking Like a Flapper Meant a Diet of Celery and Cigarettes*, Atlas Obscura (Apr. 20, 2018), https://www.atlasobscura.com/articles/1920s-food-flapper-diet.

[29] Naomi Wolf, *The Beauty Myth: How Images of Beauty Are Used Against Women* (1991).

[30] Christy Harrison, *Anti-Diet* 33-34 (2019).

[31] *Id.* at 34–35.

[32] *Id.* at 35.

[33] *Id.* at 34–36.

[34] *Id.* at 36.

[35] *Id.*

[36] Lisa Kingsley, *The Seesawing History of Fad Diets*, Smithsonian Magazine (Feb. 7, 2023), https://www.smithsonianmag.com/innovation/the-seesawing-history-of-fad-diets-180981586/.

tradicted the federal government's endorsement of a low-fat diet in its *Dietary Goals for the United States*.[37] In 1992, the National Institutes Health panel concluded that diets do not work and that most people who have sought intentional weight loss regain most if not all their weight within five years.[38]

In 1995, the *Washington Post* published an article stating that Americans were "fatter than ever before" due to dieting, pointing out that dieters' weight loss only lasts between two to three years. [39] The article also stated that dieting often leads to an obsession with food. The article also quoted a doctor from the Baylor College of Medicine in Houston, urging people to stop dieting for their health.[40] By the mid-1990s, forty-four percent of women and twenty-nine percent of men in the U.S. were trying to lose weight.[41]

In 1998, the National Institutes of Health (NIH), the US federal agency that sets the official BMI categories for American guidelines, released a report "changing its thresholds for what it considered 'overweight' and 'obese.'"[42] Overnight, millions of Americans became "overweight" and "obese." This launched what is now called the "obesity epidemic."

It is important to note that the NIH based the new BMI cutoffs on a report that the World Health Organization (WHO) released two years prior.[43] The International Obesity Task Force (IOTF) wrote said report. Two large pharmaceutical companies that make weight loss drugs funded the IOTF: Hoffman-La Roche and Abbott Laboratories.[44] The IOTF lobbies for and creates science that supports the interest of the pharmaceutical industry. Thus, lowering BMI cutoffs convinced millions more Americans that they have a "weight problem," and benefited pharmaceutical companies selling weight loss drugs.[45] Today, "obesity" is inaccurately considered one of the biggest killers in the US.[46]

III. FATPHOBIA IN THE WORKPLACE

Fatphobia is rampant in the U.S. and greatly impacts fat people's ability to gain employment. In 2017, employment website

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[37] Ann F. La Berge, *How the Ideology of Low Fat Conquered America*, 63 J. Hist. Med. & Allied Sci. 139, 149 (2008).

[38] Christy Harrison, *Anti-Diet* 42 (2019).

[39] Abigail Trafford, *Losing the Weight Battle*, The Washington Post (Feb. 7, 1995), https://www.washingtonpost.com/archive/lifestyle/wellness/1995/02/07/ losing-the-weight-battle/da649449-bf3f-4bf1-a08f-f0999b0c9d31/.

[40] *Id.*

[41] Christy Harrison, *Anti-Diet* 43 (2019).

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.* at 43–44.

[46] *Id.* at 49.

Fairygodboss conducted a survey of five hundred job recruiters who were shown a photograph of a fat woman. The recruiters were asked if they would hire this woman.[47] Only 15.6 percent of the recruiters said that they would hire this woman. One in five of these recruiters deemed this woman "lazy" and twenty-one percent deemed her "unprofessional."[48] Not only do fat people struggle to gain employment, they also face discrimination in the workplace.

Although fatphobia greatly impacts fat people's ability to gain employment, few remedies are available. Michigan, however, has become a leading state on the issue and in 1976 was the first to pass a weight discrimination law.[49] Michigan's Elliott–Larsen Civil Rights Act states that an employer cannot "[f]ail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of...weight."[50] Michigan is currently the only U.S. state that forbids weight discrimination in the workplace.[51]

In 2007, in *Figgins v. Advance America Cash Advance Centers of MI, Inc.*, the Michigan law against weigh discrimination in the workplace was put to the test.[52] Not only does *Figgins* outline the kind of explicit or implicit discrimination against fat employees, but the case also exemplifies the need for a federal law to bar such discrimination.[53]

In *Figgins*, Advance America Cash Advance Centers of Michigan, Inc. ("Advance America Cash Advance") had hired Figgins as a manager.[54] Figgins was five-foot-four and weighed two hundred and ten pounds. Figgins maintained this weight through most of her employment. Advance America Cash Advance acknowledged that Figgins was "overweight" according to govern-

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[47] Reed Alexander, *Only 15% of Hiring Managers Would Consider Hiring an Overweight Woman*, MarketWatch (Dec. 11, 2017), https://www.marketwatch.com/story/only-15-of-hiring-managers-would-consider-hiring-an-overweight-woman-2017-12-11.

[48] *Id.*

[49] Mich. Comp. Laws Ann. § 37.2202(a) (West 2009).

[50] *Id.*

[51] Randon Herrera, *Weight-Based Discrimination: The State of the Law and Why it Should be Rethought*, OnLabor (June 12, 2019), https://onlabor.org/weight-based-discrimination-the-state-of-the-law-and-why-it-should-be-rethought/. It is important to note that New York City Mayor Eric Adams enacted Intro. 209-A on May 26, 2023, prohibiting discrimination based on weight in employment, housing, and public accommodations. City of New York, *Mayor Adams Signs Legislation To Prohibit Height Or Weight Discrimination In Employment, Housing, And Public Accommodations*, City of New York (May 26, 2023), https://www.nyc.gov/office-of-the-mayor/news/364-23/mayor-adams-signs-legislation-prohibit-height-weight-discrimination-employment-housing-#/0.

[52] 476 F. Supp. 2d 675 (E.D. Mich. 2007).

[53] *Id.*

[54] *Id.*

ment guidelines.[55] Due to her second pregnancy, Figgins reduced her work hours per her doctor's advice in April 2004. [56] Figgins took a full-time leave of absence on August 9, 2004, and gave birth on September 10. Figgins' doctor deemed Figgins fit to work in November 2004.[57]

Figgins claimed that her supervisor criticized Figgins' weight before and during her pregnancy.[58] A former area manager said in an affidavit that Figgins' supervisor made comments about Figgins' eating habits. In July 2003, Figgins' supervisor allegedly told the former area manager and an assistant manager that Figgins "looked like [she] just walked out of a trailer."[59] The former area manager also said that, in July or August 2003, Figgins' supervisor asked Figgins if she got "diet pop" when Figgins got a soda to drink. The former area manager also said that, in November 2003, Figgins' supervisor said, "Didn't she have enough to eat?" about Figgins.[60]

When Figgins' second pregnancy began in January 2004, Figgins' supervisor said, "With your weight and your age being pregnant, you're going to end up being off work all the time."[61] Figgins' supervisor also told Figgins to watch what she eats at least twelve times. Figgins' supervisor also gave Figgins unsolicited diet advice, such as drinking less soda, eating fewer fattening foods, and eating more salads. At a managers' meeting where candy was often offered, Figgins' supervisor said that "we can't have candies on the table because of [Figgins]."[62] In January or February 2004, Figgins' supervisor criticized Figgins' meal while at Red Lobster with the former area manager.[63]

At one point during Figgins' pregnancy, Figgins and her assistant manager allegedly opened Advance America Cash Advance's store late because they were sitting at the front counter of the store with the lights out eating food instead of opening the store. Figgins denied this claim.[64] Figgins' assistant manager also alleged that Figgins took four cigarette breaks each day even though she was allotted two breaks. Figgins' supervisor claimed that one day, she watched Figgins take a twenty-minute smoke break and that, thirty minutes later that same day, Figgins came outside for another smoke break. Figgins denied these claims.[65] Figgins' super-

[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.* at 680.
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.* at 681.

visor also claimed that Figgins did not fulfill her marketing duties and violated Advance America Cash Advance's dress code numerous times. Figgins again denied these claims. Audits of Figgins' store in June and July 2004 showed Figgins had above-average performance.[66]

Due to Figgins' pregnancy, Figgins' doctor advised Figgins to only work thirty-two hours per week starting on April 2, 2004.[67] Advance America Cash Advance approved Figgins' request to use eight hours of FMLA leave per week. Figgins said she used 132.36 hours of FMLA leave from April 1, 2004 to August 9, 2004. On August 9, 2004, Figgins went on full-time FMLA leave. Figgins said in her leave request that she expected to return to work in October 2004. A few days later, Advance America Cash Advance sent Figgins a letter, stating that Figgins was not eligible for FMLA leave.[68] While Figgins said Advance America Cash Advance had miscalculated her available FMLA time, Advance America Cash Advance claimed that Figgins had miscalculated her available FMLA time. After contacting the Department of Labor and researching FMLA leave, Figgins confirmed that Advance America Cash Advance had miscalculated her available FMLA time, but she did not contact Advance America Cash Advance to dispute its decision.[69]

Figgins called her supervisor every week per Advance America Cash Advance's request in the letter. In August 2004, Figgins' supervisor said that Advance America Cash Advance replaced Figgins with a twenty-two-year-old thin woman. Figgins did not understand why her position was filled when Figgins' assistant manager covered her position when Figgins previously took FMLA in 2003. Figgins' supervisor did not have an explanation. Figgins' supervisor suggested that Figgins return as a floating manager, which received less pay and fewer benefits than a manager.[70] Figgins continued to call her supervisor every week to ask about open positions. During these calls, Figgins' supervisor often commented on Figgins' weight and always said no positions were available. Figgins claimed that four manager positions opened during her leave and none of them were offered to her.[71]

On November 6, 2004, Figgins' doctor deemed her fit to return to work. Figgins notified her supervisor.[72] Figgins' supervisor said no positions were available and terminated Figgins. Figgins' supervisor claimed in a deposition that Figgins had an opportunity to return to work but failed to report to work after her doctor

[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.* at 683.
[70] *Id.*
[71] *Id.*
[72] *Id.*

cleared her.[73] Figgins' supervisor also claimed that she offered Figgins an assistant manager position with comparable pay at another store, but Figgins declined. Figgins' supervisor did not include this information in the termination given to Figgins. On the termination form, Figgins' supervisor wrote that Figgins was terminated due to no available positions and that she was not eligible for rehire. Figgins' supervisor could not explain the discrepancy between her deposition and the termination form. Figgins said these claims were false.[74]

Figgins emailed Advance America Cash Advance asking to be rehired and detailing Figgins' supervisor's treatment of Figgins. Advance America Cash Advance did not respond. Figgins filed a complaint with the Equal Employment Opportunity Commission. On September 7, 2005, Figgins filed her complaint with the United States District Court, E.D. Michigan, Southern Division. Figgins alleged that she suffered weight discrimination in violation of the Michigan Elliott–Larsen Civil Rights Act.[75]

The Federal District Court found that the record had direct evidence of the "weight-based animus" that Figgins' supervisor felt towards Figgins that caused her to terminate Figgins, fail to rehire her, and mark her termination form as "ineligible for rehire due to an illegal motive."[76] In the Court's analysis, it explained that a plaintiff may establish "discriminatory animus" of weight discrimination in federal employment discrimination cases based on two theories: direct evidence or circumstantial evidence. Direct evidence requires that unlawful discrimination was at least a "motivating factor" in the employer's actions.[77] The Court noted that an employer using discriminatory slurs is direct evidence of discrimination that warrants a jury hearing a plaintiff's case. Even one discriminatory comment from an employer supports a direct evidence case.[78]

The Court also noted that the context of alleged discriminatory comments is important in weight discrimination cases because weight is associated with health. If an employer's comment is merely dietary advice with no underlying animus, it does not constitute direct evidence of weight discrimination.[79] While Advance America Cash Advance claimed that Figgins' supervisor's comments were out of concern for Figgins' health, the Court concluded that the direct evidence did not support this claim given the immense amount

[73] *Id.* at 684.
[74] *Id.*
[75] *Id.* at 684.
[76] *Id.* at 688.
[77] *Id.* at 686.
[78] *Id.*
[79] *Id.* at 684–88.

of comments made towards Figgins' weight and statements from witnesses.[80]

The outcome of *Figgins* is an example of the justice that all fat people who face discrimination in the workplace deserve. The *Figgins* case and Michigan's Elliott–Larsen Civil Rights Act should serve as a roadmap for amending Title VII of the Civil Rights Act of 1964. Everyone deserves to have access to legal recourse when they face discrimination in the workplace—explicit or implicit. Why should fat people be excluded from this?

V. CONCLUSION

It is imperative that the EEOC amend Title VII of the Civil Rights Act of 1964 to outlaw weight discrimination in the workplace. Millions of fat people encounter fatphobia throughout the employment process—from being rejected at job interviews to being underpaid to being fired for their size. While some may argue that weight discrimination in the workplace is justified because fat people's size is their own fault, this argument is based on pseudoscience. There are countless factors that impact a person's weight, including but not limited to genetics, gender, age, socioeconomic status, race/ethnicity, physical activity, food intake, and environment. Many of these factors are out of a person's control.[81] Even if a person did have complete control of their weight, why should they be subjected to discrimination at all? What is wrong with a fat person taking up space—*existing*? The idea that fat people deserve to be discriminated against is rooted in fatphobia, healthism, eugenics, and white supremacy—incredibly dangerous ideologies that must be combatted.

It is the EEOC's duty to ensure that all Americans—including fat Americans—have equal opportunity in employment. If the EEOC does not amend Title VII of the Civil Rights Act of 1964 to include weight as a protected class, it is failing to serve a large portion of Americans it was created to protect. Michigan's Elliott–Larsen Civil Rights Act is a model of the protection that fat people as Americans deserve and are entitled to. The EEOC should follow in Michigan's footsteps.

[80] *Id.* at 687–88.

[81] Institute of Medicine, *Weight Management: State of the Science and Opportunities for Military Program*, National Library of Medicine (2004), https://www.ncbi.nlm.nih.gov/books/NBK221834/.

***STARE DECISIS*: A Commitment to the People**

*LaToyia Baskerville-Uzzell**

I. INTRODUCTION

Stare decisis is an abbreviated version of the term *stare decisis et quieta non movere*, a Latin phrase that means to stand by the decisions and not disturb what is settled.[1] This legal doctrine can be traced back to 1765 as "an established rule to abide by former precedents" to "keep the scale of justice even and steady, and not liable to waver with every new judge's opinion."[2] Although the Constitution does not explicitly speak to the doctrine of *stare decisis*, respect to this judicial practice has been an indisputable part of America's constitutional framework for centuries.[3] Alexander Hamilton recognized its importance while framing the Constitution and wrote to "avoid an arbitrary discretion in the courts, it is indispensable" that federal judges "should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them."[4]

This article will examine *stare decisis,* its importance to our government's reliability, and the impacts of straying from this well-established doctrine. It will also explore the overruling of *Roe v. Wade* in *Dobbs v. Jackson Women's Health Org* [5] and reversal of *SFFA, Inc.* v. *President & Fellows of Harvard Coll.*[6] and *SFFA, Inc. v. University of North Carolina, et. al.*[7] that permitted affirmative action in college admissions. Finally, this article declares that the American people's

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[1] Clarke D. Forsythe & Regina Maitlen, *Stare Decisis, Settled Precedent, and Roe v. Wade: An Introduction*, 34 Regent U. L. Rev. 385, 386 (2022).

[2] 1 W. Blackstone, Commentaries on the Laws of England 69 (1765), referenced by Justice Kavanaugh: *Ramos v. Louisiana*, 206 L. Ed. 2d 583, 140 S. Ct. 1390, 1411 (2020).

[3] Randy J. Kozel, *Precedent and Constitutional Structure*, 112 Nw. U. L. Rev. 789, 837 (2018).

[4] The Federalist No. 78, p. 529 (J. Cooke ed. 1961) referenced by Justice Kavanaugh, *Ramos Id.* at 1411.

[5] *Dobbs v. Jackson Women's Health Org.*, 213 L. Ed. 2d 545, 142 S. Ct. 2228 (2022).

[6] *SFFA, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157 (1st Cir. 2020*) rev'd,* 143 S. Ct. 2141 (2023)

[7] *SFFA, Inc. v. University of North Carolina, et. al,* 567 F.Supp.3d 580 (M.D.N.C. 2021) *rev'd. sub nom. SFFA, Inc. v. President & Fellows of Harvard Coll.,* 143 S. Ct. 2141 (2023).

trust demands that the Court protect our constitutional framework by adhering to the principles of *stare decisis*.

II. OVERTURNING PRECEDENT

Deviation from precedent is within the Court's discretion; however, "[a]ny departure from the doctrine of *stare decisis* demands special justification, something more than an argument that the precedent was wrongly decided."[8] Yet, as Justice Brett Kavanaugh bluntly stated, "[a]ll Justices now on this Court agree that it is sometimes appropriate for the Court to overrule erroneous decisions. Indeed, in just the last few Terms, every current [m]ember of this Court has voted to overrule multiple constitutional precedents."[9]

The Court has overruled precedent in whole or in part fourteen times in the last decade on matters concerning criminal justice, eminent domain, immigration, and more.[10] In *Dobbs v. Jackson Women's Health Org*, the Court overruled a woman's constitutional right to abortion as set forth in *Roe v. Wade* and gave the states the authority to control the laws associated with abortion rights.[11] The Court held "[t]he Constitution does not confer a right to abortion; *Roe* and *Casey* are overruled; and the authority to regulate abortion is returned to the people and their elected representatives."[12] The issue in *Dobbs* was whether Mississippi's Gestational Age Act banning abortion after fifteen weeks was constitutional. In review, the Court not only ruled Mississippi's law was unconstitutional, but that abortion had not been an enumerated right before *Roe*, but rather a criminalized act in some states, thereby making it undeserving of constitutional protection.[13] However, critics argue the Court's reasoning for overturning *Roe* was unsound and lacked special justification to do so.[14] Thus, the ongoing debate concerning the principles of *stare decisis* and when the Court should or should not leave laws unsettled rages on.[15]

Justice Samuel Alito, in writing for the *Dobbs* majority, stated the factors that favored overruling *Roe* and its holding in *Casey*

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[8] *Kisor v. Wilkie*, 139 S. Ct. 2404 (2019), referencing *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266, 134 S.Ct. 2398, 189 L.Ed.2d 339 (2014).

[9] *Ramos, supra*, at 1411.

[10] Constitution Annotated, *Table of Supreme Court Decisions Overruled by Subsequent Decisions*, https://constitution.congress.gov/resources/decisions-overruled (last visited July 16, 2023).

[11] *Dobbs, supra.*

[12] *Id.* at 2234.

[13] Nancy C. Marcus, *Yes, Alito, There Is A Right to Privacy: Why the Leaked Dobbs Opinion Is Doctrinally Unsound*, 13 ConLawNOW 101, 102 (2022).

[14] Michael Gentithes, *Concrete Reliance on Stare Decisis in A Post-Dobbs World*, 14 ConLawNOW 1 (2022).

[15] *Id.* at 3.

included "the nature of their error, the quality of their reasoning, the 'workability' of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance."[16] However, the Court's primary focus was poor reasoning as the basis to overturn *Roe*. The Court's overturning of decisions at will destabilizes the tradition of *stare decisis by* "undermin[ing] legal stability in all areas of constitutional law."[17] Justice Alito further suggested that *stare decisis* protects only "very concrete reliance interests, like those that develop in 'cases involving property and contract rights.'"[18]

Also, in Justice Clarence Thomas' concurring opinion, he stated "the purported right to abortion is not a form of 'liberty' protected by the Due Process Clause . . . neither 'deeply rooted in this Nation's history and tradition' nor 'implicit in the concept of ordered liberty.'" [19] Thomas also explicitly expressed the Court's "duty to 'correct the error(s)'" of *Griswold*, *Lawrence*, and *Obergefell*.[20]

The Court's actions in the *Dobbs* decision suggest a potential reconsideration of all existing substantive due process precedents the Court views as distortions of constitutional law. [21] Its justification for overturning decisions at will, its interpretation of substantive due process that only recognizes protections for unenumerated rights "deeply rooted in the Nation's history and traditions" and "implicit in the concept of ordered liberty," and its expressed "duty to correct . . . errors" pose a danger "for the protection of fundamental rights and liberties in contexts even beyond abortion."[22] Therefore, *Dobbs* may serve as precedent for overturning other long-standing rights.

Like abortion rights, affirmative action held long-standing precedent, protected by the Fourteenth Amendment, the Equal Protection Clause, but is not an enumerated right. "[I]nequality remains a fact of life for many Americans . . . undermining their ability to be fully included in society and depriving them of the

[16] *Id.* at 5.

[17] *Id.* at 1.

[18] *Id.* at 7.

[19] Mustafa Aijazuddin, *Dobbs and Kennedy: A Foreshadow to the End of Stare Decisis?*, 35 DCBA Brief 30, 52 as referenced in *Dobbs, supra* at 2300 concerning *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997).

[20] *See Washington, supra.* In *Griswold v. Connecticut,* the Court held that the Constitution protects the right of marital privacy against state restrictions on contraception. 381 U.S. 479 (1965)
Lawrence v. Texas, the Court held that two adults of the same sex have the right to engage in private conduct under the Due Process Clause. 539 U.S. 558 (2003).
In *Obergefell v. Hodges*, the Court held that the Due Process Clause guarantees the right of same-sex couples to marry. 576 U.S. 644 (2015).

[21] Mustafa Aijazuddin, *supra* at 52.

[22] Nancy C. Marcus, *supra* at 102.

myriad opportunities that such inclusion permits"[23] and affirmative action aims to eliminate and prevent inequality and discrimination. The Court first established the use of affirmative action in college admissions in 1978, but has since declared it unconstitutional.[24] In 2016, Justice Clarence Thomas explicitly expressed his desire to "overrule *Grutter v. Bollinger* and hold that a State's use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause"[25] and he and the conservative Justices recently seized the opportunity to do so.

III. THE IMPORTANCE OF *STARE DECISIS*

The legal doctrine of adhering to prior decisions serves multiple purposes in America's rule of law. *Stare Decisis* provides consistency in the law and faith in the judicial review process, likened to a contract with the People.[26] As Justice David Brewer stated over one hundred years ago, "[a] change in the personnel of a court should not mean a shift in the law."[27] *Stare decisis* ensures:

> [T]hat the law will not merely change erratically, but will develop in a principled and intelligible fashion. That doctrine permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.[28]

Given precedent's importance to the stability of our legal system, overruling it demands objective consideration and special justification rather than a critique of poor reasoning. Instability of the legal system could lead to unfamiliarity with the law, illegitimacy of the Court, and potential deviation from precedent by lower

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[23] Reginald T. Shuford, *Why Affirmative Action Remains Essential in the Age of Obama*, 31 Campbell L. Rev. 503, 510 (2009).

[24] *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2147 (2023).

[25] Margaret Kruzner, *Redlining Reimagined: Exploring "Race-Neural Alternatives" in the Likely Wake of Affirmative Action*, 18 Duke J. Const. L. & Pub. Pol'y Sidebar 323, 324 (2023) *referencing Fisher v. University of Tex. at Austin*, 136 S.Ct.2198, 2215 (2016).

[26] Mustafa Aijazuddin, *Dobbs and Kennedy: A Foreshadow to the End of Stare Decisis?*, 35 DCBA Brief 30, 33 (2022).

[27] Colin Starger, *Chapter 2 the Dialectic of Stare Decisis Doctrine*, 33 IUS Gentium 19, 41 (2013).

[28] *Vasquez v. Hillery*, 474 U.S. 254, 265–66, 106 S. Ct. 617, 624, 88 L. Ed. 2d 598 (1986).

Courts that anticipate overturning of wrongly decided precedent.[29] Justice Thurgood Marshall echoed concern for overruling precedent in 1991 when the personnel of the Court were the only change that rendered "victim impact" evidence admissible four years following its initial inadmissible precedent.[30] He said the Court's overruling of precedent absent special justification "sends a clear signal that scores of established constitutional liberties are now ripe for reconsideration, thereby inviting the very type of open defiance of our precedents that the majority rewards in this case."[31]

IV. AFFIRMATIVE ACTION IN COLLEGE ADMISSION PRECEDENT REVERSAL

In 2003, Justice Sandra Day O'Connor's stated "[t]he Court expects that 25 years from now, the use of racial preferences will no longer be necessary."[32] That decree, coupled with a Supreme Court wavering on the legal doctrine of *stare decisis,* aiming to correct "wrongly decided" precedent left affirmative action in college admissions ripe for reconsideration.

The Court last affirmed the constitutionality of race-conscious admissions under the Equal Protection Clause seven years ago in *Fisher v. Univ. of Texas at Austin*.[33] The ruling stipulated that race-conscious admissions must withstand strict scrutiny[34], pursue the educational benefits that flow from a diverse student body, and be narrowly tailored to achieve a university's goals.[35] Other controlling precedent that permitted race-conscious admissions included: *Regents of the University of California v. Bakke*, *Gratz v. Bollinger*, and *Grutter v. Bollinger*.[36] *Regents* paved the way for affirmative action in college admissions. The *Regents* Court invalidated a

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[29] Michael Gentithes, *Concrete Reliance on Stare Decisis in A Post-Dobbs World*, 14 ConLawNOW 1, 5 (2022).

[30] *Payne v. Tennessee*, 501 U.S. 808, 844, 111 S. Ct. 2597, 2619, 115 L. Ed. 2d 720 (1991).

[31] *Id.* at 845.

[32] *Grutter v. Bollinger*, 539 U.S. 306, 310 S.Ct. 2325, 156 L.Ed.2d 304 (2003).

[33] *Fisher v. Univ. of Texas at Austin*, 579 U.S. 365, 136 S. Ct. 2198, 195 L. Ed. 2d 511 (2016).

[34] To pass strict scrutiny, a university must prove that its "purpose or interest [in considering race] is both constitutionally permissible and substantial, and that its use of the classification is necessary ... to the accomplishment of its purpose." To do so, the university must justify its policy by showing a compelling interest. Then, the university must demonstrate that its policy is narrowly tailored to achieve the interest and that the policy is the least restrictive means available to achieve that purpose. Margaret Kruzner, *Redlining Reimagined: Exploring "Race-Neural Alternatives" in the Likely Wake of Affirmative Action*, 18 Duke J. Const. L. & Pub. Pol'y Sidebar 323, 331 (2023).

[35] *Fisher, supra* at 2203.

[36] *Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978); *Gratz v. Bollinger*, 539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003); *see also Grutter*, *supra* at 123.

public school's special program that admitted "a specified number of students from certain minority groups" yet upheld the use of race as part of a number of applicant consideration factors for admissions.[37] In the companion cases *Gratz* and *Grutter*, the Court precluded the University of Michigan's undergraduate admissions use of "predetermined points for racial minority" applicants and upheld the "Law School's system of holistic review . . . of a candidate's application."[38]

The Court granted *certiorari* in the 2022–23 term to review two separate cases initiated by Students for Fair Admissions (SFFA), Inc., a voluntary, nonprofit membership association whose stated mission is "to defend human and civil rights secured by law, including the right of individuals to equal protection under the law, through litigation and any other lawful means."[39] In the case initiated against the University of North Carolina (UNC), a public institution, SFFA alleged "that the use of race in its undergraduate admissions process . . . violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Title VI of the Civil Rights Act of 1964" that forbids a person to be excluded from participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[40] SFFA also argued "Supreme Court precedents allowing race-conscious admissions were wrongly decided at the time they were issued" and warranted overruling, [41] although, the District Court found "that UNC had met its burden of demonstrating that the University's undergraduate admissions program withstands strict scrutiny and is therefore constitutionally permissible."[42]

Likewise, in the case SFFA initiated against the President and Fellows of Harvard College, a private institution, SFFA alleged that its undergraduate admissions program discriminated against Asian Americans and violates Title VI of the Civil Rights Act of 1964.[43] In the District Court's statistical analysis of Harvard's demographic makeup from 1980 through 2019, data indicated "[s]ince 1980, the Asian American proportion of the admitted class has increased roughly five-fold, and since 1990, the Asian American proportion of the admitted class has increased roughly two-

[37] *Regents, supra* at 267.

[38] *Fischer, supra* at 372.

[39] *SFFA, Inc. v. Univ. of N. Carolina*, 567 F. Supp. 3d 580, 586 (M.D.N.C. 2021), *cert. granted before judgment,* 142 S. Ct. 896 (2022).

[40] *SFFA*, Inc. *supra*. at 586; *see also* 42 U.S.C. § 2000d.

[41] *Id*. at 588.

[42] *Id*. at 649.

[43] *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard Corp.)*, 397 F. Supp. 3d 126, (D. Mass. 2019).

fold.[44] Upon review of the evidence, the District Court held there was no indication of intentional discrimination and that Harvard had a compelling interest in student body diversity that was sufficiently precise to permit judicial scrutiny and its program "bears the hallmarks of a narrowly tailored plan" in that "race [is] used in a flexible, nonmechanical way."[45]

Despite the Court's long-held precedent in support of race-based admissions under the Equal Protection Clause, it held "universities have for too long wrongly concluded that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned, but the color of their skin."[46] The Court further held both "Harvard's and UNC's admissions programs lack sufficiently focused and measurable objectives warranting the use of race and that they 'lack a logical end point' as *Grutter* required" and "must therefore be invalidated under the Equal Protection Clause of the Fourteenth Amendment."[47]

V. THE IMPACT OF OVERTURNING PRECEDENT

The transformation of abortion rights, law, and access in a post-*Dobbs* era creates a new level of complexity for states and women alike that demands a review of its unworkability for consideration of a constitutional amendment. In *Dobbs*, the Court suggested that allowing each state to decide its own abortion laws would provide a more workable alternative; however, the Court's interpretation is misguided.[48] The unprecedented variation in the law across state lines will create jurisdictional conflicts that could include criminalization of women who cross state lines for abortions.[49] "As of November 2022, twenty-one states—mostly in the Midwest and South—have banned or tried to ban abortion in almost all circumstances. "Seven state bans . . . have been stymied by courts . . . [while] remaining states—mostly along the coasts—continue to offer legal abortion, regulated to varying degrees, with some states codifying abortion rights and expanding access."[50] Also, increased cost and travel due to limited accessibility will be burdensome and disproportional for the poor and women of color.[51]

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[44] *Id. at* 177, aff'd sub nom. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157 (1st Cir. 2020).

[45] *SFFA v. Harvard Corp., supra* at 182, 193.

[46] *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, *supra at* 2147.

[47] *Id.* at 2166.

[48] David S. Cohen et al., *The New Abortion Battleground,* 123 Colum. L. Rev. 1, 8 (2023).

[49] *Id.* at 10.

[50] *Id.* at 3.

[51] *Id.* at 14.

The impact of overturning precedent has also gutted affirmative action. Since *Bakke*, the Court has repeatedly reaffirmed the constitutionality of limited race-conscious college admissions.[52] Affirmative action in college admissions is necessary to provide opportunities for underrepresented groups and to foster educational environments with diversity "of social backgrounds, economic circumstances, personal characteristics, philosophical outlooks, life experiences, perspectives, beliefs, expectations, and aspirations" for the benefit of all students.[53] UNC, for example, "promotes intellectual growth and derives the educational benefits of diversity by creating opportunities for intense dialogue and rigorous analysis and by fostering mutually beneficial interactions among members of the community,"[54] while Harvard embodies a view that "student body diversity—including racial diversity—is essential to [Harvard's] pedagogical objectives and institutional mission."[55] SFFA argued that race-neutral alternatives can achieve student body diversity; however, both UNC and Harvard referenced on-going internal research of these alternatives and have found them insufficient in reaching their goals. UNC "continues to face challenges admitting and enrolling underrepresented minorities, particularly African American males, Hispanics, and Native Americans" and as a result, "minority students.... report feelings of isolation and unfair pressure to represent their race or ethnicity."[56]

Similarly, Harvard indicates African American, Hispanic, and other minority students' enrollment would decrease by forty-five percent with race-neutral admissions.[57] Evidence from other states that banned race-conscious admissions validates that enrollment of minority students drops with race-neutral programs. California and Michigan banned affirmative action in 1998 and in 2006, respectively, wherein the University of California's Berkeley campus experienced a 5.2 percent drop in Black student enrollment by 2015 while the University of Michigan's Black student enrollment dropped thirty percent by 2014.[58]

Disallowing race-conscious admissions on a much larger scale would prove detrimental to underrepresented groups and institutions that seek to train students in the public and private sector

[52] *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., supra*, at 2233.

[53] *Students for Fair Admissions, Inc. v. Univ. of N. Carolina*, 567 F. Supp. 3d 580, 590 (M.D.N.C. 2021), cert. granted before judgment, 142 S. Ct. 896 (2022).

[54] *Students for Fair Admissions, Inc. v. Univ. of N. Carolina*, *supra* at 590.

[55] *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 173 (1st Cir. 2020).

[56] *Students for Fair Admissions, Inc. v. Univ. of N. Carolina*, *supra.* at 593–94.

[57] *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., supra* at 198.

[58] Price, T. (2017, November 17). Affirmative action and college admissions. *CQ Researcher*, 27, 41.

through a diverse student body. Also, "[t]he two universities contend such a court ruling could extend beyond the academic world and apply to other sectors, such as business and health care."[59]

VI. CONCLUSION

Governance by a living and breathing Constitution presents both opportunities and impediments. Although the Constitution does not explicitly reference the long-held doctrine of *stare decisis*, this judicial practice has offered direction and stability to the People and, in turn, complemented our constitutional framework. The U.S. Supreme Court holds the authority to overturn precedent, yet was there sufficient, special justification to support forfeiting a woman's constitutional right to choose? Or does this overruling represent an abuse of authority and a decision made by a Court marred by political polarization in the absence of a Code of Ethics?

Following the *Dobbs* opinion leak, a Pew Research Center poll found that fifty-seven percent of Americans disapproved of overturning *Roe*.[60] Invalidation of *Roe* has created a societal crisis and jurisdictional battlefield that has sparked years of discord, litigation, and hardships for women.[61] The invalidation of affirmative action in college admissions sends an egregious message to African Americans who continue to make-up for the educational and subsequent financial gap wrought from years of oppression, but also negates diversity growth in higher education, albeit inadequate, that this precedent elicited. As Justice Sonia Sotomayer stated, "th[is] Court cements a superficial rule of colorblindness as a constitutional principle in an endemically segregated society where race has always mattered and continues to matter."[62] Furthermore, overturning long-standing precedent hinders Americans' declining trust in the Court, our Constitution, and the integrity of the judicial review process. Therefore, it is the Court's duty to render unbiased and reasoned judgment that aligns with the legal doctrine of *stare decisis* when considering precedent that impacts the fundamental rights of the People it serves.

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[59] Lyons, C. L. (2022, December 16). The Supreme Court. *CQ Researcher*, *32*, 1–31. http://library.cqpress.com/.

[60] Lyons, *supra* at 1–31.

[61] David S. Cohen et al., *supra* 8–13.

[62] *SFFA, Inc. v. President & Fellows of Harvard Coll.*, *supra* at 2200.

JACK DANIEL'S HAS A BONE TO PICK WITH A DOG TOY: When Does Parody Infringe on a Trademark?

*Lisa Effrig Lagreca**

I. INTRODUCTION

In 2013, VIP Products, Inc. ("VIP"), a dog toy manufacturer, designed and marketed a dog-chew toy that resembled or rather parodied a trademarked bottle of Jack Daniel's Old No. 7 Black Label Tennessee Whiskey.[1] The squeaky rubber novelty dog-chew toy has a similar design with an artistically expressional playful dog-pun—Bad Spaniels, the Old No. 2, on your Tennessee Carpet. The dog-chew toy includes a disclaimer stating, "This product is not affiliated with Jack Daniels's Distillery."[2]

In 2014, Jack Daniel's Properties, Inc. ("JDP") demanded VIP stop selling the dog-chew toy insofar as it infringed on JDP's trade dress rights and diluted its trademark.[3] VIP, in turn, sought declaratory judgment claiming its product was an artistic parody protected under the First Amendment.[4] VIP alleged that JDP's trademark design is not entitled to trademark protection under the Lanham Act[5] because it is functional and non-distinctive; therefore, no likelihood of confusion exists, and VIP amended its complaint in 2015 seeking the court to cancel JDP's trademark because the bottle shape and overall appearance of its mark should not have initially been given trademark protection.[6]

In 2023, this matter reached the United States Supreme Court.[7] In light of the vast public interest surrounding this case, including the many media articles which satirized the case with canine-referenced titles,[8] this article will explore *VIP Products, LLC v.*

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[1] *See VIP Products, LLC v. Jack Daniel's Properties Inc.*, 291 F. Supp. 3d 891 (2018).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *See* Lanham Act, *infra*.

[6] *Id.*

[7] *Jack Daniels Properties, Inc. v. VIP Products LLC*, 599 U.S. ___ (2023).

[8] *See*, e.g., Deirdre M. Wells, William H. Milliken and Kristina Caggiano Kelly, *Bad Spaniel's: barking the line between permitted parody and trademark infringement,*

Jack Daniel's Properties, Inc., and how the United States Patent and Trademark Office ("USPTO") and the courts define trademark protection; and the effects parodies have on trademarks.

II. TRADEMARKS AND PARODIES

According to the USPTO, "[a] trademark can be any word, phrase, symbol, design, or combination of these things that identifies a good or service."[9] Trademarks are registered with the USPTO to distinguish sources of a good or service, provide legal protection for a brand, and help protect against fraud and imitation. For a trademark to be registered and protected, it must also be non-functional (not having any particular purpose or function) and inherently distinctive.[10] A trademark immediately and distinctly identifies the source or origin of a good or service.[11] The preferred term used by the USPTO is "designation of source."[12] Therefore, a registered trademark allows consumers to recognize a brand in the marketplace and differentiate it from the competition.

Generally, having a "trademark" does not mean you lawfully own a particular word or phrase and can prevent others from using it, but only to how that word or phrase is used with specific goods or services.[13] For instance, if a distillery uses a specific design and logo for its whisky business to identify and distinguish its goods or services from others in the liquor industry, this does not mean it can stop others from using a similar design and logo for non-liquor-related goods or services.[14]

That said, a "parody" is a work that copies or mimics the style of another in an artistically exaggerated way, usually for comedic effect.[15] Parodies can take many forms, including film, music, poetry, visual art, and more.[16] For instance, *Space Balls* is a film that parodies *Star Wars*, and Weird Al Yankovic's song "Eat It" is a parody of Michael Jackson's song "Beat It."

Around the seventh century, author John Dryden defined parodies of poetic works as works altered into another view than their author proposed. Parodies, of course, can also be visual. For

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Reuter.com (February 15, 2023), https://www.reuters.com/legal/ legalindustry/bad-spaniels-barking-line-between-permitted-parody-trademark-infringement-2023-02-15/.

[9] *See* Title X, Section 45 (15 U.S.C. § 1127).

[10] "Trademark Process." *USPTO*, 24 Mar. 2023, www.uspto.gov/trademarks/ basics/trademark-process.

[11] *Id.*

[12] *Id.*

[13] *What is a Trademark? USPTO*, 1 June 2023, www.uspto.gov/trademarks/ basics/what-trademark.

[14] *Id.*

[15] Parody-Definition and Examples|LitCharts." *LitCharts*, www.litcharts.com/ literary-devices-and-terms/parody.

[16] *Id.*

example, the *Star Wars* coffee logo used the same green and white color scheme as the Starbucks logo, substituting the head of a Storm Trooper for the Starbucks siren.

III. *VIP PRODUCTS, LLC V. JACK DANIEL'S PROPERTIES INC.*

After VIP amended its complaint against Jack Daniels in 2015, the parties subsequently filed dispositive motions, which the Federal District Court ruled in favor of JDP and against VIP, stating that VIP was not entitled to use its First Amendment[17] or fair use parody defense under the Lanham Act[18] (the "Act"),[19] because VIP had "failed to rebut the validity of JDP's bottle design registration"[20] and JDP's trade dress and bottle design are nonfunctional and distinctive as required by the USPTO for a mark to register and be protected.[21] This left the court to decide the remaining issues of JDP's dilution by tarnishment and its claim for infringement from the likelihood of confusion for famous marks.[22]

In 2018, the Court held JDP was entitled to trademark protection and established dilution by tarnishment and trademark infringement.[23] The Court found that although VIP's dog toy is humorous, it nonetheless diluted and tarnished JDP's trademark with the description "43% poo by volume" referenced on VIP's product and entered an injunction prohibiting VIP from continuing to sell its dog-chew toy.[24]

In 2020, on appeal, the Ninth Circuit Court of Appeals affirmed in part, reversed in part, vacated in part, and remanded the case for further analyses.[25] Though the Court upheld the lower court's decision on JDP's issues of aesthetic functionality and distinctiveness, it held VIP was entitled to First Amendment protection for artistic expression since JDP could not prove that VIP's product was not artistically relevant or that it explicitly misled consumers.[26] Thus, the Court reversed the dilution by tarnishment, vacating the trademark infringement after finding VIP's use was funny, expressive, noncommercial, and protected under the First

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[17] *See* U.S. Const. amend. 1 ("Congress shall make no law… prohibiting the free exercise thereof; or abridging the freedom of speech.").

[18] *See* Lanham Act, 15 U.S.C. §§ 1051–1141n (2009).

[19] *See VIP Products, LLC v. Jack Daniel's Properties Inc.*, 291 F. Supp. 3d 891 (2018).

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *See VIP Products, LLC v. Jack Daniel's Properties Inc.*, 953 F.3d 1170 (9th Cir. 2020).

[26] *Id.*

Amendment. The Court subsequently vacated the permanent injunction.[27]

In 2021, though denied, JDP petitioned the Supreme Court to overturn *Rogers v. Grimaldi*,[28] a case that helps courts balance freedom of expression with the Act. The *Rogers* test was created by the U.S. Court of Appeals for the Second Circuit in 1989 in response to a trademark infringement and right of publicity claim by Ginger Rogers for the use of her name in a film titled, "*Ginger and Fred."*[29] The test in *Rogers* requires a plaintiff to establish the following: (1) the use is not artistically relevant to the underlying work, and (2) the use explicitly misleads consumers as to the source or content of the work.[30]

In November of 2022, JDP sought a *writ of certiorari* with the U.S. Supreme Court,[31] based on the Court's holding "that a dog toy manufacturer's use of the Jack Daniel's trademark and label design is expression protected by the First Amendment." JDP argued that *Rogers* conflicted with the foundations of trademark law, and it was the wrong tool to determine the likelihood of confusion and claimed the Court erred in using *Rogers* to grant First Amendment protection to VIP. JDP, therefore, asked the Supreme Court to reanalyze whether funny and artistically expressive use of another's trademark should be subject to the Act and the likelihood-of-confusion test or given First Amendment protection from claims of trademark infringement; and whether VIP's use was noncommercial because it was humorous.[32]

IV. ANALYSIS

With the recent attention to trademarks and parodies, a pertinent question arises again: What structure is best for balancing trademark protection with funny, harmless, artistically expressive, and noncommercial parodies, and does using *Rogers* to determine the likelihood of confusion fail to account for the public's interest in free expression?

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[27] *Id.*

[28] *See Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989).

[29] *Id.*

[30] *Id.*

[31] "Writ of Certiorari." LII / Legal Information Institute, www.law.cornell.edu/wex/writ_of_certiorari. A writ of certiorari is a legal order issued by a higher court to a lower court, requesting the lower court to send the records of a case for review. The word "certiorari" comes from Law Latin and means "to be more fully informed." The writ of certiorari is used by appellate courts to select cases they wish to review. It is a discretionary order, meaning that the higher court has the discretion to decide whether to grant the writ.

[32] *See Jack Daniel's Properties, Inc. v. VIP Products LLC*, 22-148, 2022 WL 1234567 (U.S. Nov. 21, 2022).

According to the Act, claims of trademark infringement are governed by a likelihood of confusion test and protects owners of trademarks against the use of similar marks if such use is likely to result in consumer confusion.[33] Even though VIP clearly indicates a disclaimer on its dog-chew toy that its product is not associated with JDP, the courts apply a "likelihood of confusion test" to claims brought under the Act. The likelihood of confusion test requires the plaintiff to prove two elements: (1) that "it has a valid, protectable trademark," and (2) that "the defendant's use of the mark is likely to cause confusion."[34] In *Rogers v. Grimaldi*, the Court opined "in general the . . . Act should be construed to apply to artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression."[35] There is no dispute that VIP designed this specific dog-chew toy to match the bottle design for JDP's whisky as it did when designing its other creative and harmless parody silly squeaker dog-chew toys, which resemble a variety of well-known beverages. For instance, Smella R-Crotches, a parody of Stella Artois; Heini Sniff'n, a parody of Heineken; Pissness, a parody of Guinness; and its Mountain Drool, a parody of Mountain Dew. Are these parodies considered expressive works and protected by the First Amendment because VIP's products are used to convey humorous messages?

The Court in *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC* held that "dog toys which 'loosely resemble[d]' small Louis Vuitton handbags were successful parodies of LVM handbags and its mark and trade dress, and therefore, did not infringe the [famous] LVM trademark."[36] For a trademark parody to succeed, the parody must call to mind the actual product, differentiate itself from the original product, and communicate some element of sarcasm, ridicule, joke, mockery, or contemptuous expression.[37]

Here, there is a rubber squeaky dog-chew toy and a glass bottle of whisky for adult consumption. In *Gordan v. Drape Creative*, the court opined that "creative artistry" was protected under the First Amendment because the defendant "relie[d] on graphics and text to convey a humorous message to alter the seriousness of the phrase." [38]

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[33] *See* Lanham Act, *supra*.

[34] *See Gordon v. Drape Creative, Inc.*, 909 F.3d 257, 264 (9th Cir. 2018).

[35] *See Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989).

[36] *See Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252 (4th Cir. 2007).

[37] "Parody Under the Trademark Laws | New York Law Journal." *New York Law Journal*, 8 Oct. 2019, www.law.com/newyorklawjournal/2019/10/08/parody-under-the-trademark-laws/?slreturn=20230805103345.

[38] *See Gordan v. Drape Creative, Inc.*, 909 F.3d 268-69 (9th Cir. 2018).

When applying a First Amendment right for expressive works, the law must balance the rights of the trademark owner against the interests of free speech. The Court in *L.L. Bean, Inc. v Drake Publishers, Inc.*[39] held, "[a] work need not be the "expressive equal" and "that business and product images need not always be taken too seriously."[40]

As stated above, the *Rogers* test draws a balance in favor of artistic expression and bears the slight risk that "[the use of the trademark] might implicitly suggest endorsement or sponsorship to some people."[41] JDP implored the courts to use the likelihood of confusion test and not *Rogers* based on the belief that VIP's product confuses the marketplace and parodies used with famous marks should not shield liability when used commercially as a designation of source for its goods.

Pending the resolution of this matter, the Supreme Court's clarification was important, not only for JDP but for others like it, and for those who chose to express themselves artistically through parodies of other's products commercially or uncommercially. In conclusion, "The First Amendment may offer little protection for a competitor who labels its commercial good with a confusingly similar mark, but "[t]rademark rights do not entitle the owner to quash an unauthorized use of the mark by another who is communicating ideas or expressing points of view."[42]

On June 8, 2023, the Supreme Court ruled on *Jack Daniels Properties, Inc. v. VIP Products, LLC* by vacating and remanding the case; however, the Supreme Court unanimously sided with JDP, specifically, the Court held when an alleged infringer uses a trademark as a designation of source for the infringer's own goods commercially, the *Rogers* test does not apply, and therefore must be analyzed under the standard likelihood of confusion analysis that applies to typical trademark infringement claims.[43] The Lanham Act's exclusion from dilution liability for "[a]ny noncommercial use of a mark,"[44] does not shield parody, criticism, or commentary when an alleged diluter uses a mark as a designation of source for its own goods.[45] The Court also opined that a parody is exempt

[39] *See L.L. Bean, Inc. v Drake Publishers, Inc.*, 811 F.2d 26-34 (1st Cir. 1987).

[40] Trademark Protection and Practice § 5.12[1][c][vi], at 5-240 (this exemption "is intended to prevent the courts from enjoining speech that has been recognized to be [fully] constitutionally protected," "such as parodies") (quoting *Mattel*).

[41] *See Dr. Seuss Entprs., L.P. v. ComicMix LLC*, 983 F.3d 443, 462 (9th Cir. 2020) (holding Lanham Act did not apply despite alleged use of trademark when junior use was not explicitly misleading and distinguishing Gordon v. Drape Creative, Inc., 909 F.3d 257 (9th Cir. 2018)).

[42] *See L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 29 (1st Cir.1987).

[43] *See Jack Daniels Properties, Inc. v. VIP Products LLC*, 599 U.S. ___ (2023).

[44] *See* § 1125(c)(3)(C).

[45] *See Jack Daniels Properties, Inc. v. VIP Products LLC*, 599 U.S. ___ (2023).

from liability only if it is not used to designate a source. The Court's expansive view of the noncommercial use exclusion—that parody is always exempt, regardless of whether it designates source—effectively nullifies Congress's express limit on the fair-use exclusion for parody.[46]

Based in its holding, the Court found that only one question remained: whether the Bad Spaniels trademarks were likely to cause confusion.[47] The Court stated that "[a]lthough VIP's effort to parody Jack Daniel's does not justify use of the *Rogers* test, it may make a difference in the standard trademark analysis."[48] Accordingly, the Court remanded the issue to the lower courts to address.

V. FINAL THOUGHTS

On remand, it is unknown how the District Court will rule; however, it is clear that the *Rogers* test does not apply here. Though the Supreme Court sided with Jack Daniels in that VIP's dog-chew toy is commercially motivated and not expressive, all may not be lost for VIP as some questions remain.[49] Will the disclaimer VIP added to its product bear any weight on consumer confusion in the marketplace? And even though the law is inclined not to grant companies the right to prevent jokes made at their expense, did VIP go too far with its parody? Finally, and more fundamentally, do we risk losing our democracy if freedom of expression and our First Amendment rights are stifled?

[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*

HANDLE WITH CARE: Why the Due Process Standard for Lost or Destroyed Evidence Needs Revision in Light of the Increasing Use of DNA to Solve Cold Cases and Crimes

R. Christopher Campbell *

I. INTRODUCTION

Imagine you are arrested for murder. Investigators find blood at the crime scene thought to be from the murderer. The blood is collected for DNA testing, but a lab misplaces it. Later inquests reveal that the blood is lost, and no other sample exists. You believe the blood is exculpatory and that the government has lost the one piece of evidence that would prove your innocence. Your attorney immediately moves to dismiss the charges, but because the government only "negligently" lost the blood, the court denies the motion, and the murder case against you proceeds.

This scenario is not an outlier, and the court would have ruled correctly. In the seminal 1988 case of *Arizona v. Youngblood*,[1] the U.S. Supreme Court held that for due process relief for lost or destroyed evidence under the Fourteenth Amendment,[2] a defendant must prove that the evidence was "potentially useful," and that the government lost or destroyed the evidence in "bad faith."[3] In other words, that the government acted "knowingly."[4] Simple negligence will not suffice.

But because the due process standard for the government is so low, and the burden for a defendant is so high, *Youngblood* does not mandate nor encourage the government to handle blood or DNA evidence with particular care. Indeed, handling blood or DNA is not like handling a knife or a letter. Blood and DNA must be collected, tested, and stored in a delicate, punctilious, and se-

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[1] *Arizona v. Youngblood*, 488 U.S. 51 (1988).

[2] The Fourteenth Amendment provides, in part:

> 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. 14, § 1.

[3] *See Youngblood*, *supra*.

[4] *See* note 18, *infra* ("bad faith" implies the "dishonesty of belief, purpose, or motive.").

cure manner—deviations may result in contaminating, losing, or destroying the sample.[5]

The "bad faith" standard is problematic as DNA has become the fulcrum in recent years in solving violent crimes, and the increasing use of genetic databases like *GEDmatch*[6] and *FamilyTreeDNA*[7] to solve decade-old crimes is a case in point.[8] In short, there may be no more crucial evidence in solving a crime than DNA. The current due process standard thus needs revision to mandate and encourage the government to handle blood and DNA evidence with particular care.

This article focuses on the "bad faith" standard and the need for its revision in light of the increasing use of DNA to solve cold cases and crimes. Section II examines the underlying flaws of the "bad faith" standard and how these flaws are magnified for blood and DNA. Section III suggests revising the "bad faith" standard and offers an alternative that requires only "negligence" for a due process violation. Lastly, section III argues that the government should handle blood and DNA evidence with particular care or suffer strict consequences.

II. THE DEFICIENCY OF THE "BAD FAITH" STANDARD

As stated *supra*, the current due process standard for lost or destroyed evidence under *Youngblood* has two steps.[9] First, a court must determine whether the lost or destroyed evidence was "potentially useful."[10] If the evidence was "potentially useful," a due process violation occurs in the second step when a defendant shows that the government acted in "bad faith" in losing or destroying the evidence before a defendant could examine it.[11]

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[5] *See*, e.g., the Iowa Department of Public Safety Division of Criminal Investigation's *Guidelines for DNA Sample Documentation, Collection, Packaging and Preservation* (https://dps.iowa.gov/sites/default/files/criminal-investigation/criminalistics-laboratory/laboratory-sections/toxicology-section/guidelines-for-dna-sample-collection.pdf).

[6] *GEDmatch* is a "website for genetic genealogy research. Anyone can upload their DNA file, analyze results, and compare DNA shared with others." *See* https://www.gedmatch.com.

[7] *FamilyTreeDNA* provides "interactive tools to help find [ ] DNA matches, trace [ ] lineage through time, and determine family connections." *See* https://www.familytreedna.com.

[8] *See*, e.g., Grace, A., *I took a 23andMe DNA test—and cops linked me to an unsolved murder*, New York Post (February 2, 2023), https://nypost.com/2023/02/02/i-took-a-23andme-dna-test-and-cops-linked-me-to-a-murder/.

[9] *See Youngblood, supra*.

[10] *Id.* Note that this step is rarely at issue as nearly every lost piece of evidence could be argued as "potentially useful."

[11] *See Commonwealth v. Snyder*, 963 A.2d 396 (Pa. 2009); *Illinois v. Fisher*, 540 U.S. 544 (2004); and *Arizona v. Youngblood*, 488 U.S. 51 (1988).

Youngblood's due process standard was, alas, insufficient the moment it became law as it did not consider the materiality of the lost evidence or the potential for systematic errors in collecting and storing evidence.[12] Nor did *Youngblood* provide a defendant even a token chance at relief when evidence was lost or destroyed.[13]

Although *Youngblood* was criticized at the time, many courts did not take notice until 2008 when legal scholar Norman C. Bay sounded the alarm on *Youngblood's* shortcomings, specifically its inadequacies for blood and DNA.[14] Bay argued that with limited due process violations under *Youngblood* and with the advancement of DNA evidence, "recent developments have so undermined *Youngblood's* rationale and legitimacy that it no longer merits *stare decisis* effect."[15] As Bay highlighted, the primary issue with *Youngblood* is the "bad faith" standard which had been "eroded" by "legislative reform, state judicial disapproval, and doctrinal incoherence" and did not account for "scientific advances."[16]

Added to Bay's concerns, the term "bad faith" is undeniably vague, with varying definitions.[17] *Black's Law Dictionary,* for example, defines "bad faith" as "dishonesty of belief, purpose, or motive."[18] Yet Connecticut defines "bad faith" as "generally implying a design to mislead or to deceive another, or a neglect or refusal to fulfill some duty . . . not prompted by an honest mistake."[19] Whereas the Third Circuit Court of Appeals defines "bad faith" as more than bad judgment or negligence, but rather that "it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity."[20]

Even without the varying definitions, *Youngblood's* "bad faith" burden is almost impossible for a defendant to show.[21] To

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[12] *See Scott v. State* and *state v. Ferguson*, *infra*, where Alabama and Tennessee courts found, respectfully, that *Youngblood's* "bad faith" standard does not consider the materiality of the missing evidence or its effect on a defendant's case.

[13] *See* Norman C. Bay, *Old Blood, Bad Blood, and Youngblood: Due process, Lost Evidence, and the Limits of Bad Faith*, 86 Wash. U. L. Rev. 241 (2008), highlighting the few times courts found a due process violation using *Youngblood's* "bad faith" standard.

[14] *Id*

[15] *Id.* at 291.

[16] *Id.* at 245–46.

[17] *Id.* at 289–92 ("jurisdictions have formulated an assortment of definitions" for the term "bad faith.").

[18] *Black's Law Dictionary*, "bad faith" (11th ed. 2019). *Black's Law Dictionary* also defines "bad faith" as "evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance."

[19] *Twelve Havemeyer Place Co., LLC v. Gordon,* 888 A.2d 141 (Conn. App. 2006).

[20] *U.S. v. Manzo*, 712 F.3d 805, 811 (3rd Cir. 2013).

[21] Tennessee courts, for example, found that *Youngblood* "substantially increases the defendant's burden while reducing the prosecution's burden at the ex-

be sure, *Youngblood's* "bad faith" standard is illustrated best "in terms of knowledge of the evidence's exculpatory value" when the evidence was lost or destroyed.[22] But such a standard is "incongruous and unduly burdensome with respect to evidence that was never tested" or viewed by a defendant.[23] Say, for instance, the government informs a defendant that it lost a crime-scene photograph and a gun used in a shooting. At first glance, losing the gun seems more egregious; but what if the photograph has exculpatory value and the gun does not? Save for a confession on what the government believed about the photograph when it was lost, it is nearly impossible for a defendant to prove that the government lost the photograph in "bad faith."[24]

The "bad faith" standard is also inconsistent with *Youngblood's* objective as it appears only concerned with prohibiting government misconduct.[25] But the objective should be concerned with re-enforcing the government's "obligation" to safeguard and preserve evidence; to put the government on notice that the preservation of evidence—specifically blood and DNA—is of the utmost importance.[26] Indeed, irrespective of the government's intent, a defendant is still in the same unresolvable and unjust position when the government loses potentially useful evidence.[27] As Justice John Paul Stevens articulated in his *Youngblood* concurrence, "there may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair."[28]

To that point, while prohibiting government misconduct is a worthy goal under *Youngblood*, such an objective does not account for inadequate collection and storage of evidence or sloppy and

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pense of the defendant's fundamental right to a fair trial." *State v. Ferguson*, 2 S.W.3d 912, 916–17 (Tenn. 1999).

[22] *See* Norman C. Bay, *supra.* at 291.

[23] *Id.*

[24] *Lolly v. State*, 611 A.2d 956, 960 (Del. 1992) ("Short of an admission by the police, it is unlikely that a defendant would ever be able to make the necessary showing to establish the required elements for proving bad faith.").

[25] *See* Norman C. Bay, *supra.* at 303. ("*Youngblood* has the wrong focus. As between competing visions of due process, an instrumental focus on deterring official misconduct should not be allowed to trump adjudicative fairness.").

[26] *Id.* Surely, from a government's perspective, it has more concern safeguarding inculpatory evidence than potential exculpatory evidence.

[27] The "bad faith" test may also violate *Brady v. Maryland,* 373 U.S. 83 (1963). *See* Chouleng Soun, *The Rising Tide in Wrongful Conviction: The Shortcomings of Brady and the Need for Additional Safeguards,* 56 New Eng. L. Rev. 221 (2022) ("Requiring a bad faith showing for a Due Process Clause claim, for what can be viewed as a procedural requisite to fulfill one's *Brady* obligation, erodes the right *Brady* was meant to give to the defense.").

[28] *Youngblood*, 488 U.S. at 67 (Stevens, J., concurring in the result).

reckless investigations.[29] Plus, two remedies already exist for government misconduct when it knowingly or recklessly destroys evidence: (1) obstruction of justice[30] and (2) *Brady v. Maryland* (holding that the government must disclose materially exculpatory evidence in their possession to the defense).[31] Both of these remedies may authorize a new trial.[32]

Given *Youngblood's* indelible shortcomings, a growing number of courts have declined to follow it. The Utah Supreme Court, for example, found *Youngblood's* "bad faith" standard too narrow, in that "the culpability or bad faith of the state should be only *one consideration*, not a bright line test, as a matter of due process."[33]

Vermont courts have found the "bad faith" standard as both too broad and too narrow as it fails to weigh any prejudice to a defendant:

> [The *Youngblood* test is] too broad because it would require the imposition of sanctions even though a defendant has demonstrated no prejudice from the lost evidence. It is too narrow because it limits due process violations to only those cases in which a defendant can show bad faith, even though the negligent loss of evidence may critically prejudice a defendant.[34]

Courts have also decried *Youngblood's* failure to address the value of the lost or destroyed evidence. Alabama, for example, rejected *Youngblood's* "bad faith" standard, finding that it does not weigh the materiality of the missing evidence.[35] Alabama focuses instead on (1) the culpability of the state; (2) the materiality of the lost or destroyed evidence; and (3) the prejudice that the defendant suffered because of that loss.[36]

Tennessee courts have rejected *Youngblood* on similar grounds, finding that *Youngblood* permits "no consideration of the

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[29] *See* Norman C. Bay, *supra*. at 303–04 (*Youngblood* standard is "overly deferential standard may encourage sloppy police work, for there are no due process consequences when the police lose potentially exculpatory evidence in a negligent or reckless manner.")

[30] *See*, e.g., 18 Pa.C.S.A. § 5101.

[31] "Under *Brady* and its progeny, a due process violation could be found even in the absence of bad faith." *See* Norman C. Bay, *supra.*

[32] 373 U.S. 83 (1963).

[33] *State v. DeJesus*, 395 P.3d 111, 118 (Utah 2017) (emphasis added) (*citing State v. Tiedemann*, 162 P.3d 1106 (Utah 2007)).

[34] *State v. Delisle,* 648 A.2d 632, 643 (Vt. 1994).

[35] *Scott v. State*, 163 So.3d 389 (Ala. Cr. App. 2012).

[36] *Id.*

materiality of the missing evidence or its effect on the defendant's case."[37] Thus, Tennessee focuses on whether the state had a duty to preserve the evidence. If yes, the court then examines (1) the degree of negligence involved; (2) the significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available; and (3) the sufficiency of the other evidence used at trial to support the conviction.[38]

Note that in each case the court expanded on *Youngblood's* due process standard from two elements to three or more, focusing on the government's intent and the materiality of the lost or destroyed evidence.[39] In each case, the through-line was consistent: the court found the "bad faith" standard inadequate and further considerations were needed to determine when a due process violation for lost or destroyed evidence had occurred.[40]

Still, *Youngblood's* flaws are magnified when it comes to DNA evidence. *Youngblood* was promulgated in 1988 when DNA evidence in a criminal investigation was rare. As a reference point, the first conviction based on DNA came about in England just a year before, in 1987, when Robert Melias was convicted of rape.[41] The first United States case to use DNA for a conviction occurred just a few months later when investigators used DNA to convict Tommy Lee Andrews of rape in Florida.[42] As DNA was a novel investigative tool at the time, the *Youngblood* court never could have foreseen the import of proper collection and storage of DNA evidence.[43] Nor could the court have anticipated that decade-old cases would be solved—and overturned—based on DNA.

Consider, for instance, the Innocence Project alone has exonerated 375 defendants from DNA evidence in the past three decades.[44] Those defendants served an average of fourteen years in prison before exoneration.[45] Ten percent of the defendants

[37] *State v. Ferguson*, 2 S.W.3d 912, 916–17 (Tenn. 1999).

[38] *Id.* at 917–18.

[39] Pennsylvania courts (where this Journal is published) have used *Youngblood's* standard for lost or destroyed evidence in the same relative form since 1988. *See*, e.g., *Commonwealth v. Donoughe*, 243 A.3d 980 (Pa. Super. 2020).

[40] *See DeJesus, Delisle, Scott,* and *Ferguson*, *supra*.

[41] *See* the GuinnessWorldRecords.com for the "first person to be convicted of a crime using DNA evidence." (https://www.guinnessworldrecords.com /world-records/first-use-of-dna-profiling-in-a-criminal-conviction).

[42] *Andrews v. State*, 533 So.2d 841 (Fla. 5th DCA 1988).

[43] *See Youngblood, supra.*

[44] According to the Innocence Project, "As of January 2020, the Innocence Project has documented over 375 DNA exonerations in the United States. Twenty-one of these exonerees had previously been sentenced to death." *See* InnocenceProject.org. (https://innocenceproject.org/research-resources/).

[45] *Id.* Although the 375 defendants were innocent and exonerated of these crimes, "approximately 25% had confessed and 11% had pleaded guilty."

served over twenty-five years in prison.[46] Twenty-one of the defendants had been previously sentenced to death.[47] Thus, unlike other forms of evidence, the government's obligation to safeguard and preserve blood and DNA is not just for a defendant's trial, but for *decades* after trial.[48]

Youngblood also fails to compel the government to modernize its infrastructure for storing and testing DNA evidence. Suppose, for example, "City A" employs state-of-the-art measures to store and track blood evidence while "City B" employs outdated facilities. Granted, the government is motivated to preserve evidence, but what incentive is there for "City B" to update its facilities if a simple "shoulder shrug" will excuse its mishandling of DNA?

Lastly, *Youngblood* and its "bad faith" standard fail to distinguish the preservation of evidence from lesser crimes and homicides.[49] As homicides are often solved with DNA, the government should be held to an even higher standard to preserve evidence when a defendant is facing a life sentence. In other words, a court should consider the severity of a defendant's potential punishment when analyzing any prejudice when blood or DNA evidence is lost.[50] Put bluntly, blood and DNA evidence in a homicide case should be tracked and handled not just with care, but with extraordinary care.[51]

III. HANDLE WITH CARE

The only way to impel the government to handle blood and DNA evidence with care is to scrap the "bad faith" standard and replace it with one that enacts strict consequences for lost or destroyed evidence.[52] Such a standard would be consistent with other constitutional safeguards. For example, the Fourth Amendment's "exclusionary rule" for unlawful searches and seizures bars unlawfully seized evidence from trial.[53] The exclusionary rule serves "to deter deliberate, reckless, or grossly negligent conduct, or

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[46] *Id.*

[47] *Id.*

[48] Post-conviction laws in most jurisdictions allow a court to order retesting of evidence after trial. *See*, e.g., 42 Pa.C.S.A. § 9543.1 (Postconviction DNA testing)

[49] *See* Norman C. Bay, *supra* at 304. ("[*Youngblood*] fails to differentiate between the seriousness of charges facing an accused and the nature of the potentially exculpatory evidence. The bad faith standard fails to distinguish between a misdemeanor drunk driving charge or a capital case; it applies equally to both cases in spite of the disparity in potential punishment.")

[50] *Id.*

[51] By analogy, top secret records have higher security and better safekeeping than classified records.

[52] "Rules of law send [ ] messages . . . . What message is sent when the accused has no claim for relief for the loss or destruction of potentially exculpatory evidence?" *See* Norman C. Bey, *supra* at 306.

[53] U.S. Const. amend. IV.

in some circumstances recurring or systemic negligence."[54] The exclusionary rule is strenuous with few exceptions. Unlike the "bad faith" standard for lost evidence, the exclusionary rule notifies the government that its conduct must be at a high standard or face strict consequences. Without a doubt, the "bad faith" standard falls remarkedly short of this same high standard.

As outlined above, some courts have modified their due process standards for lost or destroyed evidence, but these courts have not gone far enough.[55] Although the modifications provide a defendant greater protection than *Youngblood*, they still fall somewhat short in compelling the government to handle blood and DNA evidence with particular care.

Delaware, however, may offer the best approach insofar as it deals with potential "negligence" on the part of the government when evidence is lost or destroyed.[56] With its "negligent" standard, Delaware deters "deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence."[57]

In *Hammond v. State,* the Delaware Supreme Court held "[w]hen evidence has not been preserved, the conduct of the State's agents is a relevant consideration, but it is *not* determinative."[58] Delaware courts thus look at the following: "(1) the degree of negligence or bad faith involved, (2) the importance of the lost evidence, and (3) the sufficiency of the other evidence adduced at the trial to sustain the conviction."[59]

With its negligence standard, Delaware's approach not only imposes a high burden on the government to preserve evidence, but also provides defendants a reasonable chance at relief when evidence is lost or destroyed.[60] Delaware's standard accounts for the "importance of the lost evidence," weighing it against the government's "negligence."[61] Such a standard undoubtedly considers the handling and storing of blood and DNA.

Yet Delaware goes one step further. In Delaware, the government's "obligation to preserve evidence is rooted in the due process provisions" of the Delaware Constitution, Article I, section 7.[62] Thus, if the government fails to preserve important physical evidence, "a criminal defendant may be entitled to an inference

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[54] *Herring v. United States*, 555 U.S. 135, 144 (2009).

[55] *See,* e.g., *Scott v. State*,163 So.3d 389 (Ala. Cr. App. 2012) (finding that *Youngblood* gave "no consideration of the materiality of the missing evidence or its effect on the defendant's case.")

[56] *Hammond v. State*, 569 A.2d 81 (Del. 1989)

[57] *See Herring, supra* (discussing the objective of the Fourth Amendment's "exclusionary rule.").

[58] *See Hammond*, 569 A.2d at 87 (emphasis added).

[59] *Deberry v. State*, 457 A.2d 744, 752 (Del. 1983).

[60] *See Hammond, supra.*

[61] *Id.*

[62] *Id.* at 85; *see also* Del.C.Ann. Const., Art. 1, § 7

[jury charge] that the missing evidence would have been exculpatory."[63] In other words, a defendant can request a charge instructing the jury that it can infer the lost or destroyed evidence would have tended to prove his innocence.[64]

Indeed, Delaware provides due process safeguards far above *Youngblood*. To illustrate the difference between Delaware's approach, *Youngblood*, and its progeny, take a similar example as the one at the top of this article: Bill is arrested for murder, and blood from the crime scene is sent to a DNA lab for testing, but the lab misplaces it, and no other samples exist. Bill believes the blood is exculpatory.

First, the degree of negligence or bad faith is decidedly met here.[65] The government's negligence—like *res ipsa loquitur*—speaks for itself.[66] The government sent blood to a lab for DNA testing, never retrieved nor tracked it, which was entirely under the government's control.[67] Simply put, the government released blood to a lab and never followed up. This negligence approaches recklessness with potentially a systematic error in storing and processing blood evidence.

Next—the importance of the lost evidence—is also decidedly met here.[68] Because the blood was found at the crime scene, the blood evidence is crucial to Bill's case. It is axiomatic that blood at a crime scene has only two likely sources: the victim or the perpetrator.

Finally, Delaware's last element—the sufficiency of the other evidence adduced at the trial to sustain the conviction—would be on a case-by-case basis.[69] The example here does not offer sufficient facts to analyze this third element. Still, this third element is a welcomed balancing test that *Youngblood* fails to weigh. More precisely, this third element allows the court to consider "all factors"—

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[63] *Coleman v. State*, 289 A.3d 619 (Del. 2023).

[64] Similarly, in 2007, the ABA updated its regulations on mishandled DNA, stating that "[w]hen DNA evidence is offered at trial, evidence relevant to the reliability of that evidence, including relevant evidence of laboratory error, contamination, or sample mishandling, should also be admissible." *ABA Standards for Criminal Justice: DNA Evidence,* Standard 5.3 (Presentation of expert testimony), 3d ed., 2007. (https://www.americanbar.org/groups/criminal_ justice/publications /criminal_justice_section_archive/crimjust_standards_dnaevidence/ #2.1).

[65] *See Hammond, supra.*

[66] *Res ipsa loquitur* allows a jury to "infer negligence from the circumstances surrounding the injury. *Res ipsa loquitur,* meaning literally 'the thing speaks for itself,' is 'a shorthand expression for circumstantial proof of negligence—a rule of evidence.'" *Quinby v. Plumsteadville Family Practice, Inc*., 907 A.2d 1061, 1071 (Pa. 2006) (*citing Gilbert v. Korvette, Inc.,* 327 A.2d 94, 99 (Pa. 1974)).

[67] Custody is relevant here as the defendant would not have contributed to the government losing the blood or DNA.

[68] *See Hammond, supra.*

[69] *Id.*

not just the government's intent—before granting or denying relief.[70]

IV. FINAL THOUGHTS

Historically, due process and other constitutional standards are principally high for the government to justify its conduct when infringing on an individual's constitutional rights.[71] Yet *Youngblood's* due process standard is exceedingly low—when the government loses evidence, a simple "oops" will suffice. To be sure, *Youngblood* appears less concerned with protecting the individual and more concerned with protecting the government. *Youngblood* would thus need revision even without the increasing use of blood and DNA to solve decade-old crimes. The ubiquitous use of DNA as an investigative tool has only accelerated this need.

[70] *Id.*

[71] *See*, e.g., U.S. Const. amend. IV, and its exclusionary rule, which holds the government to a high standard to "deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Herring v. United States*, 555 U.S. 135, 144 (2009).

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