

## PROFESSIONAL WOMEN SILENCED BY MEN-MADE NORMS

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## INTRODUCTION

WHEN A WOMAN has to be made invisible, it is because she is powerful, and her presence reverberates, touching everything in its path. Whether by her beauty, her spirit, her intellect, her capacity for loving, her conscious witnessing, her creative rebelliousness-called-madness, her liberating laughter, her voice-seeking truth, her difference, she has not gone unnoticed. Without trying, she has called attention to herself, and she is anything but invisible. She is so present, she is threatening to those who are afraid of such power. The fearful ones will do anything to destroy what makes them cower. They will diminish the woman's being, pretend she is not there, she is not important, they will make her disappear. And sometimes, for a time, their efforts will work. Sometimes she almost ceases to exist.

But there is also a tremendous power in being invisible.<sup>1</sup>

The call of this symposium was for articles regarding women's rights and the movement toward equality. We are still wrestling with what equality should mean. In this Article, when I refer to equality I envision it as both a strategy and as the end goal. Equality as a strategy means assessing the inherent inequalities of particular situations and using the means necessary to remedy the inequalities and achieve equality as the end goal.<sup>2</sup> The end goal is for women (with all our complexities and intersectionalities) to achieve the *same rights and results* as men (with all their complexities and intersectionalities) and to be free from all forms of discrimination.<sup>3</sup> Women<sup>4</sup> continue to face

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1. THE LATINA FEMINIST GROUP, *TELLING TO LIVE: LATINA FEMINIST TESTIMONIOS* 167 (2001).

2. See Jo Lynn Southard, *Protection of Women's Human Rights Under the Convention on the Elimination of All Forms of Discrimination Against Women*, 8 PACE INT'L L. REV. 1, 10 (1996) (citing Diana Majury, *Strategizing in Equality*, 3 WIS. WOMEN'S L.J. 169 (1987)). Canadian law professor Diana Majury advocates using equality as a strategy. *Id.*

3. See Alda Facio & Martha I. Morgan, *Equity or Equality for Women? Understanding CEDAW's Equality Principles*, 60 ALA. L. REV. 1133, 1159 (2009). Professor Catharine MacKinnon proposes that "[a] substantive equality approach . . . changes not only the outcomes of discrimination cases but, as importantly if not more so, alters the circumstances that are identified as giving rise to equality questions in the first place. It begins by asking, what is the substance of this particular inequality, and are these facts an instance of that substance?" Catharine A. MacKinnon, *Substantive Equality: A Perspective*, 96 MINN. L. REV. 1, 11 (2011). "Substantive equality principles, rather than requiring that reality fit existing legal equality interpretation, could transform inequality by recognizing substance—the reality of inequality—as what it is." *Id.* at 27.

4. When I use the terms "women" and "men" (including their singular forms), I mean women and men of all races and ethnicities. When I state "women of color" and "men of color" (or their singular forms), I mean women and men who are not White. Similarly, when I state "people of color" I mean people who are not White. In other instances, I specify the race of the men or women that I refer to (e.g., White men). With the exception of quotes from other authors, Black and White

injustices in the workplace that make it difficult to attain equality.<sup>5</sup> The *Anita—Speaking Truth to Power* film (the Anita Hill story)<sup>6</sup> will remind us of what happens to some women in the workplace.<sup>7</sup> In October 1991, during the confirmation hearings of now United States Supreme Court Justice Clarence Thomas, Anita Hill, a law professor, appeared before a U.S. Senate Judiciary Committee and testified that Thomas sexually harassed her when he was her boss at the Education Department<sup>8</sup> and at

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are capitalized in this Article when the terms are used to refer to groups of people socially constructed as races, in the same way as African American, Asian American, Hispanic, Latino, and Native American. Other authors have also adopted this change in general capitalization rules. See, e.g., Laura Ho, Catherine Powell & Leti Volpp, *(Dis)assembling Rights of Women Workers Along the Global Assembly Line: Human Rights and the Garment Industry*, 31 HARV. C.R.-C.L. L. REV. 383, 384 n.5 (1996). The terms African American, Asian American, and Native American are not hyphenated per Rule 3.83 of the Chicago Manual of Style, unless they are used as adjectival phrases.

5. There is another definition of equality that requires proactive action in the workplace. “Actual equality” means equality beyond what is written in internal policies or what is stated orally at convenient times and in convenient places. See Ivan E. Bodensteiner, *The Risk of Complaining—Retaliation*, 38 J.C. & U.L. 1, 40-41 (2011).

An institution’s commitment to *actual* equality goes much further and assures its constituents that it will, for example, examine the impact of its neutral practices and policies; that it is aware of the possibility of unconscious discrimination and implicit bias and will engage in affirmative steps to address it; that it regularly will look at the results of its nondiscriminatory hiring and student recruitment policies to determine whether those policies yield a diverse faculty, staff and student body; that it regularly will examine promotion and tenure decisions to determine whether the faculty is diverse at all ranks; and that it regularly will review academic achievement to determine whether there is an equal opportunity to succeed.

*Id.* at 40 (internal citations omitted). Achieving actual equality also requires “publicly emphasize[ing] the important role of reporting discrimination, and perceived discrimination, in the effort to achieve *actual* equality.” *Id.* at 41.

6. See *Anita Speaking Truth to Power* (Samuel Goldwyn Films 2013), available at <http://anitahill-film.com> (last visited Aug. 15, 2014).

7. The documentary may provide additional information that may aid some people to judge the veracity of Hill’s allegations and her credibility during the “Hill-Thomas hearings.” We should keep in mind that Hill publicly disclosed her allegations *reluctantly*. RACE, GENDER, AND POWER IN AMERICA—THE LEGACY OF THE HILL-THOMAS HEARINGS xx (Anita Faye Hill & Emma Coleman Jordan eds., 1995) [hereinafter Hill & Coleman Jordan, RACE, GENDER, AND POWER IN AMERICA]. There were people who corroborated that Hill had indeed told them about Thomas’s sexual harassment, contemporaneous to when the events happened or soon thereafter. See *id.* at xx-xxi, xxvii-xxix. Moreover, Hill was not the only woman who alleged improper conduct by Thomas during his time at the EEOC. *Id.* at xxv. Hill took a lie detector test and “her examiner concluded that she was telling the truth.” *Id.* at xxviii. She testified under oath before the Senate Judiciary Committee after she was subpoenaed to do so. Charles J. Ogletree, Jr., *The People vs. Anita Hill: A Case for Client Centered Advocacy*, in RACE, GENDER, AND POWER IN AMERICA: THE LEGACY OF THE HILL-THOMAS HEARINGS 242, 145 (Anita Hill & Emma Coleman Jordan eds., 1995).

8. In her book, Professor Hill refers to the U.S. Department of Education as the Education Department. See e.g., ANITA HILL, SPEAKING TRUTH TO POWER 77 (1997) [hereinafter HILL, SPEAKING TRUTH TO POWER]. The official website for the department states: “ED was created in 1980 by combining offices from several federal agencies.” U.S. Department of Education, *About*

the Equal Employment Opportunity Commission (EEOC).<sup>9</sup> The sad truth is that gender/sex inequality and the power dynamics in many U.S. workplaces make women easy targets of workplace abuse.<sup>10</sup> Additionally, societal expectations of a “woman’s place” continue to limit women’s contributions. And, as the Hill story illustrates, women of color are especially vulnerable to abuse by men of color. This is the first in a series of articles I plan to write, including from a woman of color perspective, about the issues that impede professional women’s equality in the workplace.<sup>11</sup>

Not too long ago, what happened to women because of sex were just actions and situations that they had to deal with if they wanted to be in the male-run workplace. A legal theory eventually developed, however, from the work of women who identified, spoke, documented, analyzed, and litigated what was happening to women because they were women. This led to “sexual harassment” as a legal cause of action. Today, few people would argue that women should put up with sexual harassment on the job, but there are other forms of abuse, which similar to sexual harassment, are about power and sex. We have not reached equality in the workplace; therefore, we cannot become complacent about the gains we have made, especially when abuse *because of sex and race* is still prevalent in the lives of many women in the workplace.

It is evident that the mere presence of women in the workforce, including in “critical mass”<sup>12</sup> numbers, is not enough to cure the

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*ED, Overview and Mission Statement*, <http://www2.ed.gov/about/landing.jhtml>.

9. HILL, SPEAKING TRUTH TO POWER, *supra* note 8, at 170-96.

10. The terms abuse, aggression, bullying, discrimination, harassment, and mobbing are used to describe forms of workplace abuse. See MAUREEN DUFFY & LEN SPERRY, *MOBBING—CAUSES, CONSEQUENCES, AND SOLUTIONS* 39 (2012). Workplace abuse may become actionable at law under state and federal laws when it is inflicted because of the target’s protected class status (e.g., race or gender) or when it is retaliation for protected conduct, including whistle blowing. See David C. Yamada, *Emerging American Legal Responses to Workplace Bullying*, 22 TEMP. POL. & CIV. RTS. L. REV. 329, 332 (2013). In this Article, when I refer to abuse I mean conduct that may not be necessarily actionable under current laws. When I refer to discrimination and harassment, I include conduct that may be actionable at law, such as under Title VII of the Civil Rights Act of 1964, as amended, and other civil rights and employment laws. Title VII of the 1964 Civil Rights Act (Title VII) prohibits employment discrimination based on race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a) (2006).

11. At one time, the term “sexual harassment” did not exist in the employment lexicon or in the legal system. CATHARINE A. MACKINNON, *WOMEN’S LIVES – MEN’S LAWS* 111 (2005) [hereinafter MACKINNON, *WOMEN’S LIVES*].

12. The “critical mass” concept is widely used in legal discourse, including in judicial opinions. See generally Adeno Addis, *The Concept of Critical Mass in Legal Discourse*, 29 CARDOZO L. REV. 97 (2007). “[T]here is, however, no agreement as to what the concept precisely means.” *Id.* at 111. Critical mass can be the level at which there are enough members of a particular under-represented group such that individual members feel free to fully participate in the

injustices that plague women.<sup>13</sup> Some women “go along to get along” and some women provide cover for wrongdoing against other women.<sup>14</sup> “[S]ome women, however nominally, are compensated for women’s status better than others. This gives the relatively advantaged a stake in the status quo, which they hang on to with all the tenacity of having something to lose.”<sup>15</sup> Some women play the role of the “token” and try to keep other women out, thereby perpetuating the cycle of exclusion.<sup>16</sup> These and other dynamics keep women from reaching equality in many workplaces. Therefore, the challenges that women face must still be acknowledged (spoken) and analyzed as we continue to engage in the movement toward equality, including equality in the workplace. This Article seeks to provide information about why many professional women remain silent when we endure abuse, discrimination, and harassment in the workplace.

Employers, employees, judges, legislators, advocates, and the general public must be aware of the professional and workplace norms that silence professional women.<sup>17</sup> This is an effort to challenge the popular myth that professional women have now reached equality in U.S. workplaces; that our conditions of employment are equal to men’s because if it were otherwise more women would complain.<sup>18</sup> This way,

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particular educational or work environment. “For example, in order for women to participate in class in an ongoing and effective manner, it is often necessary to have at least thirty to forty percent of the classroom be composed of women students. The same data holds true for racial and ethnic minorities.” Gerald Torres, *Fisher v. University of Texas: Living in the Dwindling Shadow of LBJ’s America*, 65 VAND. L. REV. EN BANC 97, 108 (2012).

13. See generally Deborah L. Rhode, *Gender and the Profession: The No-Problem Problem*, 30 HOFSTRA L. REV. 1001, 1001 (2002) [hereinafter Rhode, *Gender and the Profession*].

14. “One of the biggest threats to the equality of women is the silence and acquiescence of fellow women who enjoy the benefits attained thanks to the persistence and hard work of the radical feminists while participating in the oppression of womanhood by becoming apologists for misogyny and opportunists of patriarchy.” Maritza Reyes, *Women in the Media as in Society?*, FEMINIST LAW PROFESSORS (Mar. 14, 2012), <http://www.feministlawprofessors.com/2012/03/women-media-society/>.

15. CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 12 (1987) [hereinafter MACKINNON, FEMINISM UNMODIFIED]. “But male supremacy is a protection racket. It keeps you dependent on the very people who [often] brutalize you so you will keep needing their protection—and no rights of your own.” *Id.* at 31 (citations omitted).

16. See Tracy Anbinder Baron, *Keeping Women Out of the Executive Suite: The Courts’ Failure to Apply Title VII Scrutiny to Upper Level Jobs*, 143 U. PA. L. REV. 267, 280 (1994).

17. “[W]e must remember and honor the early tools, methods, and visions of the feminist movement that birthed the inspiration for feminist scholars and journals. That is, we must engage in some continued forms of consciousness raising and we do that best by communicating in our work the voices of experience.” Elvia R. Arriola, *Tenure Politics and the Feminist Scholar*, 12 COLUM. J. GENDER & L. 532, 537 (2003) [hereinafter Arriola, *Tenure Politics*].

18. The myth finds support in the fact that some women themselves proclaim that “[t]here are plenty of laws in place today that a woman can look to if she’s truly discriminated against at work.”

the few women who dare to challenge, speak out, and even litigate their cases will hopefully not be treated as anomalies, discontents, disgruntled employees, and troublemakers.<sup>19</sup> Furthermore, this Article proposes that men and women must make a conscious decision and effort to support women's rights and equality in the workplace.<sup>20</sup> Men and women can further the cause of equality through individual actions on a daily basis.<sup>21</sup> Collective movements, after all, begin with the actions of individuals. Men and women must join together because the issues that women face are not "women's issues"; they are society's issues.<sup>22</sup>

Many people question why professional women, like Hill, remain silent when we face workplace abuse, including discrimination and harassment because of sex, race, or a combination thereof. The assumption is that college-educated, professional women, certainly academics and lawyers, should be the best prepared to report inappropriate conduct and litigate violations of employment laws.<sup>23</sup> But as Professor Hill acknowledged in her book: "While lawyers often

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S.E. Cupp, *Carly Fiorina Slams Dems' 'War on Women' Campaign*, CNN CROSSFIRE (June 30, 2014), <http://www.cnn.com/2014/06/30/opinion/cupp-interview-carly-fiorina/>. One of the shortcomings of the Women's Rights Movement has been the lack of monitoring of whether women can actually take advantage of those laws without suffering retaliation and whether the courts are honoring the intent of those laws. See discussion *infra* Parts IV-VII.

19. See *North Country* (2005), IMDB, <http://www.imdb.com/title/tt0395972> (Warner Bros. 2005) (last visited June 19, 2014). This movie is "[a] fictionalized account of the first major successful sexual harassment case in the United States." *Id.* The case that inspired the movie was *Jenson v. Eveleth Taconite Co.*, 139 F.R.D. 657 (D. Minn. 1991). *Id.* It was the first case in which a judge granted the plaintiffs' motion for class certification based on hostile environment sexual harassment. Susan Deller Ross, *Sexual Harassment Law in the Aftermath of the Hill-Thomas Hearings*, in RACE, GENDER, AND POWER IN AMERICA, *supra* note 7, at 233. The class consisted of a group of women miners. *Id.*

20. This message is also meant for judges who can support the rule of law by upholding plaintiffs' legal rights to enforce employment laws by proving their cases before a jury.

21. See e.g., Yolanda Flores Niemann, *Lessons from the Experiences of Women of Color Working in Academia*, in PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA 498 (Gabriella Gutiérrez y Muhs, Yolanda Flores Niemann, Carmen G. González & Angela P. Harris eds., 2012) [hereinafter PRESUMED INCOMPETENT] (advocating that "small wins matter, and enough small wins can change a culture over time").

22. Rona Kaufman Kitchen, *Off-Balance: Obama and the Work-Family Agenda*, 16 EMPLOYEE RTS. & EMP. POL'Y J. 211, 236 (2012) (citing President Obama's remarks). Some Republican women proclaim, "that the recent focus on women's issues is a 'distraction' tactic by President Obama." See e.g., Mollie Reilly, *Nikki Haley: 'There Is No War On Women'*, THE HUFFINGTON POST (Apr. 10, 2012), [http://www.huffingtonpost.com/2012/04/10/nikki-haley-war-on-women\\_n\\_1415051.html](http://www.huffingtonpost.com/2012/04/10/nikki-haley-war-on-women_n_1415051.html). This opinion is shortsighted, however, because the issues that affect women in negative ways also affect society in general (men, women, children, and the elderly) in negative ways. Therefore, we should not dismiss the emphasis on addressing these issues as a "distraction."

23. See Danné L. Johnson, *It's a Scandal: Can Minority Women in the Legal Academy Be Gladiators?*, 12 SEATTLE J. FOR SOC. JUST. 349, 356-57 (2013).

defend the rights of others, there is no evidence that they are more forthcoming in complaints about violations of their own civil rights.”<sup>24</sup> Ultimately, the reality is that professional women are still pressured to remain in gendered places, including by remaining silent.<sup>25</sup> Additionally, professional, workplace, community, and cultural norms make it even more difficult for some women to speak out.

When Professor Anita Hill testified before Congress about sexual harassment by Clarence Thomas, many people asked why she did not speak at the time when the conduct happened.<sup>26</sup> “When pressed about why she hadn’t come forward sooner, [Hill] seem[ed] as perplexed as some of the senators. But 20 years ago, that wasn’t exactly unusual behavior for women whose bosses made unwanted sexual advances. It still isn’t.”<sup>27</sup> Hill was a young lawyer when the events she testified about occurred.<sup>28</sup> I cannot help but think that many professional women thought of at least one obvious reason why she remained silent. It would have been “professional suicide” for Hill to file a complaint against her boss,<sup>29</sup> a man with powerful connections in legal and political circles.<sup>30</sup> Thomas was the Director of the EEOC, the agency charged with policing and preventing “such things as sexual harassment on the job from happening to women throughout the nation.”<sup>31</sup> Hill’s credibility would

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24. HILL, SPEAKING TRUTH TO POWER, *supra* note 8, at 150. “Most sexual harassment cases do not involve women lawyers as plaintiffs. Yet one should not conclude that sexual harassment does not exist in the profession or that women lawyers are not its targets.” *Id.* For a discussion about workplace and professional norms that silence lawyers, see *infra* discussion at Part V.

25. *See id.* at 362.

26. Robin Abcarian, *Anita Hill’s Still Standing 22 Years Later*, L.A. TIMES, Mar. 16, 2014, <http://www.latimes.com/local/la-me-abcarian-anita-hill-20140317,0,5507302.story#axzz2wH42BcFh>.

27. *Id.*

28. JULIE BEREBSKY, SEX AND THE OFFICE—A HISTORY OF GENDER, POWER, AND DESIRE 2 (2012).

29. Lawyers who handle discrimination cases are especially aware of the consequences of complaining in the workplace:

Complaining about bias risks making individuals seem too “aggressive,” “confrontational,” or “oversensitive”; they may be typecast as a “troublemaker,” “bitch,” or an “angry black.” Advice from colleagues is generally to “let bygones be bygones,” “let it lie,” “[d]on’t make waves, just move on.” Those who ignore that advice frequently experience informal retaliation and blacklisting; “professional suicide” is a common description.

Deborah L. Rhode, *Litigating Discrimination: Lessons from the Front Lines*, 20 J.L. & POL’Y 325, 332 (2012) [hereinafter Rhode, *Litigating Discrimination*].

30. Hill explained that, at the time of the sexual harassment, she did not know whom to turn to and “Clarence Thomas was the most powerful and well-connected person [she] knew.” HILL, SPEAKING TRUTH TO POWER, *supra* note 8, at 70 (1997).

31. Tracey Jean Boisseau, *Response to “The Duke Rape Case Five Years Later: Lessons for the Academy, The Media, and the Criminal Justice System” by Dan Subotnik*, 45 AKRON L. REV.

have been questioned, as it was during the hearings,<sup>32</sup> and the timing of her allegations may have placed her job prospects in further jeopardy because she was just starting her legal career.<sup>33</sup>

The stories of some law students confirm that women in the “third wave” still “feel silenced on a daily basis.”<sup>34</sup> “We are not living in a post-gendered world or a post-feminist world.”<sup>35</sup> Several of my current and former law students have shared with me their own stories of workplace abuse, discrimination, and harassment, especially at the hands of lawyers—people who should know better.<sup>36</sup> It pains me to confirm

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927, 931 (2012). By way of background, when Clarence Thomas was tapped for the position of assistant secretary for the Civil Rights Division in the Department of Education by President Ronald Reagan in 1981, “[a]ccording to Thomas, he] ‘initially resisted and declined taking the position . . . simply because [his] career was not in civil rights and [he] had no intention of moving into th[e] area.’ Although Thomas was sure that his appointment was due to his race, he ultimately decided to accept the position upon persuasion from friends.” Angela Onwuachi-Willig, *Just Another Brother on the SCT?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. 931, 971-72 (2005) [hereinafter Onwuachi-Willig, *Just Another Brother on the SCT?*] (citations omitted). “After spending only ten months in the position at the Department of Education, Thomas was then promoted to become the Chair of the Equal Employment Opportunity Commission (‘EEOC’).” *Id.* at 972 (citation omitted).

32. A search of the website of the United States Senate Committee on the Judiciary indicates that both the singular and plural form of the word “hearing” are used to refer to the confirmation hearing(s) of Supreme Court Justice nominees. U.S. Senate Committee on the Judiciary, <http://www.judiciary.senate.gov> (last visited Aug. 8, 2014). I use the plural form in this Article.

33. In a book that she published in 1997, six years after the hearings, Professor Hill explained that she knew that many victims of harassment felt that filing a complaint would be “fruitless” because of the “negative reactions to charges of sexual harassment.” HILL, *SPEAKING TRUTH TO POWER*, *supra* note 8, at 134, 147 (“[O]nly 3 percent of the incidents of sexual harassment culminate in a formal complaint being filed against the harasser. And by most accounts, employers rarely sanction those who are found to have harassed an employee or colleague.”). By the time of the hearings, Hill was a tenured, full professor at the University of Oklahoma College of Law. *Id.* at 86. She was the first African-American woman to teach at the law school. *Id.* at 87. But neither tenure, full professorship, nor academic freedom protected her from attacks after the hearings. *Id.* at 326-41. She decided that it was not worth it “to remain in a situation of discrimination simply to prove to those who vilified [her] that [she] could ‘tough it out.’” *Id.* at 340. She left Oklahoma. *Id.* at 341.

34. See e.g., Laura MacInnis, Note, *A Third Wave Approach to Analyzing Presumed Incompetent*, 29 BERKELEY J. GENDER L. & JUST. 406, 407 (2014).

35. Kathleen McCartney, *Happy 80th, Gloria Steinem*, CNN Opinion, Mar. 25, 2014, <http://www.cnn.com/2014/03/24/opinion/mccartney-steinem-at-80/> (updated 2:19 PM EDT, Tue).

36. Cf. Tiffany N. Darden, *The Law Firm Caste System: Constructing a Bridge Between Workplace Equity Theory & the Institutional Analyses of Bias in Corporate Law Firms*, 30 BERKELEY J. EMP. & LAB. L. 85, 90-91 (2009) (“Law firm culture today resembles in important ways the law firm culture in place when Congress passed antidiscrimination laws. And to understand the slow improvements in diversity at corporate law firms, one must acknowledge the high institutionalization of the employment practices now recognized as adverse to the advancement of minority attorneys.”). The Florida Supreme Court Gender Bias Study Commission’s 1990 Report found that women lawyers were subjected to the following (by male lawyers and judges): (1) “Overtly Insulting Behavior;” (2) “Demeaning Sexual Innuendo;” (3) “Verbal Condescension to

that new generations of women continue to face the same inappropriate and often unlawful conduct as past generations. When we do not inform women who are preparing to enter the professional workforce about the realities that some of them will encounter, we do them a disservice. We must empower them so they are prepared to deal with these barriers to equality.

Having worked in the federal courts, I understand how traumatic it is for victims to report employment violations, fight through internal procedures that are set up to protect employers, and end up in court trying to obtain justice before federal judges.<sup>37</sup> After discovery, even when the law and the facts reveal conduct that the “objectively reasonable person” (a juror) may find outrageous and worthy of civil punishment, most employment cases are decided by judges in favor of employers at the motion to dismiss or motion for summary judgment stage.<sup>38</sup> As a lawyer who worked at the EEOC, Anita Hill was aware of this reality.<sup>39</sup> As many women do, Hill decided to “move on” with her

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Gain a Tactical Advantage;” (4) “Non-Verbal Condescension or Rejection;” (5) “Unequal Treatment;” (6) “Mistreatment Based on Allegedly Inappropriate Role Behavior” (“Assertive advocacy by women is frowned upon”); (7) “Refusing to Recognize Female Authority;” (8) “Ostracizing Women Who Complain Publicly About These Matters;” (9) “Employment-Related Issues;” and (10) “Silencing.” Andrew E. Taslitz & Sharon Styles-Anderson, *Still Officers of the Court: Why the First Amendment Is No Bar to Challenging Racism, Sexism and Ethnic Bias in the Legal Profession*, 9 GEO. J. LEGAL ETHICS 781, 788-89 (1996) [hereinafter *Still Officers of the Court*]. Professor Taslitz, one of the co-authors of *Still Officers of the Court*, died on February 9, 2014. *Andrew E. Taslitz, Law Professor, Dies at 57*, WASH. POST, Obituaries, Mar. 4, 2014, [http://www.washingtonpost.com/local/obituaries/andrew-e-taslitz-law-professor-dies-at-57/2014/03/04/31c15354-a332-11e3-8466-d34c451760b9\\_story.html](http://www.washingtonpost.com/local/obituaries/andrew-e-taslitz-law-professor-dies-at-57/2014/03/04/31c15354-a332-11e3-8466-d34c451760b9_story.html) (“Andrew E. Taslitz, a law professor at Howard University and, most recently, American University, died Feb. 9 at Virginia Hospital Center in Arlington.”). May he rest in peace.

37. Most violations of civil rights and employment laws are litigated in the federal courts. Some plaintiffs’ lawyers try to avoid federal court jurisdiction to prevent having their cases decided in a forum that is perceived as pro-business (pro-employer). *Cf. Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013) (seeking to avoid federal jurisdiction by stipulating to a lower amount of damages). Defendants, on the other hand, generally remove cases to the federal courts, where the odds of getting more favorable outcomes are in their favor. *Cf. id.* (seeking to remove case to federal court despite stipulation by plaintiffs to lower damages in order to remain in state court). In the federal courts, the odds of employers winning before the cases get to a jury are even higher in employment cases than in any other type of cases. Nathan Koppel, *Job-Discrimination Cases Tend To Fare Poorly in Federal Court*, THE WALL STREET JOURNAL, Feb. 19, 2009, <http://online.wsj.com/news/articles/SB123500883048618747>.

38. See Katie R. Eyer, *That’s Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1276 (2012); Jeffrey A. Van Detta, “*Le Roi Est Mort; Vive Le Roi!*”: An Essay on the Quiet Demise of McDonnell Douglas and the Transformation of Every Title VII Case after *Desert Palace, Inc. v. Costa* into a “Mixed-Motives” Case, 52 DRAKE L. REV. 71, 106 (2003); Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 MARQ. L. REV. 141, 168-69 (2000).

39. HILL, SPEAKING TRUTH TO POWER, *supra* note 8, at 134, 147

life instead of trying to hold her boss accountable for his actions.<sup>40</sup> Looking for another job has been women's standard response to workplace abuse for over a century, and this approach continues even after feminists managed to enact laws to protect women in the workplace.<sup>41</sup>

The incidents of abuse documented in articles and books like *Presumed Incompetent*<sup>42</sup> are different from sexual harassment, but they are potentially as damaging (emotionally, physically, psychologically, financially, and professionally) for the women who endure them.<sup>43</sup> How do we make the American polity understand that this abuse, like sexual

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40. *Id.* at 90. Professor Hill later explained (about her experiences with Thomas and with “racist hostility at Oral Roberts and later at Oklahoma”):

[These experiences] were something in my life that I'd had to rise above in order to move forward. I refused to wallow in these experiences or punish myself because of them. I rarely talked about them. Perhaps wrongly, I wouldn't even try to make those responsible for the behaviors accountable in any way. In that sense, I share some of the responsibility for its perpetuation. For my own benefit, however, I only wanted to move beyond it. It was not that I ever forgot what had happened, or even that I work very hard to forget; I had simply convinced myself that what mattered was my right to not cling too tightly to the hurt, and to move on with my life.

*Id.* at 89-90.

41. BEREBITSKY, *supra* note 28, at 5.

42. PRESUMED INCOMPETENT, *supra* note 21. The first two paragraphs of a recent review provide a synopsis of the book.

Women of color in academia are at a crucial crossroad. Within the inherently biased and unwelcoming academic culture, compounded by massive budgetary cuts and trends towards corporatization in universities nationwide, underrepresented groups increasingly find themselves targets of bullying, harassment, and dismissal. Sadly, the vast majority continue to endure the violent onslaught feeling helpless and isolated—unable and sometimes unwilling to seek assistance or simply unaware of how to begin to advocate for themselves.

Parallel to this dismal reality, however, is the growing movement of scholars speaking up against the injustices in academe. This trend is led in part by the impactful publication of *Presumed Incompetent: The Intersections of Race and Class for Women in Academia* (2012 Eds. Gabriella Gutiérrez y Muhs, Yolanda Flores Niemann, Carmen G. Gonzalez, and Angela P. Harris, Utah State University Press). Few texts in recent years have had such a rippling effect in the non-self-reflective world of academia, and the book has inspired a tsunami of support for change within the system.

Kieu Linh Caroline Valverde, *Class for Women in Academia*, THE FEMINIST WIRE, Feb. 5, 2014, <http://thefeministwire.com/2014/02/a-call-to-action-for-women-of-color-in-academia/>.

43. See Harris & González, *Introduction*, in PRESUMED INCOMPETENT, *supra* note 21, at 7 (“Mounting public health evidence suggests that chronic stress—like the pressure of being continually misperceived or belittled or having to fight off microaggressions—can result in higher levels of hypertension, cardiovascular disease, and coronary heart disease.”) (citations omitted). See also Ramona Fernandez, *De-tenured: A Latina Endures More Than Four Decades in the Educational Industrial Complex*, 12 SEATTLE J. FOR SOC. JUST. 421, 431, 451-52, 463-64 (2014) (getting so sick as a result of microaggressions that she went into clinical depression and spent a lot of time in the emergency room with unexplained physical symptoms).

harassment, should not be accepted as a condition of employment for women who enter professional spaces dominated by men? One huge challenge is that we have to work against messages, such as “if you do not like it, leave;” “toughen up and stop whining;” “employers should have a right to hire and fire whomever they want (and pay them whatever they want);” “the market will fix it;” “it is much better than it used to be;” “it is not that bad;” “it could be worse;” and “you are privileged compared to other women so shut up and stop complaining.”<sup>44</sup>

At the American Association of Law Schools (AALS) Annual Meeting in January 2013, Professor Catharine A. MacKinnon received the Ruth Bader Ginsburg Lifetime Achievement Award from the Section on Women in Legal Education.<sup>45</sup> In her remarks she stated, “[m]y question is: what can we do, what are we doing, to change the dynamic that the more and deeper the truth you tell about women’s lives, or (horrors) try to do something about it[,] . . . the less our profession wants you in the room, far less at the table?”<sup>46</sup> She reasoned that, despite the

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44. These silencing strategies may be internalized as coping mechanisms, but they do not change the fact that some women in “privileged” positions suffer racism and sexism on the job. In a study for the Diversity in Legal Academia Project, one of the participants explained that she does not complain about her working conditions because, in comparison to slavery, a professional job is a “global luxury.” Meera E. Deo, *An Intersectional Empirical Critique of Legal Academia* 72 n.150 (May 6, 2014) (unpublished manuscript) (on file with author).

Minority women in the Academy neatly disassociate from the racism and sexism that we experience because our lives are good. We know all too well that it could be worse so we do not complain. The result of failing to name and resist the pervasive cultural view that racism can be overcome with education and employment is that we all believe that the educated and privileged minority women in the Academy can care for themselves. Further, we accept that these women will not and cannot be harassed out of their jobs. This phenomenon is similar to Japanese-Americans who were placed in internment camps. There is a general unwillingness among this group to call the internment camps concentration camps because the experience of the Japanese-Americans was not like the experience of the Jews.

Johnson, *supra* note 23, at 358 (citing *THE RABBIT IN THE MOON* (Wabi-Sabi Productions 1999)). Under this rubric of comparing any oppression to slavery and the holocaust, there would seem to be no room to complain about any current oppression in the United States (including sexism and racism). On its face, no current oppression in this country is as horrific as the holocaust or as slavery. But, does this rubric measure the pain and harm caused to persons through means other than slavery and the holocaust? Should two of the worst genocides against humankind be the measuring sticks with which we decide if any other oppression is wrong and worth the effort to complain about it to try to ameliorate it or eradicate it?

45. Bridget Crawford, *Catharine MacKinnon Receives AALS Section on Women in Legal Education Ruth Bader Ginsburg Lifetime Achievement Award*, Feminist L. Professors Blog (Jan. 16, 2014), <http://www.feministlawprofessors.com/2014/01/catharine-mackinnon-receives-aals-section-women-legal-education-ruth-bader-ginsburg-lifetime-achievement-award/>.

46. Professor Catharine A. MacKinnon, Remarks at the AALS 2014 Annual Meeting: Ruth Bader Ginsburg Lifetime Achievement Award (Jan. 3, 2014) [hereinafter MacKinnon, *Remarks*] (on

rise in women's presence in law schools and the escalating problems that women face, few women make these problems central to our legal agenda because we suffer "punishment: the discrimination against taking the subject and reality of women's status and treatment seriously, particularly in the upper reaches of a status-obsessed profession."<sup>47</sup> But maybe, just maybe, the women in legal education are reigniting our individual and collective commitment to address and solve, once and for all, the recurring (same old) problems that we face as professional women.<sup>48</sup> A "Women in Legal Education Spring"<sup>49</sup> appears to be developing after many women wrote about experiences with unequal treatment and oppression in e-mail messages in the Women in Legal Education Listserv, starting on April 25, 2014.<sup>50</sup> This Article is a contribution to this movement.

This Article proceeds in eight Parts. Part I narrates my path to "academic feminism" and the legal academy.<sup>51</sup> In the tradition of feminist scholars before me, I set forth the personal to provide the background for the socio-legal-political views that inform this Article.<sup>52</sup>

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file with author) (unpublished remarks cited with Professor MacKinnon's permission).

47. *Id.*

48. The "no problem problem" is still a problem. See Rhode, *Gender and the Profession*, *supra* note 13, at 1001.

49. This is the term I coined to describe what I hope will rise after the exchanges in the Women in Legal Education Listserv in late April and May 2014. Posting of Maritza Reyes, maritza.reyes@famu.edu, to sectwo.xxxx@xxxxx.xxxx.xxx (May 7, 2014) (on file with author). The complete Women in Legal Education listserv e-mail address is omitted in citations of this Article because it is not meant to be available in the public domain. Correspondingly, private e-mail addresses that are not readily available in the public domain are also not included. The term I used was a reference to the "Arab Spring." See *infra* note 181.

50. Professor Nareissa L. Smith posted the e-mail that began the e-mail thread. See Posting of Nareissa L. Smith, nsmith55@nccu.edu, to sectwo.xxxx@xxxxx.xxxx.xxx (Apr. 25, 2014) (on file with author) (cited with Professor Smith's permission).

51. I use the term "academic feminism" to describe the recording, analysis, and development of women's experiences into academic and legal theories that are taught in some educational institutions. "Academic feminism" is a term used by third-wave feminist Jessica Valenti to describe the feminism that she was exposed to in graduate school, as part of her graduate degree in women's studies, and in academia. JESSICA VALENTI, FULL FRONTAL FEMINISM—A YOUNG WOMAN'S GUIDE TO WHY FEMINISM MATTERS 175 (2007).

52. According to Gloria Steinem, "[a] feminist is anyone who recognizes the equality and full humanity of women and men." Kathleen McCartney, *Happy 80th, Gloria Steinem*, CNN Opinion, Mar. 25, 2014, <http://www.cnn.com/2014/03/24/opinion/mccartney-steinem-at-80/>. Some Christian feminists define feminism as:

[T]he commitment to work for the political, economic, and social equality of man and woman, boy and girl, in every area of life. To this commitment Christian feminists add the belief that mutuality—is the relational order exemplified by Jesus and specified by the New Testament epistles. Therefore, if they share a commitment to human sexual equality and mutuality, men as well as women may be, and indeed are, feminists.

VIRGINIA RAMEY MOLLENKOTT, *THE DIVINE FEMININE* 2 (1994).

I did not get to the academy by chance or circumstance. I made a concerted effort to reach this destination and have relied on my spiritual faith for strength in this journey as in all other journeys in my life.<sup>53</sup> I must acknowledge that I have struggled to gain freedom from the “religious,” men-made rules and interpretations that have been used to dominate, oppress, and subordinate people, especially women.<sup>54</sup> I stay away from Pharisee-style Christianity.<sup>55</sup> I believe that every human

53. *Joshua* 1:9 (“Have I not commanded you? Be strong and courageous. Do not be terrified; do not be discouraged, for the Lord your God will be with you wherever you go.”). As a child I experienced how members of my family decided to leave behind our homeland, personal and professional lives, and material possessions to embark on a journey of migration to another country where we had to start life again with clear disadvantages. They made the sacrifices because they valued freedom and remaining true to their values more than the economic and professional opportunities they may have enjoyed if they had “sold out” their principles and convictions. Once in the United States my adult family members learned to survive without a permanent immigration status and without the ability to practice in their professions. Monetarily, we did not have a lot but we always had enough. And we had plenty of principles and convictions. The lessons I learned at home taught me that I should not be afraid to leave and start again for the sake of the inner satisfaction of remaining true to my core value system. For me, reaching the destination does not justify using means that violate my principles and convictions during the journey. No destination has been worth that to me. This means that I have to be open to re-thinking destinations and journeys.

54. I do not envision God as male or female, masculine or feminine. Interpreting God as male has set the stage “for exploitation of girls and women.” VIRGINIA RAMEY MOLLENKOTT, *THE DIVINE FEMININE—THE BIBLICAL IMAGERY OF GOD AS FEMALE* 5 (1994). Men-made rules and traditions are not what Jesus had in mind. See *Mark* 7:1-20. Jesus was a liberator, revolutionary, and friend to women. See e.g., *Luke* 10:38-41 (visiting the home of Martha and Mary, his friends); *John* 4:7-26 (asking a Samaritan woman for water when Jews were not supposed to associate with women like her); *John* 8:1-11 (stopping Pharisees and scribes from stoning a woman who was caught in the act of adultery); *Luke* 8:1-3 (receiving financial support from Mary Magdalene, Joanna, Susanna, and many other women); *Mark* 14:3-9 (standing up for a woman in Bethany after his disciples chastised her).

55. “Watch out for false prophets. They come to you in sheep’s clothing, but inwardly they are ferocious wolves. By their fruit you will recognize them.” *Matthew* 7:15-16. Jesus reprehended the Pharisees (the “holier than thou” of their time) for their hypocrisy:

Woe to you teachers of the law and Pharisees, you hypocrites! You shut the kingdom of heaven in men’s faces. You yourselves do not enter, nor will you let those who are trying to.

Woe to you, teachers of the law and Pharisees, you hypocrites! You travel over land and sea to win a single convert, and when he becomes one, you make him twice as much a son of hell as you are.

*Matthew* 23:13-15. Religious dogmas complicate workplaces when, for example, some people do a lot of Christian talk but little Christian actions. See Angela Mae Kupenda, *Challenging Presumed (Im)Morality: A Personal Narrative*, 29 BERKELEY J. GENDER L. & JUST. 295, 296 (2014) [hereinafter Kupenda, *Challenging Presumed (Im)Mortality*]. Some Christians use phrases, such as “I will pray for you,” to end debates “with condescending arrogance.” JT Eberhard, *I’ll Pray for You, What Would JT Do?* (Nov. 30, 2011), <http://www.patheos.com/blogs/wwjtd/2011/11/ill-pray-for-you/>. As one blogger noted, the phrase is sometimes “a Christian’s passive-aggressive way (or a passive-aggressive Christian’s way) of putting you down.” *Id.* “When someone is being mean or

being has the right to seek religion or to be free from religion.<sup>56</sup> It is my spiritual faith that feeds my calling to identify the best ways in which I can utilize my talents to contribute and make a difference wherever I am and for whatever time I am here,<sup>57</sup> including by speaking out when others “do not have a [public] voice or the courage or freedom to raise it.”<sup>58</sup>

Part II explains the need for broader perspectives and approaches to legal scholarship. It is important for the legal academy to recognize that, just like the legal market is calling for changes,<sup>59</sup> we have to stop silencing the development of scholarship and perspectives that can bring forth the change we need.<sup>60</sup> The academy has already benefitted from

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hurtful to you and not acting in a Christian manner, yet then stares you in the face and says ‘But I’ll Pray for You’ . . . how do you react?” *Id.*

56. In addition, consistent with biblical teaching, we should certainly be free from the dictates of religion in secular spaces, like most workplaces. *Matthew 22:21* (“Give to Caesar what is Caesar’s, and to God what is God’s.”). By this, I mean that individuals should be free to hold on to their religious convictions, but they should not try to use those convictions to dictate the norms and behaviors of others in the workplace. For example, if a man or a woman follows the teaching of *1 Corinthians 14:34* that women should remain silent *in the churches*, that they are not allowed to speak and must be in submission, he or she should not expect or push (by action or omission) that silencing norm in the workplace.

57. *Matthew 5:13* (“You are the salt of the earth.”).

58. When I was getting ready to graduate from the LL.M. program at Harvard, some of my classmates encouraged me to write some final thoughts. I wrote the following:

As attorneys, we have an important role to play in some of the societal challenges of each of our countries because we know the law and how to use it. It is this knowledge that places us in a position to influence the lives of our fellow citizens, governments, the legal profession, and society in general. . . . We can choose to use our skills for purely personal advancement. However, I hope that most of us also will consider it a duty to contribute in the fight against human suffering and injustice. We can do this in different ways, including activism, legislative initiatives, volunteering, fundraising, writings, advocacy, or by simply speaking up for those who do not have a voice or the courage or freedom to raise it.

Maritza Reyes, *Congratulations LL.M. Class of 2008*, THE HARVARD LAW RECORD, April 24, 2008, <http://hlrecord.org/?p=12770>.

59. See James R. Silkenat, *Major Push for Diversity: ABA Scholarship and Other Programs Broaden Inclusion in All Areas of the Law*, ABA JOURNAL (Mar. 2014), [http://www.abajournal.com/magazine/article/aba\\_scholarship\\_and\\_other\\_programs\\_broaden\\_inclusion\\_in\\_all\\_areas](http://www.abajournal.com/magazine/article/aba_scholarship_and_other_programs_broaden_inclusion_in_all_areas). “Law schools, law firms, corporations, and bar associations form the institutional layers that give the legal profession capacity to reform effectively.” Darden, *supra* note 36, at 90-91.

60. Even some progressive scholars who are more senior in the academy (because they arrived earlier) participate in this silencing. The hierarchical nature of the academy places more senior and established scholars in a position to silence junior scholars with the threat of their potential negative input in the scholarship review process that accompanies tenure and promotion decisions, especially when junior scholars bring new perspectives or scholarly positions and theories that contradict what the more senior scholars advocate. Moreover, some scholars of color feel that they can do this with impunity and without any remorse when they do it to other scholars of color. See Maria P. Lopez & Kevin R. Johnson, *Presumed Incompetent: Important Lessons for University*

the work of pioneers. Following their lead, I bring a viewpoint and a way of telling stories that are my own, informed by my personal and professional knowledge and experiences, which may or may not be the same as those of other women similarly situated. I validate the experiences of other women by including their stories in this Article. A goal of diversity is to expand the points of reference, and, in this quest, every individual and every story adds value.<sup>61</sup>

Part III documents one woman's story, Iman al-Obeidi's, an attorney from Libya who risked her life to tell her story of surviving gang rape at the hands of Muammar Gaddafi's men. Women all over the world crave freedom from injustice and oppression. Some professional women are leading the fight by telling their stories and, through their individual actions, starting movements to seek justice for themselves and for all women in their particular countries. Al-Obeidi's story is meant to highlight what some women go through in other parts of the world when they break the silence and tell on their oppressors. I also introduce al-Obeidi's story in contrast to how women in the United States are silenced. Her story is also meant to support my proposal that the actions of individuals can start movements. My hope is that more professional women will be inspired by al-Obeidi's story to break their own silence and tell their stories.

Part IV introduces how professional and workplace norms silence professional women in the United States. Many people assume that women in this country, especially professional women, are free to

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*Leaders on the Professional Lives of Women Faculty of Color*, 29 BERKELEY J. GENDER L. & JUST. 388, 395 (2014) ("At times, those minority scholars seem to relish, rather than to resist, providing negative feedback about minority faculty candidates and faculty members. Unfortunately, the overly critical side of academia can rub off on minority scholars as they assimilate into academia.").

61. While one woman's experiences and perspectives do not necessarily apply to all women, there is value in each woman's story and in considering diverse experiences and perspectives. When the Honorable Patricia M. Wald, the first woman to sit on the bench of the U.S. Court of Appeals for the District of Columbia Circuit (later serving as Chief Judge), wrote an autobiographical essay, she acknowledged at the onset that "[e]very woman's journey to the bench and beyond is different and highly personal." Patricia M. Wald, *Six Not-So-Easy Pieces: One Woman Judge's Journey to the Bench and Beyond*, 36 U. TOL. L. REV. 979, 979 (2005). But she wrote her story "[f]or what it is worth." *Id.* When Justice Paul H. Anderson of the Minnesota Supreme Court wrote a tribute to Minnesota Supreme Court Justice Esther M. Tomljanovich, he recognized that Justice Tomljanovich brought her own perspective to the bench informed by her own experiences with gender discrimination. Justice Paul H. Anderson, *A Tribute to Justice Esther M. Tomljanovich*, 32 WM. MITCHELL L. REV. 1737, 1739 (2006). "Esther's view was that a wise woman on the bench can influence and may even change the opinion of a wise man—and vice versa." *Id.* She also touted a diversity of judicial problem-solving models (that a wise woman may implement in a different way than a wise man) "as having an inherent value to the judicial decision-making process." *Id.*

complain and demand our rights. However, professional and workplace norms silence us with nearly as much power as the threat of a gun to our heads. Professional women in American workplaces may not generally be physically attacked as punishment for seeking equality, but we may be wounded in other ways when we try to assert our equality at work.<sup>62</sup> Even “microaggressions” cause damage to a woman’s health, her emotional well-being, and her career.<sup>63</sup>

Part V illustrates through Anita Hill’s story how professional and workplace norms silence professional women, in her case the unwritten rules of the legal profession. The *Anita—Speaking Truth to Power* film will introduce new generations of men and women to the events surrounding Professor Hill’s testimony during the confirmation hearings of now U.S. Supreme Court Justice Clarence Thomas.<sup>64</sup> This Part provides some reasoning behind the decisions that Hill made when she was a lawyer, a couple of years out of law school, and as she testified about sexual harassment in the workplace. It explains why professional women, especially lawyers, often remain silent.

Part VI presents additional considerations that silence women of color when we are abused, discriminated, and harassed by men of color in professional settings. It is difficult enough for women to defy professional and workplace norms that require our silence. But for women of color there is the additional pressure of not telling on men of color because community and cultural norms also require our silence. As more men of color climb into positions of power, this community/cultural dynamic may subject more women of color to workplace abuse.<sup>65</sup> Therefore, it is important to recognize that women

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62. Statistics show, for instance, that workplace bullying is an emerging form of workplace abuse that disproportionately affects women. GARY NAMIE, PH.D. & RUTH NAMIE, PH.D., *THE BULLY AT WORK: WHAT YOU CAN DO TO STOP THE HURT AND RECLAIM YOUR DIGNITY ON THE JOB* 8 (2009) [hereinafter NAMIE & NAMIE, *THE BULLY AT WORK*]. Statistics also show that more women leave jobs because of bullying. *Id.* Related to bullying, mobbing is another form of abuse in the employment context. DUFFY & SPERRY, *supra* note 10, at vii. More research across disciplines is emerging to examine the similarities and differences between bullying and mobbing. *Id.* at xiii. Mobbing seems to be different from bullying in at least one way—it is systemic. *Id.* at 4. Mobbing includes organizational dynamics and involvement. *Id.* Mobbing is about “group behavior” whereas bullying is about “individual acts.” *Id.* at 29. “While bullying tends to be done more one on one, mobbing implies that a group of people are uncivil to one or more persons.” DARLA J. TWALE & BARBARA M. DE LUCA, *FACULTY INCIVILITY* xi (2008).

63. See e.g., Elvia R. Arriola, “*No Hay Mal Que Por Bien No Venga*”, in *PRESUMED INCOMPETENT*, *supra* note 21, at 372-83 [hereinafter Arriola, *No Hay Mal Que Por Bien No Venga*].

64. Jocelyn Noveck, *Anita Hill in Spotlight Again as New Film, ‘Anita’, Opens*, HUFF. POST BLACK VOICES, Mar. 22, 2014, [http://www.huffingtonpost.com/2014/03/22/anita-hill-spotlight-anew-film-anita-opens\\_n\\_5012568.html](http://www.huffingtonpost.com/2014/03/22/anita-hill-spotlight-anew-film-anita-opens_n_5012568.html).

65. Making a space for women of all races and ethnicities in the feminist project requires

of color are not necessarily “safe” in institutions where people of color have achieved critical mass and positions of power.<sup>66</sup> The converse may be true. We may be even more vulnerable because community and cultural norms permeate professional and workplace norms.<sup>67</sup>

Part VII analyzes why professional women generally do not file lawsuits after our rights are violated in the workplace. Many employers, employers’ lawyers, and employees’ lawyers are well informed about the dismal odds against an employee winning a case for violations of federal employment laws in the federal courts.<sup>68</sup> The Alliance for Justice (ALJ)<sup>69</sup> and U.S. Senator Elizabeth Warren have called on President Barack Obama to diversify the professional backgrounds of federal judges.<sup>70</sup> This is in recognition of the obvious reality that judges

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attention “to the multiple ghosts that continue to haunt law, the legal academy, and feminist legal theory, and [also] requires a commitment to constant reflexivity about the very framing of the feminist project.” Jennifer C. Nash, *Bearing Witness to Ghosts: Notes on Theorizing Pornography, Race, and Law*, 21 WIS. WOMEN’S L.J. 47, 72 (2006).

66. See Flores Niemann, *in* PRESUMED INCOMPETENT, *supra* note 21, at 479.

67. An issue worthy of analysis but beyond the scope of this Article is how professional women of color should navigate the treacherous waters at the intersection of race and gender when it comes to abuse, discrimination, and harassment by men and women of color in the workplace. Women of color must have this difficult conversation and do something to assert our right to be free from discrimination within people of color groups. Gloria Anzaldúa, bell hooks, and Alice Walker suffered intra-community backlash for daring to speak the truth about what happens in communities of color. “Women of color often choose to study such matters, not simply out of interest, but out of a desire to push society further toward equality. For some, the focus of their research is hardly a choice at all.” Maritza I. Reyes, Angela Mae Kupenda, Angela Onwuachi-Willig, Stephanie M. Wildman & Adrienne Katherine Wing, *Reflections on Presumed Incompetent: The Intersections of Race and Class for Women in Academia Symposium—The Plenary Panel*, 29 BERKELEY J. GENDER L. & JUST. 195, 207 (2014) [hereinafter Reyes, Kupenda, Onwuachi-Willig, Wildman & Wing, *Reflections on Presumed Incompetent*]. *Machismo*, sexism, and misogyny continue to live and thrive in our communities. Beyond analysis, we must put a stop to the abuse. No man or woman (White or not) should get a free pass. People of color’s reliance on skin color to provide cover for the wrongdoing of people within our groups “has something in common with aspects of white racism, where what counts is bloodline.” Eleanor Holmes Norton, *Anita Hill and the Year of the Woman*, *in* RACE, GENDER, AND POWER IN AMERICA, *supra* note 7, at 246.

68. These litigation outcomes reduce the chances of employees being able to find legal representation, especially on a contingency fee basis. See Koppel, *supra* note 37.

69. The ALJ describes itself as “a national association of over 100 organizations dedicated to advancing justice and democracy.” Alliance for Justice, *AFJ Vision Statement*, <http://www.afj.org/about-afj/afj-vision-statement> (last visited June 24, 2014). “Alliance for Justice believes that all Americans have the right to secure justice in the courts and to have their voices heard when government makes decisions that affect their lives.” *Id.* The organization has been in existence for over three decades. *Id.*

70. Jennifer Bendery, *Elizabeth Warren to Obama: Stop Putting Forward So Many Corporate Judicial Nominees*, HUFFINGTON POST, Feb. 7, 2014, [http://www.huffingtonpost.com/2014/02/06/elizabeth-warren-obama-judicial-nominees\\_n\\_4738029.html](http://www.huffingtonpost.com/2014/02/06/elizabeth-warren-obama-judicial-nominees_n_4738029.html); ALLIANCE FOR JUSTICE, *Broadening the Bench: Professional Diversity and Judicial Nominations* 4 (2014), <http://www.afj.org/wp-content/uploads/2014/02/Professional->

bring their own perspectives into their rulings.<sup>71</sup> When most judges are White men who come from the prosecution side or corporate practice, they may not understand the work experiences lived by employees who become plaintiffs.<sup>72</sup> In this Part, I introduce an additional rationale that explains why judges may identify, consciously or unconsciously, with parties who are employers—judges are employers themselves.

Part VIII sets forth my proposal. I call on individuals to make a conscious effort to support equality in the workplace and suggest that individual actions can make a difference. We should not wait for a national workplace movement to further the cause of equality. Through our daily deeds, we can either support equality or sabotage it. We can certainly make a difference in our particular workplaces and in the lives of our colleagues, especially the most vulnerable ones, the ones under attack.<sup>73</sup> We must act.

### I. MY PERSONAL JOURNEY TO ACADEMIC FEMINISM AND THE LEGAL ACADEMY

When I met Gloria Steinem, she was attentive, kind, and helpful.<sup>74</sup> She is nothing like the bitter, man-hating, feminist that some people may want to imagine.<sup>75</sup> She did me a favor (well, the favor was for a group of women who started a project that we hope will become a movement).<sup>76</sup> She agreed to review *Presumed Incompetent* and provide

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Diversity-Report-060314.pdf [hereinafter *Broadening the Bench*].

71. Sonia Sotomayor, *A Latina Judge's Voice*, 13 BERKELEY LA RAZA L.J. 87, 92 (2002); Nancy Gertner, *A Judge Hangs Up Her Robes*, 38 NO. 2 LITIGATION 60, 60-61 (2012) [hereinafter Gertner, *A Judge Hangs Up Her Robes*]; Maritza I. Reyes, *Latina Experience and Wisdom Welcomed*, THE HARVARD CRIMSON, July 8, 2009, <http://www.thecrimson.com/article/2009/7/8/latina-experience-and-wisdom-welcomed-as/>.

72. See *Broadening the Bench*, *supra* note 70, at 5; Gertner, *A Judge Hangs Up Her Robes*, *supra* note 71, at 60-61.

73. Reyes, Kupenda, Onwuachi-Willig, Wildman & Wing, *Reflections on Presumed Incompetent*, *supra* note 67, at 249.

74. For a similar description of Steinem, see Rachel Cooke, *Gloria Steinem: 'I Think We Need to Get Much Angrier'*, THE OBSERVER (Nov. 12, 2011), <http://www.theguardian.com/books/2011/nov/13/gloria-steinem-interview-feminism-abortion>.

75. Some men, for example, view “[f]eminism [as] a hateful ideology; feminists [a]re castrating bitches.” Bethany M. Coston & Michael Kimmel, *White Men as the New Victims: Reverse Discrimination Cases and the Men's Rights Movement*, 13 NEV. L.J. 368, 372 (2013).

76. See, e.g., Carmen G. Gonzalez & Angela P. Harris, *Presumed Incompetent: Continuing the Conversation*, 29 BERKELEY J. GENDER L. & JUST. 183 (2014) [hereinafter Gonzalez & Harris, *Presumed Incompetent: Continuing the Conversation*]; Reyes, Kupenda, Onwuachi-Willig, Wildman & Wing, *Reflections on Presumed Incompetent*, *supra* note 67; Kieu-Linh Caroline Valverde, *Fight the Tower: A Call to Action for Women of Color in Academia*, 12 SEATTLE J. FOR SOC. JUST. 367 (2013) [hereinafter Valverde, *Fight the Tower*].

a blurb.<sup>77</sup> Catharine A. MacKinnon, one of my professors during my LL.M. studies at the Harvard Law School, wrote a personal dedication in my copy of her book, *Are Women Human?*: “For Maritza Reyes, looking forward to all your contributions to this work—in sisterhood.”<sup>78</sup> The writings of these two women were my introduction to academic feminism once I was already an adult, a mother, and a lawyer.<sup>79</sup> Academic feminism is often out of reach for women without access to women’s studies.<sup>80</sup> Although I had not been introduced to academic feminism, all the premises, concepts, and principles that feminists advocate, are so natural to me, so visceral, that I did not need a women’s studies education to understand the need or longing for equality.<sup>81</sup> I comprehended it even as a child. But it was wonderful to finally put my thoughts in the context of the work of feminist activists and scholars that have spent their lives furthering and documenting women’s fight for equality.

For my *Juris Doctor* studies, I attended Nova Southeastern University Shepard Broad Law Center on a Goodwin fellowship,<sup>82</sup> which included a full-tuition scholarship.<sup>83</sup> Nova trained me to be a

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77. See generally PRESUMED INCOMPETENT, *supra* note 21.

78. Book on file with author.

79. Some women of color are introduced to academic feminism by White women. See e.g., BELL HOOKS, *AIN’T I A WOMAN* 12 (1981) [hereinafter HOOKS, *AIN’T I A WOMAN*] (describing that her first women’s studies class at Stanford University was taught by a White woman). I now have had the privilege, as a law professor, of introducing women to academic feminism. However, we need more women of color who are ready to take up the cause for women’s equality. We need to introduce new generations of students to academic feminism because it may be a source of empowerment for them individually and collectively. See *infra* text accompanying note 81.

80. See VALENTI, *supra* note 51, at 175-76.

81. Beyond providing academic knowledge, gender studies classes empower some women to stand up to sexism and sexual harassment. One woman described how taking a “Feminist Reading of Culture” class “was like [she] was being introduced to everything that [she] didn’t know [she] already knew, but lacked the understanding of how to connect the dots. [She] needed someone else to show [her] how.” Jackie Klein, *I Can’t Turn Off My Feminism, and I’m Not Sorry About It*, FEMININSPIRE, <http://feminspire.com/i-cant-turn-off-my-feminism-and-im-not-sorry-about-it/> (last visited June 8, 2014). The woman goes on to explain how what she learned in that class helped her to stand up to sexual harassment the next time she faced it. She said: “I would not have been able to walk away before, because before I had assumed that being a woman meant that I had to put up with some sexual harassment every once in a while.” *Id.*

82. The idea for the Goodwin Fellowship originated with Dean Joseph D. Harbaugh, who later told me that he envisioned the scholarships as investments in students who would raise the level of performance of all students in the law school.

83. I applied to the three South Florida law schools at the time (University of Miami, Nova, and St. Thomas). I decided to stay at home because I did not want to remove my children from their familiar environment. I was accepted by the three schools and selected the one that offered me the most generous scholarship and was geographically closest to my house and my children’s schools. The practice of awarding “generous scholarships to applicants with high Law School Admission

lawyer and started me on the journey to becoming a law professor.<sup>84</sup> As part of the fellowship, I served as research assistant for Professors Mark Dobson and Joseph Smith (two of my first semester professors).<sup>85</sup> My work with these professors inspired me to make becoming a law professor one of my professional goals. They were outstanding teachers who held students to high standards because they cared.<sup>86</sup> I was fortunate to be assigned to some of the best professors at Nova during

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Test scores and undergraduate grade-point averages at the expense of lower-scoring students who might have a greater need for financial aid” has garnered criticism recently. *See, e.g., Karen Sloan, La Verne Offers Flat-Rate Law School Tuition*, THE NAT’L L. J., Mar. 26, 2014, <http://www.nationallawjournal.com/id=1202648544187/La-Verne-Offers-Flat-Rate-Law-School-Tuition?slreturn=20140306123116>. In my case, it would have been extremely difficult for me to attend law school without the “merit” scholarship (an unexpected blessing that I did not even know was available). In addition to the scholarship, I used student loans to pay a mortgage, childcare, and additional expenses to support a family as head of household.

84. Nova “offers a rigorous traditional academic program” and prides itself on preparing graduates to make a smooth transition from the classroom to practice. NSU Law Overview, available at <http://nsulaw.nova.edu/about/overview.cfm>. I benefitted from the teaching of rigorous professors who valued teaching above all. I also benefitted from the practical skills training I received throughout my three years of law school. Nova implemented a curriculum that incorporated skills components, through a two-year Lawyering Skills and Values Program and clinical experiences, long before those programs were implemented at other law schools. I also received top-notch training in a full-time clinical placement in the U.S. Attorney’s Office, supplemented by more skills training during the evenings and on weekends by full-time professors and excellent adjunct professors, including one of the most respected prosecutors in Florida—Charles B. “Chuck” Morton Jr. *See 2014 – Charles B. “Chuck” Morton Jr.*, THE FLORIDA BAR CRIMINAL LAW SECTION, <http://www.flacsls.org/2014-charles-b-chuck-morton-jr/>. “Chuck Morton made history in 1976 when he became the first African-American prosecutor in Broward County. He eventually became the highest-ranking African-American prosecutor in Florida.” *Id.* I also attended Nova when the law school was leading the way in the use of technology in the classroom and training students to use technology as a tool in the practice of law. Nova was voted the Most Wired Law School by *the National Jurist* during consecutive years when I was a student. All this was thanks to the vision of Dean Joseph D. Harbaugh. Neal Weinberg, *Florida Law School Uses Wireless Technology*, CNN.COM, May 25, 1999, <http://www.cnn.com/TECH/computing/9905/25/campus.idg>.

85. Dean Harbaugh has described Professors Dobson and Smith as “two of [Nova’s] most academically demanding professors.” Letter from Joseph D. Harbaugh (Aug. 19, 2011) (on file with author).

86. I adhere to the following understanding of how professors show care for our students: [Law professors] do not show care for [students] through flattery or the suspension of critical faculties. We do not show care by expecting less of them than they are capable of achieving. We do not show care by pretending that the profession they are about to join does not require mental and moral toughness, as well as empathy and understanding. We show care by encouraging students to accomplish all that they possibly can, by showing that we want them to succeed, and by holding them to the standards we think will be helpful to them in reaching their potential.

Barry Sullivan & Ellen S. Podgor, *Respect, Responsibility, and the Virtue of Introspection: An Essay on Professionalism in the Law School Environment*, 15 NOTRE DAME J. L. ETHICS & PUB. POL’Y 117, 139-40 (2001) (emphasis added).

my first year of law school. During my second year, I asked Professor Dobson about the requirements to obtain a tenure-track job in the legal academy. He gave me a list of the “traditional” credentials he thought I would need.<sup>87</sup> I achieved every credential on the list before entering the teaching market, but timed the pursuit of these endeavors while prioritizing my children’s education and well-being.<sup>88</sup>

I embarked on my LL.M. studies once my children were older.<sup>89</sup> Harvard trained me to be a scholar and supplemented my training to become a law professor.<sup>90</sup> While I was there, I began to research about

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87. The list consisted of the following credentials: (1) excellent grades (I graduated in the top 1% of a class of nearly 400 students); (2) service as law review articles editor; (3) experience in “big firm;” (4) experience in a federal clerkship; (5) an “elite” LL.M. degree; and (6) publication in a legal journal. After I achieved all these credentials, I attended the Association of American Law Schools (AALS) Faculty Recruitment Conference, which is how my current institution and other schools selected me for the initial interviews. At the FAMU College of Law, I am the first member of the faculty hired through the AALS Faculty Recruitment Conference as the faculty and administration were pushing to finally obtain full ABA accreditation. I accepted the invitation to join the faculty before the law school was fully accredited because I wanted to contribute to the achievement of its mission and make a difference in the lives of students who, like me, have overcome many challenges to attain their educational goals. This, I have accomplished and for this I am thankful.

88. I am certainly not the first woman to prioritize child rearing before pursuing an academic career. See, e.g., Emma Brockes, *I Loved What I Did*, THE GUARDIAN, Oct. 29, 2003, <http://www.theguardian.com/world/2003/oct/30/usa.emmabrockes> (interviewing Madeleine Albright, the first woman U.S. Secretary of State); Caitlyn Yoshiko Kandil, *The Madeleine Effect*, MOMENT MAGAZINE, Nov.-Dec. 2012, <http://www.momentmag.com/the-madeleine-effect/> (“In Washington, Albright worked on her dissertation from afar with the hope of following in her father’s footsteps in academia, but her days were largely devoted to being a Washington mother.”). See also Laura M. Padilla, *Single-Parent Latinas on the Margin: Seeking a Room with a View, Meals, and Built-In Community*, 13 WIS. WOMEN’S L.J. 179, 200-01 (1998) (“With the strong emphasis on family, it is common for Latinas to focus on their families, rather than on their individual goals.”).

89. When I could not go away to college because I could not obtain federal financial aid due to my lack of a permanent immigration status, I pursued other goals. I married and two years later had my first child. For me, one of the realities of marrying and having children when I was very young is that balancing family and career was never a consideration—it was just a fact of my life. My career has been a source of personal and professional fulfillment and the means to support my family and make sure that my children have more opportunities in life. Thanks to my profession, I enjoy a hard-earned personal and financial independence.

90. For its LL.M. program, Harvard admits a handful of graduates from U.S. law schools “who have had at least two or three years of experience beyond law school” and a proven track record of excellence in prior law school studies and in practice, including in clerkships. Harvard Law School, *LL.M. Program: Eligibility Requirements and Admissions Criteria*, <http://www.law.harvard.edu/prospective/gradprogram/lm/eligibility/index.html> (last visited June 7, 2014). For these students, the Harvard LL.M. is specifically designed for a law teaching career. Harvard Law School, *LL.M. Degree Requirements, available at* <http://www.law.harvard.edu/academics/degrees/gradprogram/lm/ll.m.-degree-requirements.html> (last visited June 7, 2014). At Harvard, beyond focusing on substantive areas that I intended to teach, I learned about the history of legal education, the current trends and challenges in the legal academy, and legal theory. I also

legal feminism. I identified Latina<sup>91</sup> feminist scholars in the legal academy through their writings. Professors Elvia R. Arriola, Leslie Espinoza, Berta E. Hernández-Truyol, and Margaret Montoya wrote the first articles I found.<sup>92</sup> I also found many articles by Black law professors like Professors Regina Austin, Kimberlé Williams Crenshaw, Angela P. Harris, Patricia J. Williams, and Adrien Wing, *to name just a few*. As part of my feminist education, I began to learn about theories and concepts that have developed through the work of courageous “crazy feminists.”<sup>93</sup>

In Professor MacKinnon’s class, I also learned that, as academics,

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received training in teaching techniques and exposure to cutting edge research. One of my favorite teaching experiences was attending a seminar by the legendary professor Elizabeth Warren, now a U.S. Senator, on how to use the Socratic method. I also received advice on scholarship development from Professor (and now Dean) Martha Minow. Being in the classroom once again as a student, knowing that I would be seeking a teaching position, caused me to scrutinize the diverse styles and approaches of different professors.

91. I use Hispanic and variations of the term Latina/o in this Article as umbrella terms that include “persons in the [United States] who trace their origins to Mexico, Puerto Rico, Cuba or other Spanish-speaking countries” while recognizing that there are intra-group differences based on nationality, geographic location in the United States, immigration experience, and socioeconomic factors. See Maritza I. Reyes, *Opening Borders: African Americans and Latinos Through the Lens of Immigration*, 17 HARV. LATINO L. REV. 503 n.4 (2014) [hereinafter *Opening Borders*] (quoting Laura E. Gómez, *What’s Race Got to Do With It? Press Coverage of the Latino Electorate in the 2008 Presidential Primary Season*, 24 ST. JOHN’S J. LEGAL COMMENT. 425, 425 n.1 (2009)). I use Latinas/os to include men and women in the plural form. I use Latina to refer to a woman individually and Latinas to refer to women in the plural form. Similarly, I use Latino to refer to a man individually and Latinos to refer to men in the plural form.

92. Although I could not obtain one-on-one mentoring from these professors, their articles mentored me. This is a lesson I learned—our writings also serve to mentor students, colleagues, and readers in general.

93. Feminists were treated as “crazies” because they wanted “something that had never been”—“a right to every human choice.” GLORIA STEINEM, *MOVING BEYOND WORDS* 256 (1994). A Google search of “crazy feminists” reveals how this phrase continues to be used to attack feminism without any reference to the actual principles underlying the feminist movement (the first, second, or third wave). Some people label a woman a “crazy feminist” any time she, for her own individual reasons (without necessarily any relation to feminism or without self-identifying as a feminist in any way) decides to refuse a man’s advances in the best way she knows how. See e.g., *Crazy Feminist Flips Out on Douchebag*, VIMEO, available at <http://vimeo.com/85115091> (last visited June 8, 2014). Maybe it is time to reclaim the “crazy feminist” label as a positive reference to women who made it possible and continue to make it possible for women to receive the benefit of the laws, education, and employment opportunities that all women enjoy today. The work of the “crazy feminists” has benefitted women in general, including those women who choose to support patriarchy and a status quo that does not provide full equality for all.

This generation is not the first to distance itself from the word [feminism]. It is one of the ironies of our time that every woman in America, regardless of her age, race, earnings, or political beliefs, has been affected by the modern feminist movement—whether she is a supervisor on the factory floor or a physics professor at a university; or whether she is Sarah Palin or Hillary Clinton.

MADELEINE M. KUNIN, *THE NEW FEMINIST AGENDA* 9 (2012).

we can be activists and scholars. During a conversation with her, I candidly shared that I never attained an academic feminist education. I explained that, as an immigrant, I was mainly concerned for many years with obtaining a permanent immigration status. This affected the opportunities that were available to me. I made lemonade with the lemons. I worked my way through college and pursued accounting, a profession where women were underrepresented.<sup>94</sup> I did it at the same time that I raised children and took care of a family.<sup>95</sup> After a divorce,<sup>96</sup> I seized the opportunity to reclaim my own personal and professional goals.<sup>97</sup> MacKinnon, in her very matter-of-fact way, responded to my

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94. The decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and the prior and subsequent history of the case shed light on the plight of women in accounting firms. Under a model of identity theory of gender in the workplace, some women do not choose careers in accounting and law because of gender associations of these careers with “male professions.” See EMMA COLEMAN JORDAN & ANGELA P. HARRIS, A WOMAN’S PLACE IS IN THE MARKETPLACE—GENDER AND ECONOMICS 255-57 (2006).

95. I did housework—“woman’s work”—without pay. See MACKINNON, FEMINISM UNMODIFIED, *supra* note 15, at 24.

96. Because I married when I was very young (as a teenager), life after a divorce was the first period of true independence in my adult life. I relish in my independence and cannot comprehend why some people, including in professional circles, seem to be automatically threatened by or suspicious of women who choose to remain unmarried. *But see* REGINA BARRECA, PERFECT HUSBANDS (& OTHER FAIRY TALES) 33 (1993) (proposing that men who remain unmarried “by choice” are “likely to be found not suspiciously deviant, but ‘healthy’”). Over the years, there have been opportunities for remarriage, but I have decided against it. I have come to realize that marriage is not necessarily the “natural state for a woman.” See *id.* at 6. However, I must admit that there are some negative consequences for single women in society, including in workplaces. See HILL, SPEAKING TRUTH TO POWER, *supra* note 8, at 275-76, 283. To avoid being further stigmatized in society and because they have internalized patriarchal norms, some women (of all socioeconomic and education levels) stay in unhappy (and sometimes abusive) relationships because they need a man to validate their existence. See Janell Hobson, *Storyteller, A Ms. Conversation with Chimamanda Ngozi Adichie*, MS. MAGAZINE at 28 (Summer 2014) (“I’ve found even feminist American women who will settle, even when they’re not satisfied in their relationships.”). Like comedian and talk show host Joy Behar, I may one day re-consider marriage (on mutually agreed-upon terms) as an option but not as a necessity or as a life goal. See Zach Johnson, *Joy Behar: Why I Finally Got Married After 29 Years*, US WEEKLY CELEBRITY NEWS, Sep. 6, 2011, <http://www.usmagazine.com/celebrity-news/news/joy-behar-why-i-finally-got-married-after-29-years-201169>.

97. Many Latinas live our own type of feminism, including as mothers and heads of households. Cecilia Ballí, in COLONIZE THIS! YOUNG WOMEN OF COLOR ON TODAY’S FEMINISM 196 (Daisy Hernández & Bushra Rehman eds., 2002) [hereinafter Hernández & Rehman, COLONIZE THIS!]. Some women make professional choices, like which schools to attend, based on family considerations, such as staying close to home. See e.g., Angelique T. EagleWoman, *Balancing Between Two Worlds: A Dakota Woman’s Reflections on Being a Law Professor*, 29 BERKELEY J. GENDER L. & JUST. 250, 259 (2014). U.S. Supreme Court Justice Ruth Bader Ginsburg gave up a Harvard Law School degree when she transferred to Columbia Law for her third year of law school because of “exigent family circumstances.” Elena Kagan, *Remarks Commemorating Celebration 55: The Women’s Leadership Summit*, 32 HARV. J. L. & GENDER 233, 234 (2009). As a single parent, keeping my children at home, where we were close to family, was certainly my primary

narrative: “Of course, you were busy.” She understood that I learned to practice before I learned to theorize.<sup>98</sup> She encouraged me to write about my experiences, but, until now, I have been hesitant to do this because I was trained in the “conventional” approach to legal writing.<sup>99</sup> This approach includes the reluctance to introduce “the personal” in law review articles.<sup>100</sup> But then I learned that the “personal is political,” a long-established feminist principle.<sup>101</sup>

In my self-education about academic feminism, I found critical race feminism.<sup>102</sup> “Like many critical race feminists, I discovered the path unto myself at a relatively overdue stage in my life.”<sup>103</sup> But, better late than never, I found my bridge.<sup>104</sup> I have been guided by the innovative, enlightening, scholarly, personal/political writings of feminists, womanists,<sup>105</sup> and *mujeristas*,<sup>106</sup> including some professors in the legal

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consideration when I decided where to go to school.

98. See MACKINNON, *WOMEN’S LIVES*, *supra* note 11, at 23 (“We know things with our lives, and live that knowledge, beyond what any theory has yet theorized.”). “[W]omen of color—African American women, Latinas, Asian American women, Native women—have created feminism in their own image, a feminism of the real world largely obscured in academic feminism.” Catharine A. MacKinnon, *Keeping It Real: On Anti-“Essentialism,”* in *CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY* 71 (Francisco Valdes, Jerome McCristal Cult & Angela P. Harris eds., 2002).

99. While researching for this Article I learned that Professor Angela D. Gilmore, one of my law professors at Nova, had this same hesitation when she was thinking about publishing *It Is Better to Speak* in a national law journal. Angela D. Gilmore, *It is Better to Speak*, in *CRITICAL RACE FEMINISM—A READER* 117 (Adrien Katherine Wing ed., 2d ed. 2003).

100. This convention seems hypocritical because every author injects “the personal” into his or her writings. The choices of what to write about, what angle to analyze it from, what proposals to make, and what conclusions to reach are all influenced by personal and subjective thoughts and experiences, even if these are not directly set forth or acknowledged.

101. Ira C. Lupu, *Gloria Steinem at the Harvard Law Review Banquet*, 2 *GREEN BAG* 2d 15, 22 (1998).

102. Professor Angela Onwuachi-Willig provides the following description of critical race feminism (CRF):

CRF serves as a bridge toward understanding the legal status of women of color and the ways in which women of color face multiple discrimination on the basis of factors, including but not limited to race, gender, class, able-bodiedness, and sexuality. Critical race feminists expose how various factors, such as race, gender, and class, interact within a system of white male patriarchy and racist oppression to make the life experiences of women of color distinct from those of both men of color and white women.

Angela Onwuachi-Willig, *Foreword: This Bridge Called Our Backs: An Introduction to “The Future of Critical Race Feminism,”* 39 *U.C. DAVIS L. REV.* 733, 736 (2006).

103. *Id.* at 735.

104. *See id.* at 736 (referring to critical race feminism as a “bridge”).

105. “The term ‘womanist’ refers to Black women’s experiences.” *See WOMEN AND RELIGION* 325 (Elizabeth A. Clark & Herbert Richardson eds., 1996) (citing JACQUELYN GRANT, *WHITE WOMEN’S CHRIST AND BLACK WOMEN’S JESUS: FEMINIST CHRISTOLOGY AND WOMANIST RESPONSE* 209, 211-12, 215-20 (Atlanta: Scholars Press, 1989)). It was a term coined by Alice Walker. *Id.*

academy. This Article is one of my contributions to the movement for women's rights and equality—unalienable parts of our right to the pursuit of happiness.<sup>107</sup> It is fueled by a duty to pay it forward.<sup>108</sup> I write to honor Sor Juana Inés de la Cruz, my Mexican sister who paid the ultimate price for daring to think, question, and write.<sup>109</sup> I also write in response to Virginia Woolf's call to write in *A Room of One's Own*—for Shakespeare's sister.<sup>110</sup> I am following the lead of women who have used their voices and writings in support of women's equality, including scholars that I mention and cite in this Article.

The perspectives that most inform this Article are derived from my experiences as a professional woman, lawyer, and law professor. I also analyze, through my individual lens as a Latina, some of the workplace dynamics I have experienced, learned about, or observed in these roles.<sup>111</sup> Gender studies show that women lawyers are still disadvantaged in many workplaces, but it is considered whining or asking for special treatment when women ask for equal treatment.<sup>112</sup> Women are told to “toughen up.”<sup>113</sup> As a result, many women tolerate

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106. *Mujeristas* is the term used by some Hispanic/Latina feminists in the United States, starting with Ada María Isasi-Díaz. *Id.* at 330-31 (citing Ada María Isasi-Díaz's essay *Mujeristas: A Name of Our Own*).

107. The *Declaration of Independence* of the United States recognizes “certain unalienable rights,” including “Life, Liberty and the pursuit of Happiness.” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). These rights were granted by our “Creator” and are the reason for governments to be instituted with the consent of the people who are governed. *Id.*

108. See generally THIS BRIDGE CALLED MY BACK—WRITINGS BY RADICAL WOMEN OF COLOR (Cherríe Moraga & Gloria Anzaldúa eds., 1981, 1983) [hereinafter Moraga & Anzaldúa, THIS BRIDGE CALLED MY BACK]. “Ours is the responsibility of marking the journey and passing on the torches and rituals left by those who have already crossed many types of bridges. . . . We honor those whose backs are the bedrock we stand on, even as our shoulders become the ground for the generations that follow, and their bodies then will become the next layer.” Gloria E. Anzaldúa, *Preface—(Un)natural Bridges, (Un)safe Spaces*, in THIS BRIDGE WE CALL HOME 5 (Glorida E. Anzaldúa & Analouise Keating eds., 2002) [hereinafter Anzaldúa & Keating, THIS BRIDGE WE CALL HOME]. Since I joined the legal academy, I have often heard female law professors acknowledge that we stand on the backs of those who came before us. I wonder why, with this knowledge, more women are not rising up to honor the backs of the ones who came before us and enforcing the rights that they worked so hard to attain for us.

109. I include a brief excerpt about Sor Juana's life as background material. See *infra* Appendix.

110. I include a brief excerpt from Woolf's *A Room of One's Own* as background material. See *infra* Appendix.

111. “So much of where we are, is about who we are, because of where we have been.” Leslie Espinoza Garvey, *Beyond the Matrix: The Psychological Cost of Fighting for Gender Justice in Law Teaching*, 11 S. CAL. REV. L. & WOMEN'S STUD. 305, 313 (2002).

112. Rhode, *Gender and the Profession*, *supra* note 13, at 1007 (citations omitted). “[C]alls for equal treatment are often seen as calls for ‘special treatment’ in situations where discrimination has become the norm.” HILL, *SPEAKING TRUTH TO POWER*, *supra* note 8, at 340.

113. See Kerry Lynn Stone, *Teaching the Post-Sex Generation*, 58 ST. LOUIS U. L.J. 223, 237

inappropriate and even unlawful conduct in professional environments. One foundational way to combat the norms that oppress women in the workplace is to name them (to speak them).<sup>114</sup> Feminist legal theory has engaged in a critical investigation of the often unacknowledged ways in which patriarchy and heteronormativity construct and apply gendered inequities and male supremacy in law and society.<sup>115</sup> Law is shaped by “cultural traditions, norms, and practices.”<sup>116</sup> Ultimately, denial and silence do not further the cause of women’s equality.<sup>117</sup> Therefore, I speak, write, and act in furtherance of women’s freedom from oppression.

## II. BROADENING PERSPECTIVES – PIONEER LAW PROFESSORS WHO BROKE FROM SILENCING “CONVENTIONS”

The legal academy is known for its proclaimed adherence to academic freedom—the freedom of professors to teach, research, write, engage in academic activities (in our institutions, academy, and communities), and participate in faculty governance free of administrative and political interference.<sup>118</sup> Yet some well-meaning members of the legal academy advise junior faculty to stay away from the narrative or “non-traditional” forms of scholarship and from “controversial” topics.<sup>119</sup> But some of us decide that we do not want to be bound by the master’s tools.<sup>120</sup> We honor a self-imposed duty to

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(2013). For women of color,

[a] community standard which requires that women “toughen up to” gender abuse for the sake of the community creates a complex set of dilemmas. Particularly where toughness requires her to participate in her own denigration, she loses her individual dignity. A requirement that she show her toughness by not protesting such behavior places her at odds with other more broadly accepted definitions of feminine traits and makes her responsible for ending the behavior. In sum, it encourages a dangerous and vicious cycle of abuse.

HILL, *SPEAKING TRUTH TO POWER*, *supra* note 8, at 279.

114. “Betty Friedan’s *The Feminine Mystique* took on ‘the problem that had no name’ (women being sick and tired of being maids).” VALENTI, *supra* note 51, at 170. “Susan Brownmiller wrote *Against Our Will* about the culture of rape; feminists fought for increased awareness of violence against women.” *Id.* at 172.

115. Nash, *supra* note 65, at 47.

116. *Id.* at 48.

117. “Within feminist circles, silence is often seen as the sexist ‘right speech of womanhood’—the sign of woman’s submission to patriarchal authority.” BELL HOOKS, *TALKING BACK—THINKING FEMINIST, THINKING BLACK* 6 (1989) [hereinafter HOOKS, *TALKING BACK*].

118. Mark L. Adams, *The Quest for Tenure: Job Security and Academic Freedom*, 56 *CATH. U. L. REV.* 67, 79-81 (2006).

119. See Arriola, *Tenure Politics*, *supra* note 17, at 534-36.

120. “For the master’s tools will never dismantle the master’s house. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine

speak and write about subjects that otherwise might not be considered, through new lenses, in the legal academy and in society.<sup>121</sup> We feel a responsibility to lend our voices to further a broader construct of law and society.<sup>122</sup>

In the late 1980s, “Professor MacKinnon was quoted as saying that she was pursuing other models of scholarship than the traditional one.”<sup>123</sup> But it meant that she did not get a permanent job for many years “despite a significant body of work and activism.”<sup>124</sup> Today, few if any question her contributions to scholarship, law, society, and equality, even if some do not agree with her theories. Professor Adrien Katherine Wing also decided (pre-tenure and against the advice of many) to write *Brief Reflections towards a Multiplicative Theory and Praxis of Being*, a narrative essay about the multiplicative discrimination she faced as a Black woman.<sup>125</sup> For Professor Wing, writing the essay was a “cathartic” experience.<sup>126</sup> The project that some thought would be “political suicide” was the opening for future projects, including *Critical Race Feminism* (two editions), *Global Critical Race Feminism*, more

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change. And this fact is only threatening to those women who still define the master’s house as their only source of support.” Audre Lorde, *History Is a Weapon, The Master’s Tools Will Never Dismantle the Master’s House* (1979) from *Sister Outsider*, THE CROSSING PRESS FEMINIST SERIES (1984), available at <http://www.historyisaweapon.com/defcon1/lordedismantle.html>.

121. See e.g., Carlo A. Pedrioli, *The Rhetoric of Catharsis and Change: Law School Autobiography as a Nonfiction Law and Literature Subgenre*, 41 MCGEORGE L. REV. 843 (2010) (explaining the use of the autobiographical genre); Reyes, Kupenda, Onwuachi-Willig, Wildman & Wing, *Reflections on Presumed Incompetent supra* note 67, at 207 (“[W]omen of color often choose to study such matters [as race, gender, sexuality, and/or class] not simply out of interest, but out of a desire to push society further toward equality.”).

122. “[F]or scholars in a professional school, at least part of the mission is to advance understanding and promote improvement of their profession and its institutions. For legal academics, this includes all of the contexts in which law is developed, enforced, interpreted, and practiced.” Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1330 (2002). Law review journals understand the need for creative and innovative scholarship. See, e.g., Wang Ping, *Who Killed Soek-Fang Sim*, 29 BERKELEY J. GENDER L. & JUST. 308 (2014); Philomila Tsoukala, *Reading a Poem Is Being Written: A Tribute to Eve Kosofsky Sedgwick*, 33 HARV. J. L. & GENDER 339 (2010); Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. COLO. L. REV. 683 (1992).

123. Jo Ann Palchak, *A Legal Room of One’s Own*, 46 TULSA L. REV. 11, 11 (2010) (citing Tamar Lewin, *Job Offer to Feminist Scholar May Mark Turn*, N.Y. TIMES, Feb. 24, 1989, at B5) (internal quotations omitted).

124. *Id.*

125. Adrien Katherine Wing, *Lessons from a Portrait*, in PRESUMED INCOMPETENT, *supra* note 21, at 356-57 [hereinafter Wings, *Lesson from a Portrait*] (citing Adrien K. Wing, *Brief Reflections towards a Multiplicative Theory and Praxis of Being*, 6 BERKELEY WOM. L. J. 181 (1990-91)).

126. *Id.* at 358.

articles, countless panels, and speeches around the world.<sup>127</sup> Professor Wing became a leader in the development of a jurisprudential area and, perhaps as important, she was affirmed.<sup>128</sup> She realized that she was not alone.<sup>129</sup> She explained that many women were “caught between race and gender discrimination . . . despite [their] stellar academic and professional credentials and the multiple burdens that [they] were juggling.”<sup>130</sup>

I recently re-read *Reflection*, an essay by Professor Patricia J. Williams.<sup>131</sup> It was published as part of a symposium organized around a prior essay, which she published in 1988.<sup>132</sup> She wrote her initial essay in a “summer course at the School of Criticism and Theory, then situated at Dartmouth College.”<sup>133</sup> She took that class in 1987 when she had decided to leave the legal academy (after teaching for seven years) to start a Ph.D. in English.<sup>134</sup> “[She] was going to wipe the slate clean, start over, try something that wasn’t so seemingly insurmountably an exclusive gentleman’s preserve.”<sup>135</sup> And then she wrote *On Being the Object of Property*.<sup>136</sup> This is how she describes what that essay meant to her and the impact it had on her trajectory in the legal academy:

When I wrote this essay for which I have become so notorious, I’d been a trial lawyer for five years, and a law professor for another seven after that. I was lonely and miserable in my chosen profession. . . .

. . .

. . . For the life of me I can’t remember the topic of that assignment; but, whatever it was, I was so inspired by it that I sat down and wrote the essay that literally did change the course of my career. . . . I entitled that piece *On Being the Object of Property* and it was a lamentation about chattel slavery and personhood. . . .

It was an immensely satisfying project, and to this day I’m really proud of it. Sometimes it feels as though it has done the yeoman’s work in my career, not I. It is as though I accidentally gave birth to a champion

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127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. Patricia J. Williams, *Reflection*, 27 COLUM. J. GENDER & L. 52 (2013) [hereinafter Williams, *Reflection*].

132. *See generally id.*

133. *Id.* at 53.

134. *Id.*

135. *Id.* at 53.

136. Patricia J. Williams, *On Being the Object of Property*, 14 SIGNS 5 (1988).

poodle and have spent years meekly trotting around after it, while it strikes pose after noble pose. I still believe it's far and away the best thing I've ever written, but I've never quite been able to equal it, never again found the place where I was when I wrote it, even though I perpetually share the same stage with it.

To make a long story short, Professor [Sacvan] Bercovitch liked the piece too. He shot it over to Harvard Press, whose editor, the legendary Lindsay Waters, asked me to render it into a book. That book became *The Alchemy of Race and Rights*, a publication that opened all kinds of other doors for me. So, weirdly enough, the essay I wrote as an escape hatch from the legal profession ended up drawing me back into it, as I became both hailed and assailed for being genre-busting, and quirky.<sup>137</sup>

Professor Williams' essay re-directed the path of her law teaching career.<sup>138</sup> In addition, it also exposed scholars like me, and many others, to the potential reach of creative and innovative legal scholarship.

Twenty years after writing *Mascaras, Trenzas, y Greñas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*,<sup>139</sup> Professor Margaret Montoya was honored by the UCLA *Chicano/a - Latino/a Law Review* with a symposium about her article.<sup>140</sup> She was also recognized at the Harvard Law School in a special event to commemorate the publication of her article by the *Harvard Journal of Law & Gender*, which had published it two decades earlier.<sup>141</sup> Professor Montoya stated that “[t]he most unexpected lesson from the article was how recognizable [her] experiences and responses were to persons from many backgrounds.”<sup>142</sup> She used the narrative, autobiographical approach to legal scholarship.<sup>143</sup> Her article “developed into a scholarly

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137. Williams, *Reflection*, *supra* note 131, at 52-55.

138. *Id.* at 55.

139. Margaret Montoya, *Mascaras, Trenzas, y Greñas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN'S L.J. 185, 210, 220 (1994) [hereinafter *Mascaras I*].

140. University of New Mexico School of Law, *Professor Montoya Receives Recognition from Law Journals*, <http://lawschool.unm.edu/news/archives/2013/april/montoya.php> (Apr. 5, 2013) (“According to the Latino Education Task Force, Professor Margaret Montoya was one of the first to write about Identity and the masks some may use to show or hide themselves, especially as Latinas and, in her case, in the legal profession.”).

141. *Id.*

142. Margaret E. Montoya, *Máscaras y Trenzas: Reflexiones un Proyecto de Identidad y Análisis a Través de Veinte Años [Masks and Braids: Reflections About a Project of Identity and Analysis Throughout Twenty Years]* 36 HARV. J. L. & GENDER 469, 476, 478 (2013) [hereinafter *Máscaras II*].

143. Professor Montoya advocated for the use of autobiographical writings by Latinas similar to the way in which African Americans have used this mode of scholarship to serve “descriptive and

project about knowledge and narrative-based epistemology, skills, and attitudes relating to race, gender, and identity. The article initiated an examination of such concepts as voice and silence, assimilation and resistance, different forms and expressions of power, narrativity, and identity as performance.<sup>144</sup> Narrative scholarship provides a vivid picture of the complexity of “human experience[s] upon which law ultimately acts.”<sup>145</sup>

The students in my Spring 2014 Latinos and the Law seminar inspired me to finish this project. They were enthusiastic about researching and writing their papers about topics that they knew something about—their own experiences as African-American women.<sup>146</sup> They were eager to engage in research and analysis about the similar and different experiences of African Americans and Latinas/os in law, society, and within our particular groups.<sup>147</sup> In addition, the call for papers by the *Akron Law Review* was my final motivation to make this Article a reality sooner rather than later.

The legal academy needs faculty members who contribute new viewpoints to an institution in great need of reinventing itself, keeping up with the times, and continuing to function as the training ground for the primary guardians of the rule of law.<sup>148</sup> I hope that the day will come when advice to “play it safe” for the six or seven years it takes to

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persuasive functions that are distinct from White autobiography.” Montoya, *Mascaras I*, *supra* note 139, at 211-12.

144. Montoya, *Mascaras II*, *supra* note 142, at 476, 478.

145. Alice G. Abreu, *Lessons from LatCrit: Insiders and Outsiders, All at the Same Time*, 53 U. MIAMI L. REV. 787, 787 (1999).

146. It was my second time teaching the Latinos and the Law seminar. The group was small, all African-American women. All were my former students from evidence. Scheduling issues affected enrollment in the seminar, but a small group gave me more opportunities for individual engagement with each student. As it turns out, all students were interested in legal feminism and comparative analysis of the socio-legal experiences of African-Americans and Latinas/os, an area of particular interest in my own scholarship. At the beginning of the seminar, I devoted some time to the “how to” and different approaches to legal writing for legal journals. The students were pleasantly surprised to learn that they were allowed to use their voices, experiences, and creative thinking, in addition to the legal analysis and footnoting required in law review writing.

147. I use the book *Latinos and the Law* to introduce students to the historical and legal treatment of Latinas/os. See RICHARD DELGADO, JUAN F. PEREA & JEAN STEFANCIC, *LATINOS AND THE LAW* (2008) [hereinafter DELGADO, PEREA & STEFANCIC, *LATINOS AND THE LAW*]. I also supplement with additional readings. Many students (including Latinas/os) are surprised and shocked at what they learn. Before taking the course, many of them have not been introduced to the socio-legal history of Latina/os in the United States. I compare the experiences and histories of different groups and encourage students to analyze for commonalities and differences. We discuss the role of law in the development of these histories and experiences.

148. “In order to energize legal theory, we need to subvert it with narratives and stories, accounts of the particular, the different, and the hitherto silenced.” Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 615 (1990).

get tenure (if everything goes well)<sup>149</sup> will no longer be considered necessary.<sup>150</sup> I cannot help but think of the junior faculty member, a woman who died young,<sup>151</sup> and wonder how many women, like Sor Juana, die knowing that they held back their thoughts, words, and intellectual curiosity.<sup>152</sup>

I choose to believe that truth, integrity, and wisdom prevail in the end.<sup>153</sup> I do my best not to allow stereotypes or fear to rule my life.<sup>154</sup> I abide by a broadly defined code of ethics.<sup>155</sup> I fulfill a higher calling in

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149. If it does not go well, in the words of Professor Mary-Antoinette Smith's father, the woman aged on the job, was used for six to seven years, only to be easily discarded. Mary-Antoinette Smith, *Free at Last! No More Performance Anxieties in the Academy 'Cause Stepin Fetchit Has Left the Building*, in PRESUMED INCOMPETENT, *supra* note 21, at 413. Meritocracy in academic decisions is often a fallacy in dysfunctional faculty settings where decisions are made, not on the merits, but based on personal preferences and agendas, which may hide racist and sexist motives. In these institutions, some untenured faculty members may be hired and kept around to perform their jobs (on the merits), but decisions on whether they get to become permanent (tenured) members of the faculty are not always made "on the merits" of their performance; their performance is not ultimately judged by the actual standards for tenure.

150. Does the academy want to promote a sort of fraud by demanding that some junior faculty members repress their identities, interests, voices, and perspectives during the pre-tenure years? This approach is not healthy because all those suppressed feelings may change people, make them physically ill, or cause them to repeat oppressive cycles. See Elvia R. Arriola, *It's Not Over: Empowering the Different Voice in Legal Academia*, 29 BERKELEY J. GENDER L. & JUST. 320, 331 (2014) [hereinafter Arriola, *It's Not Over*].

As research now confirms, abuse is a learned experience and victims of abuse have the potential for becoming abusers themselves. That may be the case for women who bury their hurts, finally succeed, and instead of reaching out to mentor junior faculty, turn around and pass on the same misery to the next generations. Or they won't speak up on behalf of those who are getting unnecessary heat from senior colleagues about their teaching style, their writing agenda, the timing of their applications for promotion, their service, and so on. Sad, and likely, very true.

*Id.* (citing LENORE E. A. WALKER, THE BATTERED WOMAN SYNDROME (3d ed. 2009); DONALD G. DUTTON & SUSAN K. GOLANT, THE BATTERER: A PSYCHOLOGICAL PROFILE (1995)). "Speaking our truth is an act of courage. Only when we stand naked in our truth can we move forward to joy." *Id.*

151. See Kathy L. Cerminara, *Introduction: Remembering Stephanie Feldman Aleong*, 34 NOVA L. REV. 565, 565 (2010).

152. "During Sor Juana's life, she was silenced onto death." Margaret E. Montoya, *Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse*, 5 MICH. J. RACE & L. 847, 904 (2000).

153. See *Proverbs* 8:7 ("My mouth speaks what is true, for my lips detest wickedness."); *Proverbs* 11:3 ("The integrity of the upright guides them, but the unfaithful are destroyed by their duplicity."); *Proverbs* 4:5-9 ("Get wisdom, get understanding.")

154. *Psalms* 23:4 ("Even though I walk through the valley of the shadow of death, I will fear no evil, for you are with me; your rod and your staff, they comfort me."); *Proverbs* 3:25-26 ("Have no fear of sudden disaster or of the ruin that overtakes the wicked, for the Lord will be your confidence and will keep your foot from being snared.")

155. Legal ethics should not involve a "minimalist approach to professional responsibility." The ethical considerations that lawyers must weigh should not be narrowed to legal

my professional endeavors.<sup>156</sup> Therefore, I continually strive to contribute to the improvement of my institution, the academy, the legal profession, the legal system, and society, including through my writings. As an academic, I have a responsibility to promote and exercise independent, innovative, and open-minded thinking. I expect that most scholars will agree with Professor Deborah L. Rhode's conclusion "that the current diversity of approaches [to legal scholarship] is a healthy development, that recent theoretical, interdisciplinary, and 'outsider' perspectives enrich the study of legal issues, and that these perspectives are no more ideologically driven than their predecessors."<sup>157</sup>

The hybrid/narrative forms of legal writing can be as well written, well documented, well researched, and well analyzed as any other forms of legal writing. Moreover, they can influence audiences beyond the legal academy.<sup>158</sup> The "hybrid genre" reaches out to the popular reader and informs autobiographical public debates with academic insights.<sup>159</sup> "The popular reader can be a reader who is part of the majority racial and ethnic culture, yet who is also sympathetic to the concerns of fellow minority citizens."<sup>160</sup> These forms of scholarship simulate storytelling, a skill that effective lawyers master throughout our professional lives.<sup>161</sup> We hear our clients' stories; we recount our clients' stories to serve their interests; we share some of our own stories when appropriate; and we write our clients' stories in letters, briefs, motions, and other legal writings.<sup>162</sup> Judges tell stories in their opinions.<sup>163</sup> Law professors tell

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"professionalism." See generally Deborah L. Rhode, *The Professional Responsibilities of Professors*, 51 J. LEGAL EDUC. 158 (2001). Superficial "professionalism" only serves as window-dressing and can hide much unprofessional behavior. It is like superficial "collegiality." When "collegiality," which is very subjective, is judged in terms of outward acts of affability, backstabbing colleagues are judged as collegial even when they are really "two-faced" and say one thing and do another. See Leonard Pertnoy, *The "C" Word: Collegiality Real or Imaginary, and Should it Matter in a Tenure Process*, 17 ST. THOMAS L. REV. 201, 207-08 (2004). "[C]ollegiality can easily serve as a cover for the affable tenured professor who wishes to discriminate incognito against her fellow associates." *Id.* at 208.

156. *Colossians* 3:23-24 ("Whatever you do, work at it with all your heart, as working for the Lord, not for men, since you know that you will receive an inheritance from the Lord as a reward. It is the Lord Christ you are serving.").

157. Rhode, *Legal Scholarship*, *supra* note 122, at 1329.

158. See Sylvia R. Lazos Vargas, *Critical Race Theory and Autobiography: Can a Popular "Hybrid" Genre Reach Across the Racial Divide?*, 18 LAW & INEQ. 419, 448 (2000) (reviewing books by law professors Brian K. Fair, Kevin R. Johnson, and Bill Ong Hing).

159. *Id.*

160. *Id.*

161. See, e.g., Lenora Ledwon, *The Poetics of Evidence: Some Applications from Law & Literature*, 21 QLR 1145, 1152-63 (2003).

162. Linda H. Edwards, *Once Upon a Time in Law: Myth, Metaphor, and Authority*, 77 TENN. L. REV. 883, 884 (2010).

stories in classrooms, including stories about our personal and legal experiences.<sup>164</sup> The beauty of legal storytelling is that we interweave facts, research, and legal analysis in persuasive ways that support our conclusions about issues that impact law and society. It is a skill as much as an art form.<sup>165</sup> This is why I write this Article in a way that fits its content and message, a hybrid format informed by my knowledge and experiences—an expression of my academic freedom.<sup>166</sup>

### III. LAWYER IMAN AL-OBEIDI BREAKS THE SILENCE NORM IN LIBYA

When women speak our stories, we are powerful; we empower others to speak; and we start movements even without meaning to. Critical race feminism recognizes that injecting narratives of people from all confines of the globe into our writings is a way to challenge dominant knowledge paradigms.<sup>167</sup> Iman al-Obeidi<sup>168</sup> is a Libyan professional woman, a lawyer, who shared her story with the world.<sup>169</sup> She rushed into the Rixos Hotel in Tripoli, Libya in March 2011, and told foreign correspondents that she had been beaten and gang raped by fifteen men who worked for Libya's dictator Muammar Gaddafi.<sup>170</sup> At the hotel, she did her best to shout the facts as she was being forcefully silenced by men *and women* who worked for Gaddafi.<sup>171</sup> She was finally jumped, dragged away, and detained by "Libya government

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163. *Id.*

164. Leslie Espinoza & Angela P. Harris, *Afterword: Embracing the Tar-Baby—LatCrit Theory and the Sticky Mess of Race*, 10 LA RAZA L.J. 499, 547 (2008).

165. Laurie A. Lewis, *Winning the Game of Appellate Musical Shoes: When the Appeals Band Plays, Jump from the Client's to the Judge's Shoes to Write the Statement of Facts Ballad*, 46 WAKE FOREST L. REV. 983, 986 n.14 (2011) (citing MARSH CASSADY, *THE ART OF STORYTELLING* 15 (1994); Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 LEGAL WRITING 127, 131-32 (2008)).

166. "Feminist storytellers are not the first to use narratives in the context of legal scholarship. Legal historians and anthropologists have employed individual stories to enrich intellectual or cultural description, or respond to normative problems." Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 973 (1991).

167. Valverde, *Fight the Tower*, *supra* note 76, at 408.

168. Some news reports spell Eman Al-Obeidy while other reports spell Iman al-Obeidi. This is possibly due to different transliterations from the Arabic language (and alphabet) to English. I use Iman al-Obeidi after consulting with someone who speaks, reads, and writes Arabic.

169. *Eman El-Obeidy Alleged Rape Victim, Leaves Libya*, HUFFINGTON POST (July 8, 2011, 6:12 AM ET), [http://www.huffingtonpost.com/2011/05/08/eman-al-obeidy-rape-victim-libya\\_n\\_859204.html](http://www.huffingtonpost.com/2011/05/08/eman-al-obeidy-rape-victim-libya_n_859204.html).

170. *Id.*; Dragos Bota, *Iman al-Obeidi, Libya Woman Who Claimed Rape, Arrives At Romania Refugee Center*, HUFFINGTON POST (July 7, 2011), [http://www.huffingtonpost.com/2011/06/07/iman-al-obeidi-libya-woman-claimed-rape-romania\\_n\\_872374.html](http://www.huffingtonpost.com/2011/06/07/iman-al-obeidi-libya-woman-claimed-rape-romania_n_872374.html).

171. Bota, *supra* note 170.

minders.”<sup>172</sup>

Government officers held her in detention, interrogated her, and offered her money and a house if she would recant her story.<sup>173</sup> She and her mother refused.<sup>174</sup> Her family, through the international media, asked for her release.<sup>175</sup> She eventually escaped Libya with the help of rebel forces and a military officer who defected from the Gaddafi regime.<sup>176</sup> She went to Tunisia and sought sanctuary in Qatar, but was later deported back to Libya.<sup>177</sup> She fled Libya again; this time she was granted asylum by the United States with the help of then U.S. Secretary of State Hillary Clinton.<sup>178</sup> She spent time in a United Nations High Commissioner for Refugees camp in Romania.<sup>179</sup> She now lives in the United States.<sup>180</sup>

By speaking out, al-Obeidi inspired others to tell their stories and contributed to the “Arab Spring” in the Middle East.<sup>181</sup> Her individual act fueled a movement.<sup>182</sup> Al-Obeidi became a symbol in the fight

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172. *Id.*

173. Tara Bahrapour & Liz Sly, *Libyan Government Offered Money to Appease Woman in Rape-Claim Case, Mother Says*, WASH. POST, Mar. 27, 2011, [http://www.washingtonpost.com/world/mother-of-libyan-woman-in-rape-claim-case-says-she-is-very-proud-of-her-daughter/2011/03/27/AFNppLkB\\_story.html](http://www.washingtonpost.com/world/mother-of-libyan-woman-in-rape-claim-case-says-she-is-very-proud-of-her-daughter/2011/03/27/AFNppLkB_story.html).

174. *Mother Of Iman al-Obeidi, Libya Woman Claiming Rape, Would ‘Strangle’ Gaddafi* (VIDEO), HUFFINGTON POST (updated May 31, 2011 06:12 AM ET), [http://www.huffingtonpost.com/2011/03/31/libya-woman-rape-mother\\_n\\_842790.html](http://www.huffingtonpost.com/2011/03/31/libya-woman-rape-mother_n_842790.html).

175. Anderson Cooper 360, *Alleged Libyan Rape Victim Speaks Out*, CNN, Apr. 5, 2011, <http://edition.cnn.com/video/data/2.0/video/world/2011/04/05/ac.woman.talks.pt2.cnn.html>.

176. *Alleged Libyan Rape Victim Comes to U.S. to Stay*, CNN (July 29, 2011, updated 0455 GMT), <http://edition.cnn.com/2011/US/07/29/us.libya.al.obeidy.relocates/index.html>.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Mona Eltahawy Discussing the Gang Rape of Eman al-Obeidi*, (CNN television broadcast), available at <http://www.youtube.com/watch?v=uptePSGcSEw&feature=related> (including video that shows how men and women physically restrained al-Obeidi). “Arab Spring” is the term coined to describe the people’s uprisings across the Middle East and Africa (generally ignited by individual acts of resistance) that began in January 2011. Sarah Lynch, *Tunisia, Arab Spring’s Birthplace, Takes on Militants*, USA TODAY, Mar. 22, 2014, <http://www.usatoday.com/story/news/world/2014/03/22/tunisia-revolution-arab-spring-radicals/5705461/>. These movements served to overthrow “long-standing dictators” in several countries, including Tunisia, Egypt, and Libya. Sarah Joseph, *Social Media, Political Change, and Human Rights*, 35 B.C. INT’L & COMP. L. REV. 145, 145 (2012). Women ignited and joined the “Arab Spring.” See, e.g., Karla Mari McKanders, *Anatomy of an Uprising: Women, Democracy, and the Moroccan Feminist Spring*, 32 B.U. INT’L L.J. 147, 149 (2014) (examining how the “feminist perspective impacted the Arab Spring movement in Morocco and how women conceptualize their status within the movement and the future democratic society”).

182. *Mona Eltahawy Discussing the Gang Rape of Eman al-Obeidi*, *supra* note 181.

against oppression in Libya and in other parts of the Middle East.<sup>183</sup> Libyan government officials called al-Obeidi insane, crazy, a prostitute, and a slanderer.<sup>184</sup> But after al-Obeidi spoke, another woman, Mona Eltahawy, an English journalist, spoke on CNN about her own victimization (while she was performing her job) at the hands of Gaddafi's oppressive regime.<sup>185</sup> Eltahawy narrated:

I know how brutal Gaddafi's troops are because I was a journalist in Libya. I went with a group of journalists in 1996 and they kept us in a hotel, just as those journalists you saw, practically prisoners of Gaddafi's Ministry of Information. And, during a news conference, because I was considered a troublemaker, because I tried to leave the hotel without my minder, they tried to push me out of the news conference. And one of these male guards twisted my nipple, in the middle of a news conference and I appealed to Gaddafi to help me, he stopped, we made eye contact for a few seconds and he continued as if nothing happened. . . . The TV cameras were rolling. And, afterwards, an Algerian journalist told me he heard them say, "just shoot her." So this is the kind of the casual violence that is associated with Gaddafi's regime and they don't care if you're a journalist, they don't care if you're an attorney. Iman al-Obeidi is an attorney. So this is a regime that does not hesitate to use violence, hasn't hesitated to use violence for the past forty-two years. It is brutal and it must end.<sup>186</sup>

Al-Obeidi's single act of speaking out became a catalyst for women to tell their stories in the Middle East and speak out "in ways that are unprecedented."<sup>187</sup>

In Saudi Arabia, some women became activists after watching al-Obeidi's act of defiance.<sup>188</sup> A Saudi woman published a manifesto online, the *Saudi Women's Revolution*.<sup>189</sup> These women began to demand the right to vote and, several months after al-Obeidi's single act of resistance in Libya, the women of Saudi Arabia received the right to vote.<sup>190</sup> Women in Egypt are speaking out about taboo subjects like rape

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183. *Id.*

184. *Id.* In a future article, I examine how name-calling and character attacks are used to silence professional women and keep us in gendered places ("our place").

185. *Id.*

186. *Id.* ("And the interesting thing here is that they are using women to silence this woman who has been so courageous. At first they said that she was insane, and then they said she was drunk, and then they said she was a prostitute. And this all ties into the idea of sexual shaming where, if you speak out about sexual violence, there is something wrong with you.")

187. *Id.*

188. *Mona Eltahawy Discussing the Gang Rape of Eman al-Obeidi*, *supra* note 181.

189. *Id.*

190. Neil MacFarquhar, *Saudi Monarch Grants Women Right to Vote*, N.Y. TIMES, Sept. 25,

(including gang rape), which is often used as a torture tactic to punish women who dare to venture into public spheres, the public domain reserved for men.<sup>191</sup>

When al-Obeidi told her story, and risked her life to do so, she had no idea that her single act of self-expression would have a domino effect and cause other oppressed women to rise up in the Middle East. Approximately eight months after al-Obeidi spoke out, rebel forces killed Gaddafi.<sup>192</sup> *Newsweek* included al-Obeidi in its list of *150 Fearless Women* that “started revolutions, opened schools, and fostered a brave new generation.”<sup>193</sup> Professional women in the United States usually do not suffer the blatant, physical injuries that professional women in other parts of the world face when they speak out against injustice and oppression.<sup>194</sup> What, then, silences professional women in workplaces in the United States?

#### IV. PROFESSIONAL WOMEN SILENCED BY PROFESSIONAL AND WORKPLACE NORMS

Most women in the United States are not silenced through physical attacks when we demand our rights and seek equality.<sup>195</sup> But we are

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1011, [http://www.nytimes.com/2011/09/26/world/middleeast/women-to-vote-in-saudi-arabia-king-says.html?pagewanted=all&\\_r=0/](http://www.nytimes.com/2011/09/26/world/middleeast/women-to-vote-in-saudi-arabia-king-says.html?pagewanted=all&_r=0/).

191. See Mayy El-Sheikh & David D. Kirkpatrick, *Rise in Sexual Assaults in Egypt Sets Off Clash over Blame*, INT’L N.Y. TIMES, Mar. 25, 2013, [http://www.nytimes.com/2013/03/26/world/middleeast/egyptian-women-blamed-for-sexual-assaults.html?src=recg&\\_r=0](http://www.nytimes.com/2013/03/26/world/middleeast/egyptian-women-blamed-for-sexual-assaults.html?src=recg&_r=0).

192. David Williams, *Who Shot Gaddafi? New Video Shows Blood Pouring from Dictator Immediately Before Death But Mystery Surrounds Coup de Grace*, MAILONLINE.COM, Oct. 21, 2011, <http://www.dailymail.co.uk/news/article-2051361/GADDAFI-DEAD-VIDEO-Dictator-begs-life-summary-execution.html>.

193. *150 Women Who Shake the World*, NEWSWEEK, Mar. 5, 2012, [http://www.newsweek.com/150-women-who-shake-world-66131?piano\\_t=1](http://www.newsweek.com/150-women-who-shake-world-66131?piano_t=1).

194. *But see infra* note 195 and accompanying text.

195. See HILLARY RODHAM CLINTON, *LIVING HISTORY* 277 (2003) (finding inspiration for a speech on women’s rights in *Silence*, a poem written by Anasuya Sengupta, a secondary school student in India). Physical attacks against workers still occur in some U.S. workplaces. “[I]mmigrant workers, particularly women, are the workers most vulnerable to mistreatment in the workplace. As many employee and immigrants’ rights advocacy groups pointed out in their amicus brief in the *Salas v. Sierra Chemical Company* case, workplace abuses, especially sexual assault, harassment and even rape, are rampant among female undocumented workers.” Joseph Spadola, Comment, *And Ad Hoc Rationalization of Employer Wrongdoing: The Dangers of the After-Acquired Evidence Defense*, 102 CAL. L. REV. 691, 719 (2014) (citing Amici Curiae Brief of Impact Fund et al. in Support of Petitioner & Appellant Vicente Salas at 8-9, *Salas v. Sierra Chem. Co.*, 264 P.3d 33 (Cal. 2011) (footnotes omitted)). Moreover, undocumented, immigrant women may face deportation if they speak out. Tiffany Lane, *Deportation Fears Force Immigrant Women to Be Mute on Sexual Abuse, Harassment at Work*, <http://news.medill.northwestern.edu/chicago/news.aspx?id=184726&terms=tiffany%20lane> (last

often silenced nonetheless in our workplaces.<sup>196</sup> “Each profession has its own set of customs, acceptable behaviors, symbols, and means of social control.”<sup>197</sup> “Different institutions have specific norms, values, structures, and cultures that create incentives for employees to behave in particular ways.”<sup>198</sup> Professional women who do not conform to behaviors dictated by professional, institutional, and workplace norms may not be allowed to speak, may lose a job, or may not get a job.<sup>199</sup> We may have co-workers, colleagues, friends, and others view us with disapproval if we step out of the submissive, feminine role and speak out when we see or experience abuse, discrimination, and harassment in the workplace.<sup>200</sup> We may be shunned, *including by other women*, and forced to wear a scarlet letter in our professional communities.<sup>201</sup> Anita Hill was a lawyer when the sexual harassment on the job that she eventually testified about occurred.<sup>202</sup> But she initially silenced herself.<sup>203</sup> The norms of her profession indoctrinated her to remain silent.<sup>204</sup>

Professional environments create institutional norms that make it

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visited Nov. 6, 2011).

196. See Angela Onwuachi-Willig, *Silence of the Lambs*, in PRESUMED INCOMPETENT, *supra* note 21, at 142-51.

197. TWALE & DE LUCA, *supra* note 62, at 97.

198. Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1307 (2000).

199. Catharine A. MacKinnon began to develop a legal theory of sexual harassment after she learned of an administrative assistant who was harassed at Cornell University. Deborah Dinner, *A Firebrand Flickers*, LEGAL AFFAIRS, Mar./Apr. 2006, [http://www.legalaffairs.org/issues/March-April-2006/review\\_Dinner\\_marapr06.msp](http://www.legalaffairs.org/issues/March-April-2006/review_Dinner_marapr06.msp). MacKinnon is now the Elizabeth A. Long Professor of Law at the University of Michigan and the James Barr Ames Visiting Professor of Law at the Harvard Law School (long-term). *Catharine A. MacKinnon Faculty Bio*, UNIVERSITY OF MICHIGAN, <http://www.law.umich.edu/FacultyBio/Pages/FacultyBio.aspx?FacID=camtwo>. However, before the University of Michigan Law School hired her, MacKinnon, one of the leading forces in the development of the law of sexual harassment, had a difficult time finding a permanent academic position because of her “controversial scholarship.”

200. See Anita F. Hill, *Sexual Harassment: The Nature of the Beast*, 65 S. CAL. L. REV. 1445, 1446 (1992) [hereinafter Hill, *Sexual Harassment*]; HILL, SPEAKING TRUTH TO POWER, *supra* note 8, at 324.

201. See Hill, *Sexual Harassment*, *supra* note 200, at 1446; Wang Ping, *My Name is Pariah*, 29 BERKELEY J. GENDER L. & JUST. 308, 311-15 (2014). “Feminist and critical race scholarship, although they appear from the inside to be dynamic fields of scholarship addressing intellectually challenging and politically crucial issues, face a somewhat hostile response from the practitioners of traditional legal scholarship.” Coombs, *supra* note 122, at 688. Therefore, some women who wish to write in these areas wait until after tenure to begin. *Id.* at 692. But many women choose to speak out through their writings even before tenure. See *id.*

202. See discussion *infra* Part V.

203. *Id.*

204. *Id.*

difficult for women to speak out. For example, Professor Rhonda Reaves proposes that “retaliatory harassment” by fellow employees is a mechanism to enforce workplace norms, including gender norms, by retaliating against employees who speak out against discrimination.<sup>205</sup> “[R]etaliatory harassment occurs where workers are purposely targeted for criticism, ridicule, and abuse for complaining about discrimination.”<sup>206</sup> Workplace harassment “is used not just to further a worker’s own individual sexist (or racist) agenda, but . . . it is used to keep women (and minority groups) in subordinate positions.”<sup>207</sup> This is especially true in male-dominated work environments that promote a culture that is hostile to women.<sup>208</sup> Ultimately, the harassment and hostilities are meant to drive the woman or women out.<sup>209</sup> Therefore, “[t]he threat of sanctions (formal and informal) discourages workers from coming forward to complain about workplace abuses.”<sup>210</sup> What is even more problematic for the cause of women’s rights and equality is that in environments dominated by men, some women actively or passively participate in the harassment of other women.<sup>211</sup> Additionally, women in a male-dominated environment may create an additional hierarchy separate from the male-dominated hierarchy. In this women-

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205. Rhonda Reaves, *Retaliatory Harassment: Sex and the Hostile Coworker as the Enforcer of Workplace Norms*, 2007 MICH. ST. L. REV. 403, 404, 407, 409 (2007).

206. *Id.* at 404.

207. *Id.* at 407.

208. *Id.* at 408 (citing James E. Gruber, *The Impact of Male Work Environments and Organizational Policies on Women’s Experiences of Sexual Harassment*, 12 GENDER & SOC’Y 301, 301-20 (1998)). “A hostile work environment is the result of power imbalances that lead to workplace aggression, camouflaged aggression, workplace incivility, or workplace bullying. . . . When these behaviors persist over a long period of time, a bully or mob culture is allowed to develop and flourish.” TWALE & DE LUCA, *supra* note 62, at 8 (citations omitted).

209. Reaves, *supra* note 205, at 409 (citing *Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325 (4th Cir. 2003), *cert. denied*, 540 U.S. 1177 (2004)).

210. *Id.*

211. Women in male-dominated workplaces where tokenism is practiced (where few women can rise to positions of leadership) often engage in hostility and sabotage against other women. SHERYL SANDBERG, *LEAN IN—WOMEN, WORK, AND THE WILL TO LEAD* 163 (2013). *See also* Arriola, *Tenure Politics*, *supra* note 17, at 535 (narrating how she was sabotaged by a female faculty member who “actively catered to the most conservative male egos and views of the ‘proper’ role for a woman on a law faculty;” made herself the “good role model;” engaged in “whatever conduct would maintain *her* personal and professional safety;” and “actively undermin[ed] the efforts of other female faculty who claimed unjust treatment by their male colleagues”). *Cf.* Hill, *Sexual Harassment*, *supra* note 200, at 1446 (explaining that women who report sexual harassment in the workplace often do not receive support from other women). When Anita Hill testified before Congress, another woman, Phyllis Berry, someone who had worked with Hill and Thomas at the EEOC, testified that “Hill’s allegations were a result of her ‘disappointment and frustration that Mr. Thomas did not show any sexual interest in her.’” BEREBITSKY, *supra* note 28, at 270.

run hierarchy, “queen bees” or “wannabes”<sup>212</sup> and their cliques oppress more vulnerable women.<sup>213</sup>

Workplace abuse, such as retaliatory harassment and sexual harassment, developed to protect institutional patriarchy.<sup>214</sup> The harassment of employees, like rape,<sup>215</sup> is often about power.<sup>216</sup> “The unequal power relationships within workplaces create an environment in which those with less power are susceptible to mistreatment by those with more power.”<sup>217</sup> Women often find ourselves at the bottom of this power hierarchy.<sup>218</sup> Many employers, including academic institutions, have responded to sexual harassment by enacting workplace policies and disseminating them to all employees, but this approach has overshadowed broader problems of workplace harassment.<sup>219</sup>

In an overzealousness to address and confine sexual harassment, we may be overlooking a broader problem of workplace harassment that begins with uncivil acts that come to include camouflaged aggression, passive aggression, bullying, and mobbing. Passively, supervisors may be uniformly misinterpreting or failing to acknowledge that when

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212. This terminology comes from the book *Queen Bees and Wannabes: Helping Your Daughter Survive Cliques, Gossip, Boyfriends, and Other Realities of Adolescence*. See Kerri Lynn Stone, *From Queen Bees and Wannabes to Worker Bees: Why Gender Considerations Should Inform the Emerging Law of Workplace Bullying*, 65 N.Y.U. ANN. SURV. AM. L. 35, 40 n.13 (2009) (citing ROSALIND WISEMAN, *QUEEN BEES AND WANNABES: HELPING YOUR DAUGHTER SURVIVE CLIQUES, GOSSIP, BOYFRIENDS, AND OTHER REALITIES OF ADOLESCENCE* (2002)).

213. Women executives report that women erect barriers for other women. SELENA REZVANI, *THE NEXT GENERATION OF WOMEN LEADERS* 4 (2010) (analyzing the barriers to women’s leadership).

214. Cf. HOOKS, *AIN’T I A WOMAN*, *supra* note 79, at 99 (“Men of all races in America bond on the basis of their common belief that a patriarchal social order is the only viable foundation for society. Their patriarchal stance is not simply an acceptance of social etiquette based on discrimination against women; it is a serious political commitment to maintaining political regimes throughout the United States and the world that are male-dominated.”).

215. In the workplace, we do not have to be physically raped to be violated. For example, the shame of having one’s work denigrated in professional spaces, “like the shame of rape, sticks to the person they are done to who exposes them, not to those who do them. The point is to scare and humiliate, what we in the women’s movement used to call to ‘guard our prison.’” MacKinnon, *Remarks*, *supra* note 46.

216. See KEITH DROMM, *SEXUAL HARASSMENT—AN INTRODUCTION TO THE CONCEPTUAL AND ETHICAL ISSUES* 20 (2012). See also Michal Buchhandler-Raphael, *The Failure of Consent: Re-Conceptualizing Rape as Sexual Abuse of Power*, 18 MICH. J. GENDER & L. 147, 227 (2011) (proposing that “rape law should be redefined as an act of abuse of power, dominance, and control”).

217. DROMM, *supra* note 216, at 20.

218. See Ann McGinley, *Reproducing Gender on Law School Faculties*, 2009 B.Y.U. L. REV. 99 (2009) [hereinafter McGinley, *Reproducing Gender*]; Cynthia Grant Bowman, *Bibliographical Essay: Women and the Legal Profession*, 7 AM. U. J. GENDER SOC. POL’Y & L. 149, 163-65 (1999).

219. TWALE & DE LUCA, *supra* note 62, at 152.

harassment is not of a sexual nature, it is still harassment and must be addressed. . . . If no policy exists to address anything other than sexual comments and behavior, then types of aggressive behaviors may by default be deemed acceptable.<sup>220</sup>

When employers and employees view harassment on the job (other than sexual harassment) as one of the conditions of employment that some professional women are expected to put up with, it is hard to confront it.

Additionally, there is a fiction that women in “privileged” work positions do not suffer discrimination and harassment.<sup>221</sup> As Professor Stephanie M. Wildman explained, it is important to remember that:

The very sense of the workplace has been defined, not by women, and not in our terms. To be in the workplace is to enter a male-defined world. Even the notion of workplace, which exists outside the home, privileges maleness, associating work with male values and culture. The sphere outside the home has traditionally been the situs of male work, and therefore attached to the very definition of work. This privileging of maleness in the workplace has not stopped simply because women now work there as well.<sup>222</sup>

Because male values and culture inform norms in the workplace, abusers, discriminators, and harassers work at all professional levels.<sup>223</sup> Consequently, it should not be surprising that women of all socioeconomic levels, including professional women, are targets of abuse, discrimination, and harassment at work.<sup>224</sup>

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220. *Id.* at 152-53.

221. This is what Senator Orrin Hatch suggested about Anita Hill. HILL, *SPEAKING TRUTH TO POWER*, *supra* note 8, at 151 (explaining that Senator Hatch implicitly limited “the right to complain to young women with only a high school education”). *See also* Eyer, *supra* note 38, at 1315 (explaining that studies show that people do not believe that individuals, whom they perceive to have control over their stigmatized status, are victims of discrimination). What some people may not realize is that being in “privileged” positions, as in high-status jobs that were primarily reserved for men in the not so distant past, may put women at higher risk of being victimized. Some men in such workplaces resent women’s presence and employ harassment tactics to put women “in their place”—subordinate to men.

222. Stephanie M. Wildman, *Privilege in the Workplace: The Missing Element in Antidiscrimination Law*, 4 TEX. J. WOMEN & L. 171, 172-73 (1995).

223. *Cf.* Camille M. Davidson, *What’s Love Got to Do With It?: Examining Domestic Violence as a Public Health Issue Using Their Eyes Were Watching God*, 81 UMKC L. REV. 867, (2013) (“Domestic violence among middle and upper class individuals is underreported.”) (citing Christine Hagion, *Preventing Domestic Violence 5-6* (May 2, 1995) (unpublished manuscript), available at [www.the-ripple-effect.info/pdf/PreventingDomesticViolence.pdf](http://www.the-ripple-effect.info/pdf/PreventingDomesticViolence.pdf)).

224. HILL, *SPEAKING TRUTH TO POWER*, *supra* note 8, at 149. *Cf.* Dana Harrington Conner, *Financial Freedom: Women, Money, and Domestic Abuse*, 20 WM. & MARY J. WOMEN & L. 339, 359 (2014) (“[I]t is generally accepted that women of all socioeconomic groups are at risk of experiencing domestic violence.”) (citing J. Michael Collins & Collin O’Rourke, *Fam. Fin. Educ.*,

Despite our academic degrees, professional credentials, and intellectual abilities, professional women often feel helpless when we are attacked in our workplaces.<sup>225</sup> This is what is so frustrating. The same badges of merit that open better job opportunities become the chains that bind us.<sup>226</sup> “When [we] try to obtain power through education, the beast harassment responds by striking more often and more vehemently.”<sup>227</sup> Even highly accomplished professional women find ourselves in the degrading position of having to remind colleagues to treat us appropriately, as professional equals, in professional settings.<sup>228</sup> It is mentally and physically debilitating to try to address the daily macro- and micro-aggressions, sometimes lasting years.<sup>229</sup> As one Latina lawyer explained it: “If you succeed, you are ‘uppity’ and must be taught your proper ‘place.’”<sup>230</sup> The “‘micro-aggressions,’ the little digs, the snubs, the lack of respect that someone in a similar position would be accorded . . . means that you swallow some things and let it go by, even though you are furious. But what that does to your morale and your mental state . . .”<sup>231</sup> Moreover, women who challenge the micro-aggressions may be accused of being “too sensitive” and of taking things “too personally.”<sup>232</sup>

We should consider whether women need to reclaim our activism,<sup>233</sup> militancy, and open resistance to sexism and other “isms” in

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Financial Capability and Domestic Violence, at 1, Feb. 2012, available at <http://fyi.uwex.edu/financialseries/files/2012/02/Financial-Capability-and-Domestic-Violence.pdf>.

225. See Hill, *Sexual Harassment*, *supra* note 200, at 1446. Some women are more helpless than others in particular work environments, depending on our individual characteristics and circumstances, including race, ethnicity, national origin, being the “first,” etc.

226. Professional women invest a lot of time, money, and energy into our education and careers. See Valverde, *Fight the Tower*, *supra* note 76, at 392. In some professional fields it is harder to just walk away from a job, especially when the harasser(s) is (are) in a position to foreclose other job opportunities. See RACE, GENDER, AND POWER IN AMERICA, *supra* note 7, at xxi.

227. Hill, *Sexual Harassment*, *supra* note 200, at 1446.

228. See SANDBERG, *supra* note 211, at 75-76.

229. See Valverde, *Fight the Tower*, *supra* note 76, at 369.

230. MARIA CHÁVEZ, EVERYDAY INJUSTICE—LATINO PROFESSIONALS AND RACISM 83 (2011).

231. *Id.*

232. See Jessica K. Fink, *Protected by Association? The Supreme Court’s Incomplete Approach to Defining the Scope of the Third-Party Retaliation Doctrine*, 63 HASTINGS L.J. 521, 550 (2012) (“[T]hose who do step forward to report discrimination often find themselves labeled as ‘troublemakers’ or as ‘hypersensitive’—even when discrimination has, in fact, occurred.”) (citations omitted).

233. We know that activism works because many women today reap opportunities that resulted from the activism of the past. But there is still much to be accomplished. Currently, some women are still opening doors, as the “firsts,” in some work environments and doing the work that must be done to open the doors a little wider. Ironically, the challenges faced by trailblazers are

the workplace.<sup>234</sup> And let us not forget that we should enlist the help of those men who comprehend that women's rights are human rights.<sup>235</sup>

## V. WOMEN LAWYERS SILENCED BY PROFESSIONAL NORMS

The *Anita—Speaking Truth to Power* film may prompt a renewed discussion by a new generation of women and men who will ask the same old questions. Why did she wait for years to tell? Why did she follow Clarence Thomas to the next job?<sup>236</sup> Why did she stay in touch with him after they no longer worked together?<sup>237</sup> Some law students may also ask these questions.<sup>238</sup> Because Hill was a lawyer at the time of the events, I analyze the dynamics that silence professional women

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sometimes not acknowledged by women who follow and have an easier time because the trailblazers did what had to be done to widen the path. This is why I question whether “critical mass” and women in positions of leadership will suffice to achieve equality for women in the workplace. If the “critical mass” and leadership are composed of careerists and opportunists who provide cover for the status quo and even act to preserve the status quo, no changes will be accomplished and we may even regress from the achievements of the past. This is why we need institutional accountability beyond reporting numbers for “diversity” purposes. As important as keeping track of who gets hired, it is important to keep track of who gets fired or who is pushed to leave, and the reasons why they leave. We need to know if the women who are being weeded out in particular institutions (and work fields) are the very women who would advance the progress that is yet to be achieved.

Activism is the courage to act consciously on our ideas, to exert power in resistance to ideological pressure—to risk leaving home. Empowerment comes from ideas—our revolution is fought with concepts, not with guns, and it is fueled by vision. By focusing on what we want to happen, we change the present. The healing images and narratives we imagine will eventually materialize.

Anzaldúa, *Preface*, in Anzaldúa & Keating, *THIS BRIDGE WE CALL HOME*, *supra* note 108, at 5.

234. Some women who initially think that they are defying stereotypes just by their presence in male-dominated workplaces, later realize that shedding the stereotypic image (e.g., the docile woman) and challenging racism and sexism requires more than passive resistance. See Mitsuye Yamada, *Invisibility is an Unnatural Disaster: Reflections of an Asian American Woman*, in Moraga & Anzaldúa, *THIS BRIDGE CALLED MY BACK*, *supra* note 108, at 36. The problem with passive resistance is that it may be so passive that no one notices it. *Id.*

235. See Berta Esperanza Hernández-Truyol, *Out of the Shadows: Traversing the Imaginary of Sameness, Difference, and Relationism – A Human Rights Proposal*, 17 WIS. WOMEN'S L.J. 111, 117-18, 135-39 (2002) [hereinafter Hernández-Truyol, *Out of the Shadows*]. “Imagine living in a world where there is no domination, where females and males are not alike or even always equal, but where a vision of mutuality is the ethos shaping our interaction. Imagine living in a world where we can all be who we are, a world of peace and possibility . . . living the truth that we are all ‘created equal.’” BELL HOOKS, *FEMINISM IS FOR EVERYBODY—PASSIONATE POLITICS* x (2000) (citing BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER*).

236. During the hearings, “the issue of why Hill went with Thomas to the EEOC and kept in contact with him after she left Washington was repeatedly used to discredit her accusations.” BEREBITSKY, *supra* notes 28, at 269.

237. *Id.*

238. Regrettably, some law students and recent graduates may already know the answers to these questions based on their own experiences. See *infra* text accompanying note 249.

within the norms of the legal profession. However, the same or similar considerations may apply to working women in other employment environments.<sup>239</sup>

In her book, *Speaking Truth to Power*, Professor Hill states that when she was being sexually harassed by Thomas at the Education Department she confided in several of her friends, all Yale Law School graduates and practicing attorneys.<sup>240</sup> None of her friends advised her to bring a charge of sexual harassment against Thomas.<sup>241</sup> In fact, when Hill strategized with these lawyers, their goal was to find a way for her to avoid the harassment but keep her job.<sup>242</sup> Hill convinced herself that, by separating her sense of personal offense from the conduct, she was fulfilling her professional role.<sup>243</sup> Then, because the conduct subsided, she accepted Thomas's invitation to go with him to the EEOC as this move ensured job security.<sup>244</sup> To her dismay, the behavior resumed and it caused her to end up in the emergency room.<sup>245</sup> The doctor concluded that her medical condition was stress-related.<sup>246</sup> It was only when her health was at risk that Hill finally decided to look for another job.<sup>247</sup>

As for at least one of the reasons why Hill did not sever her professional relationship with Thomas after she no longer worked with

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239. See CHÁVEZ, *supra* note 230, at 3 (conducting a study of Latina/o lawyers and concluding that the experiences of these lawyers with racism are similar to the experiences of any Latina/o professional, "whether a banker, a real estate agent, a doctor, or a professor at a university"). See also Mangum v. Town of Holly Springs, 551 F. Supp. 2d 439 (E.D.N.C. 2008) (reviewing claim by female firefighter who alleged gender discrimination in the form of hostile work environment, disparate treatment, and retaliation in violation of Title VII).

240. HILL, *SPEAKING TRUTH TO POWER*, *supra*, note 8, at 71.

241. *Id.*

242. *Id.* Years later, when Thomas was nominated, Hill told more women lawyers and law professors about the harassment, but none of them told her to definitely disclose it. *Id.* at 95, 99, 104, 109. The first person who immediately told her that she should disclose the information was a businesswoman, a bank vice-president (a non-lawyer), in whom she confided about the harassment on the day when Thomas's nomination was announced. *Id.* at 94. In my experience (I majored in accounting and worked in the business world before I became a lawyer), women in business are more proactive and vocal than lawyers and law professors about issues that impact women's equality in our particular work settings and fields. Women lawyers are more hesitant to file lawsuits to enforce our Title VII rights. See generally Joyce Koria Hayes, *Subjective Employment and Training Decisions—The "Unintentional" Discrimination*, 12-FALL DEL. LAW. 18 (1993) (summarizing cases in which professional women in business and law firms sued).

243. *Id.* at 70.

244. *Id.* at 73.

245. *Id.* at 79.

246. HILL, *SPEAKING TRUTH TO POWER*, *supra*, note 8, at 79. For a scientific documentary about what stress does to human beings, including in a hierarchical employment context, watch National Geographic's *Stress, Portrait of a Killer* (NGHT, Inc. 2008).

247. HILL, *SPEAKING TRUTH TO POWER*, *supra*, note 8, at 79. Physical illness can result from enduring abuse in the workplace. See *Stress, Portrait of a Killer*, *supra* note 246.

him, it should be obvious to most professional women: she needed his professional reference.<sup>248</sup> Employers and employees know that a former employer's reference is generally a requirement for the next job(s).<sup>249</sup> This workplace norm forces employees to remain silent when abuse, discrimination, and harassment occur because they continue to depend on their past employer even after they leave the job.<sup>250</sup> During employment disputes, the letter of reference becomes a bartering tool that some employers use to persuade employees to leave jobs quietly rather than enforce their rights through internal procedures or lawsuits.<sup>251</sup> If employees do not agree to resign and take a letter of reference in exchange for giving up their right to file an administrative or legal proceeding, employers can fire them and state whatever reason they want in a letter of termination.<sup>252</sup> Consequently, many employees

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248. *Id.* at 80, 83. See also Adrienne D. Davis & Stephanie M. Wildman, *The Legacy of Doubt: Treatment of Sex and Race in the Hill-Thomas Hearings*, 65 S. CAL. L. REV. 1367, 1376 (1992) ("The importance of maintaining connection with someone who might be called as a reference cannot be minimized in this era of networking.").

249. See *id.* I recently had a conversation with one of my former students, a Latina, who shared with me how a well-respected partner (a married man) from a law firm where she had worked as an intern made a sexual pass at her. The recent law school graduate was frustrated, angry, and disappointed that someone whom she looked up to as a professional mentor would disrespect her in this way. She now has to deal with feeling torn between severing all communication with him (someone of high standing in her area of practice) or ignoring what happened and retaining his name in her list of references. What will he say after she refused his sexual proposition? She wonders how she can continue to list the firm in her resume and not list him as a reference. She gave me permission to include her thoughts about the incident in this footnote.

250. This job reference conundrum subjects victims of workplace abuse to further trauma. DUFFY & SPERRY, *supra* note 10, at 179-80. The professional reference is something that people in positions of power know they can use and abuse at their full discretion, to hide their transgressions and silence their victims. See *supra* note 249, *infra* note 251 and accompanying text.

251. See *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1524 (11th Cir. 1992). In *Fight the Tower: A Call to Action for Women of Color in Academia*, Professor Kieu-Linh Caroline Valverde explains that when her department denied her tenure, she was encouraged not to appeal the decision. Valverde, *Fight the Tower*, *supra* note 76, at 394. She was told that taking this path and focusing on her publications instead "would be [her] best chance to receive a letter of recommendation for [her] next place of employment." *Id.* at 394. Her response was an appeal and a fight for tenure at all levels. *Id.* at 394. Students began a movement to support her. *Id.* at 397-98. Alumni and students "built a website (saveVknow.com), opened social media pages, started an online petition, met with faculty and administrators, garnered endorsements from scholars across the nation, and threatened to protest on campus." *Id.* Because of her appeal, Professor Valverde received tenure and promotion to associate professor. *Id.* at 401.

252. See *e.g.*, *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 132 S. Ct. 694 (2012). In *Hosanna-Tabor*, the employee (a teacher) started the academic year on medical disability leave. *Id.* at 700. When she informed her employer (a religious institution) that she would be ready to return to work in a month, her supervisor (the principal) responded that someone else had been hired to teach during the remainder of the academic year. *Id.* The supervisor asked the teacher to resign because the supervisor did not think the employee was healthy enough to return

“go along to get along.”<sup>253</sup> As Founding Father Alexander Hamilton stated it, ““a power over a man’s subsistence amounts to a power over his will.””<sup>254</sup>

Hill also continued to maintain a professional relationship with Thomas after she began working as a law professor because she did not want to “burn bridges,”<sup>255</sup> another professional norm.<sup>256</sup> A federal judge explained the “do not burn bridges” professional norm to lawyers like this:

Whether you feel like you’re being treated unjustly by your partners, or you feel that you’re not being treated fairly as an associate, resist the urge to burn bridges because you’ll leave the law firm, and that person could ultimately be a source of business, or that person [could be] contacted and asked about you. Certainly, when you become a federal judge, they contact everybody you’ve ever had contact with!<sup>257</sup>

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to work. *Id.* The employee refused to quit and produced a note from her doctor stating that she would be able to return to work a month later. *Id.* The supervisor once again asked the employee to resign, but the employee responded that she was ready to return to work. *Id.* On the day when she was medically cleared, the employee reported to work but was asked to leave. *Id.* She refused to leave until she received written documentation that she had reported to work. *Id.* Later that afternoon, the supervisor called the employee and told her that she would likely be fired. *Id.* The employee responded that she had spoken with an attorney and intended to assert her legal rights. *Id.* After that, the supervisor and employer held meetings to approve the employee’s termination. *Id.* The employer then sent a letter to the employee firing her and stating as grounds for termination “insubordination and disruptive behavior.” *Id.* The employer basically characterized as “insubordination and disruptive behavior” the employee’s actions of reporting to work, requesting written documentation that she had reported to work, and asserting her legal rights. *See id.* In this case, neither judge nor jury will be in a position to judge the wrongfulness of the supervisor’s and employer’s actions because the Supreme Court unanimously held that the teacher was a “minister;” therefore, the religious employer could raise the “ministerial exception” as an affirmative defense. *Id.* at 699. In summary, religious institutions can violate federal employment laws with regard to any employee who is determined to be a “minister” of the religious group. Professor Leslie C. Griffin criticized the Court’s holding as “as a profound misinterpretation of the First Amendment. The Court mistakenly protected religious institutions’ religious freedom at the expense of their religious employees.” Leslie C. Griffin, *The Sins of Hosanna-Tabor*, 88 IND. L.J. 981, 983 (2013).

253. Some people go along with the program because they fear the retaliation that nonconformists who go against expectations often suffer. *See Carbado & Gulati, supra* note 198, at 1307 (explaining that outsiders who do not conform their identities to the expectations of employers are punished through workplace norms).

254. *United States v. Hatter*, 532 U.S. 557, 568 (2001) (quoting THE FEDERALIST No. 79, at 472 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

255. *See HILL, SPEAKING TRUTH TO POWER, supra* note 8, at 84. In academic circles, some scholars do not write about their experiences because they are afraid of “burning bridges” and undermining their future career prospects. Harris & González, *Introduction, in PRESUMED INCOMPETENT, supra* note 21, at 11.

256. Professional women are told by women’s magazines and in career seminars: network, maintain professional contacts, and “don’t burn your bridges.” BEREBITSKY, *supra* note 28, at 270.

257. Antony M. Novom & Ruthleen Uy, *An Interview with Judge Philip S. Gutierrez of the*

Professor Hill explained that her “sense of professionalism, which some may describe as opportunism, allowed [her] to divorce [her] personal feelings from [her] work interests.”<sup>258</sup>

Anita Hill is not the first professional woman or the last one to handle workplace harassment the way she did—by remaining silent.<sup>259</sup> “[L]ike many women, she chose to suffer in silence rather than endanger her career prospects.”<sup>260</sup> She knew that her “success depended on making and keeping professional contacts.”<sup>261</sup> She testified that “she was aware ‘that telling *at any point in [her] career* could adversely affect [her] future career.’”<sup>262</sup> As lawyers, she and her friends decided that reporting the conduct was not a viable option.<sup>263</sup> She did what she had been indoctrinated to do in her professional circles.<sup>264</sup> She quit,<sup>265</sup> moved on to her next job, and did not burn the bridge.<sup>266</sup>

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*United States District Court for the Central District of California*, 5 No. 4 LANDSLIDE 37, 43 (2013).

258. HILL, SPEAKING TRUTH TO POWER, *supra* note 8, at 84.

259. See Abcarian, *supra* note 26. By the time of the hearings, psychologists had documented that most women remain silent about harassment at work. BEREBITSKY, *supra* note 28, at 269.

260. BEREBITSKY, *supra* note 28, at 3.

261. *Id.* at 269 (citing Thomas Hearings, 4:122, 128).

262. *Id.* (emphasis added). It is ironic that a lawyer should feel afraid of being “blacklisted” in the legal profession for standing up for her legal rights. But this is another professional norm. Lawyers who file lawsuits are often “blacklisted” as whistleblowers. See Raxak Mahat, *A Carrot for the Lawyer: Providing Economic Incentives for In-House Lawyers in a Sarbanes-Oxley Regime*, 21 GEO. J. LEGAL ETHICS 913, 918 (2008).

263. HILL, SPEAKING TRUTH TO POWER, *supra* note 8, at 71.

264. See Rhode, *Litigating Discrimination*, *supra* note 29, at 332-33.

265. “Quit” is the advice that many women receive when we face or complain about workplace harassment. BEREBITSKY, *supra* note 28, at 269. But “[l]eaving may not be the answer; often if we leave before the lesson is learned, we just find the problem arising in a different form in the new place.” Arriola, *No Hay Mal Que Por Bien No Venga*, *supra* note 63, at 376 (quoting Guru Amrit Desai). “[I]f we do not stay, we betray our supposed values; we surrender to systems perpetuated by small minds, enormous egos, and politics that are mean, vindictive, and crush the hopes and dreams of others.” Arriola, *It’s Not Over*, *supra* note 150, at 333.

266. Maybe we need to re-think the “do not burn bridges” approach and consider that, sometimes, there are bridges that should be burned, so we do not look back and provide cover for wrongdoers or subject ourselves to further trauma. When Anita Hill testified before Congress, Republican senators continuously suggested that “no woman would have stayed in touch with a man such as Hill described, and if one did, she certainly could not play the injured maiden a decade later.” BEREBITSKY, *supra* note 28, at 270. A dialysis technician, an African-American woman, argued that if Thomas had done what Hill claimed he did, she (the technician) “would have told him where to go, and it wouldn’t have taken [her] that many years to tell it.” *Id.* at 271. This dialysis technician was a working woman who may not have been indoctrinated with the same professional norms and expectations as a lawyer who is tied to a relatively small professional circle. For example, let us consider the following scenario. A woman with the highest professional credentials applies for an attorney position at a firm after working for an influential person in legal circles, a judge for instance. During her interview at the firm, she is asked about her former boss. She responds that she burnt that bridge because the judge turned out to be a harasser. See Charles

## VI. COMMUNITY/CULTURAL SILENCING: WHEN THE TARGET IS A WOMAN OF COLOR AND THE HARASSER IS A MAN OF COLOR

Most professional women of color probably understand an additional reason why Anita Hill hesitated to tell on Clarence Thomas. Women of color (racialized women) belong to a doubly subordinated group at the intersection of our status as women and our ethnicity/race.<sup>267</sup> Anita Hill is an example of a woman who finally testified, although reluctantly,<sup>268</sup> about the sexual harassment by her former employer. However, it meant that she, a Black woman, had to tell on a Black man.<sup>269</sup> After she told, she was shunned by some African Americans, her own people.<sup>270</sup> She broke the unwritten code that Black women must not tell on intra-community oppression.<sup>271</sup> “[M]any African Americans [men as well as women] expressed anger that Hill broke the ranks of racial solidarity, especially given their belief that sexual harassment was a trivial issue compared with the problems facing black men.”<sup>272</sup> After Hill told her story, African-American support for

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W. Sorenson, Jr., *Are Law Clerks Fair Game? Invading Judicial Confidentiality*, 43 VAL. U. L. REV. 1, 29 (2008) (“[C]ommentators and some courts have noted that exposing wrongdoing by members of the judiciary would justify an exception to the law clerk confidentiality duty.”) (citations omitted). Would the woman be hired? With whom would a prospective employer side? The judge with more power (including the power to rule on clients’ cases) or the woman who is one of several lawyers that the firm could hire? Anita Hill faced this dilemma. Moreover, as a woman of color, even one with impressive credentials, she may have believed that she had to put up with a lot, “grit [her] teeth,” and continue working. BEREBITSKY, *supra* note 28, at 270-71 (quoting Ellen Wells, one of Hill’s witnesses).

267. Carla D. Pratt, *Sisters in Law: Black Women Lawyers’ Struggle for Advancement*, 2012 MICH. ST. L. REV. 1777, 1779 (2012) (citing Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 183; Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991); RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 51-56 (2001); Richard Delgado, *Rodrigo’s Reconsideration: Intersectionality and the Future of Critical Race Theory*, 96 IOWA L. REV. 1247, 1259-63 (2011)).

268. BEREBITSKY, *supra* note 28, at 2.

269. See Maria L. Ontiveros, *Three Perspectives on Workplace Harassment of Women of Color*, 23 GOLDEN GATE U. L. REV. 817, 823-24 (1993) (explaining the dilemma and backlash that women of color like Anita Hill endure when the harasser is a man of color). For a groundbreaking discussion of what it means for a Black woman to break the silence, see Kimberle Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. CAL. L. REV. 1467, 1471 (1992).

270. “Many blacks took the position that, even if Hill’s allegations were true, racial solidarity required supporting Thomas.” RANDALL KENNEDY, SELLOUT 117 (2008). After Thomas made his “high-tech lynching for uppity blacks” remark “support for his nomination in the black community rose from 54 percent to almost 80 percent.” BEREBITSKY, *supra* note 28, at 272.

271. Wendy Brown-Scott, *Anita Hill Meets Godzilla: Confessions of a Horror Movie Fan*, 70 TUL. L. REV. 1921, 1931 (1996).

272. BEREBITSKY, *supra* note 28, at 272. Professor Anita Hill described that Black women are

Clarence Thomas increased.<sup>273</sup> Some Black women questioned Hill's credibility and some Black men accused her of "trying to bring a brother down."<sup>274</sup> "Many Black women were angry at [Hill], not because they disbelieved her, but because she had spoken out where they had kept silent."<sup>275</sup>

Similarly, many African Americans criticized Alice Walker when she published *The Color Purple* because they viewed the book as an attack upon Black men.<sup>276</sup> In *Beauty in Truth*, a documentary that aired on the Public Broadcasting Service (PBS) on February 7, 2014, Walker explained how she was verbally assaulted and threatened by people in her own community.<sup>277</sup> The book was criticized for its depiction of life in the Black community.<sup>278</sup> In the PBS documentary, Walker disclosed that the first five years after the book was published were very painful because she had no defenders.<sup>279</sup> In her words: "It took many women and men a long time to find their voices and to say, well, this happened to me, or I know this happened."<sup>280</sup>

Like African-American women, Latinas endure our own brand of inequality at the intersection of race and sex.<sup>281</sup> Our lives are also

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conditioned "to deny both the nature of . . . [Black men's] behavior and the harm [women] feel from it." HILL, SPEAKING TRUTH TO POWER, *supra* note 8, at 276. Black women are told that the "don't tell" norm is "for the good of the race." *Id.* at 279 ("We must deny our gender in order to maintain our racial identity.").

273. KENNEDY, *supra* note 270 at 90-91.

Orlando Patterson, a highly acclaimed Harvard professor, argued in the aftermath of the Confirmation Hearings that even if testimony about Thomas's gross pornography-laden harassment was actually true, Thomas was justified in lying about it given that such behavior was recognizable (and apparently acceptable) to Black women as simply a style of "down home courting."

Crenshaw, *supra* note 267, at 1471.

274. Brown-Scott, *supra* note 271, at 1926. The accusation that women of color "bring down men of color" is an efficient defense tactic that demonizes the women and protects abusers who happen to be men of color. See HILL, SPEAKING TRUTH TO POWER, *supra* note 8, at 284. This is not to say that there may not be women of color who wrongfully accuse men of color, but I doubt that it is the standard practice.

275. Anna Deavere Smith, *The Most Riveting Television: The Hill-Thomas Hearings and Popular Culture*, in RACE, GENDER, AND POWER IN AMERICA, *supra* note 7, at 252. Some Black women said that they "[had] been taking shit for years." *Id.* So, "[w]hy should Anita get to talk about it?" *Id.*

276. *Alice Walker: Beauty in Truth* (PBS television broadcast, Feb. 7, 2014).

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. "Black women's status results from belonging to two minority classes: Blacks and women." Angela Mae Kupenda, Letitia Simmons Johnson & Ramona Seabron-Williams, *Political Invisibility of Black Women: Still Suspect But No Suspect Class*, 50 WASHBURN L.J. 109, 112

framed by our individual characteristics, experiences, and community norms.<sup>282</sup> The literature and research on the issues that professional Latinas face are in their nascent stage.<sup>283</sup> Our Latina Anita Hill has not testified, perhaps because the opportunity has not arisen, at least not in a national forum like the U.S. Supreme Court Justice confirmation hearings. In *Everyday Injustice*, a book that examines the challenges that Latina/o lawyers (as proxy for Latina/o professionals) face because of race, Professor Maria Chávez devotes a chapter to examining the struggles of Latina lawyers who face discrimination at the intersection of race, gender, class, and other characteristics.<sup>284</sup> Men of color often dismiss our particular struggles as Latinas.<sup>285</sup> “The legal field is no exception.”<sup>286</sup>

Stereotypes and community/cultural norms follow us into the workplace.<sup>287</sup> For example, Latina lawyers continue to adhere to cultural norms that tell us that we should not “boast about ourselves or seek recognition” for our accomplishments.<sup>288</sup> “Latinas in particular are raised to show deference to Latinos by allowing them to assume leadership roles, while Latinas provide critical support.”<sup>289</sup> Within the Latina/o community, *machismo* is a cultural, gender norm that promotes that Latinas must stay in our place—submissive to men.<sup>290</sup> A Latina who rebels against the *machismo* cultural norm, which requires that woman be subservient to man, is labeled a “*mujer mala* [a bad

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(2010). Black women and Latinas live at the intersection of race and sex. Kimberly R. Moffitt, Heather E. Harris & Diane A. Forbes Berthoud, *Present and Unequal—A Third-Wave Approach to Voice Parallel Experiences in Managing Oppression and Bias in the Academy*, in PRESUMED INCOMPETENT, *supra* note 21, at 78. While African-American women and Latinas share similar experiences, we also live different experiences and it is important to use “effort and imagination to root out and examine our differences, for only the recognition of women’s differences can ultimately bring feminist movement to strength. This is hard work, and painful work; but it is also radical work, real work.” Harris, *supra* note 148, at 615 (citing Bernice Johnson Reagon, *Coalition Politics: Turning the Century*, in HOME GIRLS: A BLACK FEMINIST ANTHOLOGY 359 (B. Smith ed.1983)).

282. See DELGADO, PEREA & STEFANCIC, *LATINOS AND THE LAW*, *supra* note 147, at 716.

283. CHÁVEZ, *supra* note 230, at 81.

284. *Id.* at 77-102.

285. *Id.* at 100-01.

286. *Id.* at 82 (citations omitted).

287. *Id.* at 91, 93.

288. *Id.* at 79.

289. Jill L. Cruz & Melinda S. Molinas, *Hispanic National Bar Association Commission on Latinas in the Legal Profession National Study on the Status of Latinas in the Legal Profession Few and Far Between: The Reality of Latina Lawyers*, 37 PEPP. L. REV. 971, 1008 (2010).

290. Patricia M. Hernandez, *The Myth of Machismo: An Everyday Reality for Latin American Women*, 15 ST. THOMAS L. REV. 859, 860-62 (2003). Accord DELGADO, PEREA & STEFANCIC, *LATINOS AND THE LAW*, *supra* note 147, at 697.

woman].”<sup>291</sup> “Hispanic women widely agree with an analysis of sexism as an evil within our communities, and evil that plays into the hands of the dominant forces of society and helps to repress and exploit us.”<sup>292</sup> Behaviors that are culturally learned, like *machismo*, become self-perpetuating norms that continue to be passed down (by men and women) from generation to generation.<sup>293</sup> This explains why in the study conducted by Professor Chávez some Latina law students reported lying about their professional status (saying they were secretaries) to Latino men in casual interactions because they realized that some Latinos are threatened by career women.<sup>294</sup>

Like our African-American sisters, Latinas sometimes do not speak about the abuse by men in our communities because we may be seen as traitors.<sup>295</sup> When Chicana feminists, including lesbian feminists, attacked the *machismo* in Chicano culture, they were labeled “*vendidas*” [“sellouts”].<sup>296</sup> To avoid being ostracized in their communities, some Latinas tolerate the abuse rather than speak out and seek assistance.<sup>297</sup> After all, “[t]hose of us who question or challenge the [gender] norm risk alienation from and marginalization by our comunidad Latina [Latina/o community] rendering us outsiders even within the outsider comunidad Latina.”<sup>298</sup>

Like Alice Walker in the African-American community, Gloria Anzaldúa exposed and wrote about the painful reality and consequences

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291. GLORIA ANZALDÚA, *BORDERLANDS LA FRONTERA—THE NEW MESTIZA* 39 (3d ed. 2007) [hereinafter ANZALDÚA, *THE NEW MESTIZA*].

292. Clark & Richardson, *supra* note 105, at 332 (quoting Ada María Isasi-Díaz, *Mujeristas: A Name of Our Own*, in *YEARNING TO BREATHE FREE: LIBERATION THEOLOGIES IN THE UNITED STATES* 121-25, 128(1990)).

293. See Hernandez, *supra* note 290, at 860. “Children respond to signals about desirable masculine and feminine roles at very early ages.” Deborah L. Rhode, *Perspectives on Professional Women*, 40 *STAN. L. REV.* 1163, 1182 (1988) [hereinafter Rhode, *Perspectives on Professional Women*]. Smart, aggressive, professional women are often portrayed as “domineering, mean, nasty bitches.” Darren Hutchinson, *Scalia v. Sotomayor: The Use of Gender-Coded Language to Evaluate a Judge’s “Temperament”*, available at <http://dissentingjustice.blogspot.com/2009/05/scalia-v-sotomayor-use-of-gender-coded.html> (May 8, 2009). Men on the other hand are expected to be aggressive; therefore, some men engage in acts of aggression to assert their masculinity by demonstrating “that they are not feminine or girls, and that they are not gay.” See Ann C. McGinley, *Masculine Law Firms*, 8 *FIU L. REV.* 423, 428 (2013).

294. CHÁVEZ, *supra* note 230, at 94.

295. Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 *B.C. THIRD WORLD L.J.* 231, 248-49 (1994).

296. Alma M. Garcia, *The Development of Chicana Feminist Discourse*, 3 *GENDER & SOCIETY* 226-27 (1989).

297. Rivera, *supra* note 295, at 248-49.

298. Berta Esperanza Hernández-Truyol, *Latina Multidimensionality and LatCrit Possibilities: Culture, Gender, and Sex*, 53 *U. MIAMI L. REV.* 811, 820 (1999).

of *machismo* within the Latina/o community. In *Borderlands La Frontera—The New Mestiza*, Anzaldúa wrote:

As long as woman is put down, the Indian and the Black in all of us is put down. The struggle of the *mestiza* [mixed race woman] is above all a feminist one. As long as *los hombres* [the men] think they have to *chingar mujeres* [screw women] and each other to be men, as long as men are taught that they are superior and therefore culturally favored over *la mujer* [the woman], as long as to be a *vieja* [a wife, girlfriend, or woman] is a thing of derision, there can be no real healing of our psyches.<sup>299</sup>

*Machismo* continues to exist in one form or another among Latinas/os.<sup>300</sup> Although Latinos also hold subordinated status in the racial pecking order, they “still maintain positions above women in a hierarchical [workplace] structure.”<sup>301</sup>

Some Latinas/os replicate the *machismo* and gender norms within Latina/o professional circles.<sup>302</sup> In a study of Latina lawyers that was published in 2010, some Latina lawyers reported “being subjected to or witnessing condescending treatment by male attorneys, especially Latinos.”<sup>303</sup> Moreover, when men of color harass women, they usually harass women of color.<sup>304</sup> This privilege that men of color have over women of color places women of color at higher risk of being harassed in professional settings.<sup>305</sup> “Harassers may also prefer those women of color, such as Latinas and Asian American women, whom they view as

299. ANZALDÚA, *THE NEW MESTIZA*, *supra* note 291, at 106.

300. See generally José B. Torres, Scott H. Solberg & Aaron H. Carlstrom, *The Myth of Sameness Among Latino Men and Their Machismo*, 72 AM. J. ORTHOPSYCHIATRY 163 (2002).

301. See e.g., Leticia M. Saucedo & Maria Cristina Morales, *Masculinities Narratives and Latino Immigrant Workers: A Case Study of the Las Vegas Residential Construction Trades*, 33 HARV. J. L. & GENDER 625, 626 (2010).

302. See Cruz & Molinas, *supra* note 289, at 1015-16.

303. *Id.*

304. See Ontiveros, *supra* note 269, at 818-19. See also Crenshaw, *supra* note 267, 1471 (“[W]hite harassers may believe that certain behavior is acceptable to Black women because ‘they’ are different, while Black harassers may believe that certain behavior is acceptable because ‘we’ are different.”).

305. Ontiveros, *supra* note 269, at 818-19 (“Although a white man might harass any woman, a man of color is not likely to feel that he has the prerogative to harass a white woman.”). Some men of color think they have a right to treat women of color in a disrespectful way, but they would not consider disrespecting White women in the same way. See HILL, *SPEAKING TRUTH TO POWER*, *supra* note 8, at 277 (citing Harvard University sociologist Orlando Patterson’s rationalization of Clarence Thomas’ behavior toward Anita Hill as “part of the courting ritual of black American males whose origins are in the rural South”). This means that women of color in the workplace face harassment by men of all races, increasing the odds that we will be harassed during our professional careers.

more passive and less likely to complain.”<sup>306</sup> When a harasser targets a woman of color and she responds by (1) demanding that he stop the harassment, and (2) complaining about it (speaking out), she may be attacked even worse and subjected to retaliation by the man *and the community* for resisting and complaining about his behavior.<sup>307</sup> And if the woman of color is not a member of the dominant (ethnic, racial, or national origin) community of color, she may suffer worse retaliation from men and women.

Even in professional Latina/o organizations, like Latina/o bar associations, our unique challenges as women are not adequately understood.<sup>308</sup> Latina lawyers do not get the same recognition in our communities as Latino lawyers, including when women do more work than men do.<sup>309</sup> Within so-called “safe spaces” set up specifically for Latina/o professionals, Latinas are still subjected to the Latino “‘male’ approach to doing things.”<sup>310</sup> In these supposedly “safe” spaces, Latinas are not immune from gender-insensitive treatment.<sup>311</sup> New forms of technological communication, like group e-mails and professional listservs,<sup>312</sup> provide additional opportunities for gender oppression where a woman can be “put in her place” in front of a group of colleagues inside and outside her particular workplace.<sup>313</sup>

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306. Ontiveros, *supra* note 269, at 819.

307. See HILL, *SPEAKING TRUTH TO POWER*, *supra* note 8, at 277.

308. CHÁVEZ, *supra* note 230, at 100-01 (citations omitted).

309. *Id.* at 96. One of my former students (a Latina alumna) told me that when Latina clients call the firm where she works they insist on speaking with a Latino lawyer. This preference for male attorneys demonstrates how some Latinas internalize and perpetuate *machismo*. The alumna gave me permission to cite her experience in this footnote.

310. See Elvia R. Arriola, *Difference, Solidarity and Law: Building Latina/o Communities Through LatCrit Theory Foreword*, 19 CHICANO-LATINO L. REV. 1, 12 (1998).

311. See Pamela J. Smith, *The Tyrannies of Silence of the Untenured Professors of Color*, 33 U.C. DAVIS L. REV. 1105, 1105 (2000) (“[At a “safe” progressive conference,] Latinas sought sanctuary from what they perceived as a gender-insensitive statement from one of the dinner speakers.”).

312. Listservs are group e-mail mailing lists through which individuals connect beyond their particular institutions. See e.g., Timothy M. Shea, *WINGS: Improving Service Delivery to Protected Persons and Their Guardians*, 27-JUN UTAH B.J. 38, 43 (2014). E-mails to the listserv are automatically sent to all its members. *Id.*

313. See THIS BRIDGE WE CALL HOME: RADICAL VISIONS FOR TRANSFORMATION 4 (Gloria E. Anzaldúa & Analouise Keating eds., 2002) (“[The listserv, a] supposedly safe space was no longer safe.”). A personal attack through a group e-mail or listserv not only targets the particular woman, but it also sends a message to other women of what can happen to them if they choose to participate in the conversation. Moreover, it also sends a message to men of the level of oppression against women they are allowed to exert. Earlier this year, a law professor made public in the Women in Legal Education listserv an e-mail that was sent to her through a different listserv for law professors. In the exchange, a male colleague responded to her comment to his initial e-mail in a sexist manner. Another male colleague replied to the listserv and called out the man for his sexist

I will never know exactly what it is like to walk through life as an African-American, Asian-American, Native-American, or White-American woman.<sup>314</sup> As women in a patriarchal system, we are all oppressed, although not necessarily in the same ways. White women endure sexism but are not burdened by the “cultural defense” that insists that men of color are oppressed enough already without having women of color telling on them and holding them accountable for their abusive conduct.<sup>315</sup> Women of color sometimes have to choose between protecting ourselves (and other women) and protecting men of color.<sup>316</sup> Women of color are also oppressed in places where some people might assume that race-based and sex-based oppression should not occur, such as in Historically Black Colleges and Universities,<sup>317</sup> in Hispanic-serving institutions,<sup>318</sup> and in civil rights organizations.<sup>319</sup>

Gloria Anzaldúa proposed that it is important to inform people

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comment. This may be a strategy worth replicating—outing colleagues who attack women in these professional listservs and calling them out publicly. No woman should be made to fear being attacked for making a comment in a professional listserv or in any other professional setting.

314. See Espinoza & Harris, *supra* note 164, at 519 (“I cannot speak as a Latina or for Latino/as. But I can try and ask myself what LatCrit theory requires of me as an African American.”).

315. See *e.g.*, Crenshaw, *supra* note 267, at 1472 (“This cultural defense effectively deflects criticisms of sexist attitudes and practices that subordinate Black women and other women of color in our communities.”).

Recurrently, numerous practices are inflicted on women simply because of their sex and are justified or explained by culture and tradition: genital mutilation; female infanticide; bride burning; foot-binding; slavery; veiling; wife-beating; honor-killing; forced pregnancy; forced abortion; and multiple, early, and closely spaced child-bearing and birthing, to name but a few. It is inconceivable that these practices, which some accept without protest because they are based on sex, would be justified if they were instead predicated upon another protected classification such as race (although until recently, culture and tradition were used to justify racial discrimination, including apartheid and slavery).

Hernández-Truyol, *Out of the Shadows*, *supra* note 235, at 142 (citations omitted).

316. “The invocation of cultural excuses for gender subordination and abuse is not only a distortion of community mores, it is a manipulative excuse for illegal behavior.” HILL, SPEAKING TRUTH TO POWER, *supra* note 8, at 279. People of color dread facing the “race versus sex” confrontation. See Holmes Norton, *supra* note 67, at 246. “As long as issues of abuse between [men of color] and [women of color] are suppressed and left unresolved, however, we give sanction to that abuse.” *Id.*

317. Flores Niemann, in PRESUMED INCOMPETENT, *supra* note 21, at 479. See also Reyes, Kupenda, Onwuachi-Willig, Wildman & Wing, *Reflections on Presumed Incompetent*, *supra* note 67, at 236 (citing investigations funded by the National Science Foundation “designed to improve the climate, especially for women of color in the sciences” in Historically Black Colleges and Universities).

318. Flores Niemann, in PRESUMED INCOMPETENT, *supra* note 21, at 479. The same discrimination occurs in tribal colleges. *Id.*

319. See *infra* note 336 and accompanying text.

about our particular struggles and to learn about the particular struggles of other oppressed people.<sup>320</sup> We should do this, at the least, so people will not (1) have the excuse that they did not know, or (2) make incorrect presumptions. For instance, some judges wrongly presume that “diverse workplaces are somehow impervious to racism.”<sup>321</sup> The same assumption is made about women who evaluate other women in the workplace. “Women’s negative views of female coworkers are often seen as an objective assessment—more credible than the views of men. When women voice gender bias, they legitimize it.”<sup>322</sup> When decision-makers in alleged race or gender discrimination cases are members of racial minority groups or women, some judges openly cite this as a fact that weakens inferences of discrimination.<sup>323</sup> Judges also incorrectly assume that women of color do not discriminate against other women of color when they have the power to do so in the workplace.<sup>324</sup>

If we provide this knowledge, colleagues and other people might be less likely to suppose that a woman of color is “safe” just because there are other people of color in critical mass numbers or in positions of power.<sup>325</sup> She may not be “safe” within her own racial group.<sup>326</sup> Oppression often goes around in circles and people of color are not immune from internalizing biases and acting upon them to oppress more vulnerable people of color.<sup>327</sup> In the legal academy, for example, “some

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320. ANZALDÚA, *THE NEW MESTIZA*, *supra* note 291, at 108.

321. Tanya Katerí Hernández, *Latino Inter-Ethnic Employment Discrimination and the “Diversity” Defense*, 42 HARV. C.R.-C.L. L. REV. 259, 298-301 (2007).

322. SANDBERG, *supra* note 211, at 164 (citing Derks et al., “Do Sexist Organizational Cultures Create the Queen Bee?,” 519-35; Robert S. Baron, Mary L. Burgess, and Chuan Feng Kao, “Detecting and Labeling Prejudice: Do Female Perpetrators Go Undetected?,” *Personality and Social Psychology Bulletin* 17, no. 2 (1991): 115-23).

323. *See e.g.*, *Brown v. District of Columbia*, 919 F. Supp. 2d 105, 115 (2013) (“Further, this discriminatory inference is especially weak given the fact that the two people who allegedly considered plaintiff’s tenure application unlawfully are either African-American (President Sessoms) or a woman (Provost Baxter).”) (internal citations omitted), *aff’d in part, rev’d in part sub nom.* *Brown v. Sessoms*, No. 13-7027 (D.C. Cir. Dec. 19, 2014).

324. *See* Hernández, *Latino Inter-Ethnic Employment Discrimination*, *supra* note 321, at 300-01 (analyzing the court’s rationale in *Bernard v. N.Y. City Health & Hosps. Corp.*, No. 93 CIV. 8593 (LAP), 1996 WL 457284 (S.D.N.Y. Aug. 14, 1996)).

325. Wing, *Lessons from a Portrait*, *supra* note 125, at 366. Professor Wing cautions that more senior colleagues of color may actively harm a more junior colleague of color. *Id.*

326. *See* Valverde, *Fight the Tower*, *supra* note 76, at 373 n.5, 381, 389-90. “Nuanced intra-racial and inter-ethnic tension that leads to harassment is rarely discussed or even recognized within ethnic groups, so it is even more difficult to explain and prove to the white establishment.” *Id.* at 390.

327. *Id.* at 389, 391; Reyes, *Opening Borders*, *supra* note 91, at 16. When racialized groups co-exist in certain workplaces, there may be a “favored group” that gets preferential treatment and members of this dominant racial group subordinate members of other racialized groups. Harris & González, *Introduction*, in *PRESUMED INCOMPETENT*, *supra* note 43, at 12-13.

of the harshest critics of minority faculty candidates and professors . . . are minority faculty members.”<sup>328</sup> “Those harsh evaluations are often readily and eagerly embraced” because there is an assumption that “such judgments are not tainted by impermissible factors, namely race and gender.”<sup>329</sup> We should also not assume that because one woman of color is being mentored and helped along in a particular workplace, that another woman of color is receiving the same treatment and opportunities, “particularly when both women are from the same group, either the same racial or other group.”<sup>330</sup>

Women of color must break the intra-community silence about the *machismo* and sexism in our communities, including in our professional spheres. We need to remind ourselves and remind men of color of the truth told by Gloria Anzaldúa and bell hooks:

Though we “understand” the root causes of male hatred and fear, and the subsequent wounding of women, *we do not excuse, we do not condone, and we will no longer put up with it.* From the men of our race, we demand the admission/acknowledgement/disclosure/testimony that they wound us, violate us, are afraid of us and our power. We need them to say they will begin to eliminate their hurtful put-down ways. But more than the words, we demand acts. We say to them: We will develop equal power with you and those who have shamed us.<sup>331</sup>

As people of color, our struggle against racial imperialism should have taught us that wherever there exists a master/slave relationship, an op-

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328. Lopez & Johnson, *supra* note 60, at 395.

329. *Id.*

330. See Reyes, Kupenda, Onwuachi-Willig, Wildman & Wing, *Reflections on Presumed Incompetent*, *supra* note 67, at 25. See also Hernández, *Latino Inter-Ethnic-Employment Discrimination*, *supra* note 321, at 298-99 (“Carbado and Gulati theorize that discrimination in a diverse setting can occur when the least racially assimilated employee or prospective employee is targeted for disparate treatment.”) (citing Carbado & Gulati, *supra* note 198, at 1298). In some workplaces a particular person of color may become the “pet” or “mascot” “whose accomplishments (real or imagined) and compliant attitude put other [co-workers] in a negative light.” Harris & González, *Introduction*, in *PRESUMED INCOMPETENT*, *supra* note 21, at 12. This pattern is particularly problematic for women of color who are already taxed with negative race and gender presumptions and stereotypes that we have to overcome. And it may be even more troubling for the “firsts” who are opening doors for the ones who follow. Yes, there are women, especially women of color, who are still “the first” in some U.S. workplaces. See EagleWoman, *supra* note 97, at 261. I was the first Latina/o professor hired in the tenure-track at the FAMU College of Law. And some of us are also “the first” professor from our particular group in the educational experiences or the lives of some of our students. See *e.g.*, *id.* at 269 (“The vast majority of my students are non-Native and for some of them I am the first Native American they have encountered in their lives.”). Some students (Asian Americans, African Americans, Latinas/os, Middle Easterners, and White Americans) have shared with me that I am the first Latina professor in their lives and for some also their first Latina teacher.

331. ANZALDÚA, *THE NEW MESTIZA*, *supra* note 291, at 105-06 (emphasis added).

pressed/oppressor relationship, violence, mutiny, and hatred will permeate all elements of life. There can be no freedom for black men as long as they advocate subjugation of black women. There can be no freedom for patriarchal men of all races as long as they advocate subjugation of women.<sup>332</sup>

As this Part explains, women of color must confront not only the professional and workplace norms that promote silence, but also the cultural and community norms that pressure us not to tell on men of color, including in our professional lives.<sup>333</sup>

## VII. SILENCED CANARIES: WHY FEW PROFESSIONAL WOMEN VINDICATE OUR RIGHTS IN THE FEDERAL COURTS

As lawyers, Anita Hill and her friends determined that litigating an employment case was not a feasible option.<sup>334</sup> The costs (emotional, psychological, professional, and financial) of litigating employment discrimination and harassment cases are overwhelming for employees.<sup>335</sup> Those women who complain publicly and file lawsuits often do so only as a last resort.<sup>336</sup> Is it relevant to the achievement of women's equality in the workplace to investigate how many women, like Anita Hill, have remained silent and moved on to other jobs? How many women are leaving employment in particular industries after they are harassed?<sup>337</sup> If

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332. HOOKS, AIN'T I A WOMAN, *supra* note 79, at 117.

333. While this Part of the Article focuses on the experiences of African-American women and Latinas, women in other racialized groups also face similar struggles. *See e.g.*, Valverde, *Fight the Tower*, *supra* note 76, at 373, 389 (describing experiences with patriarchy and paternalism as a professor within Asian-American group); EagleWoman, *supra* note 97, at 261 (describing experiences with male chauvinism as a lawyer within Native group).

334. HILL, SPEAKING TRUTH TO POWER, *supra* note 8, at 71. *See also* Catharine A. MacKinnon, *The Logic of Experience: Reflections on the Development of Sexual Harassment Law*, 90 GEO. L.J. 813, 830 (2002) ("*Bundy*, the closest controlling case in the D.C. Circuit to [Hill's], was too fragile, isolated, and recent to have reliably helped her when it was handed down around the time of the injuries to which she testified.").

335. *See generally* Rhode, *Litigating Discrimination*, *supra* note 29.

336. *Cf.* HILL, SPEAKING TRUTH TO POWER, *supra* note 8, at 110 (stating that she was ready to keep the "secret" of what happened to her, but realized that she had to "speak out" when Clarence Thomas was nominated to the Supreme Court).

In 1994 a group of female attorneys with the NAACP, the oldest civil rights organization in the country, complained publicly for the first time about a pattern of gender bias that had existed in the NAACP for years. Their allegations included harassment-related charges as well as charges that women were not paid comparably to men in similar positions and were not promoted at the same rate as men. Despite their familiarity with civil rights law, these women did not sue to complain about violations of their civil rights. For years they attempted to deal with the matter internally.

*Id.* at 150.

337. *See e.g.*, Jennifer Lisa Vest, *What Doesn't Kill You: Existential Luck, Postracial Racism*,

the United States has laws that protect employees from unlawful employment conduct, why is it that most employees choose to remain silent and give up their right to enforce those laws within their institutions and in the courts? Where is the legal system failing employees? Statistics show that many victims of harassment and unlawful discrimination are women.<sup>338</sup> Therefore, women's equality in the workplace will never be achieved until employment laws are actually enforced.

Employers can enforce the laws through the implementation of internal policies and procedures that hold individual violators accountable for their actions. Institutions that do not understand the benefits of proactively preventing workplace abuse and addressing complaints with the goal of correcting wrongdoing, regardless of the position of the wrongdoer, suffer the consequences. The damages include loss of valuable employees (often the most competent), a hostile work environment that harms everybody (including bystanders), low employee morale, decrease in employee productivity, workplace violence, bad publicity, and lawsuits.<sup>339</sup> Employees get sick and become disengaged.<sup>340</sup> Regrettably, studies show that when workplace abuse, harassment, and discrimination are reported, institutional actors usually go into defensive mode and side with perpetrators who may happen to be high-level employees.<sup>341</sup>

Internal departments, such as Human Resources (HR), have been

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and *The Subtle and Not So Subtle Ways the Academy Keeps Women of Color Out*, 12 SEATTLE J. FOR SOC. JUST. 471, 484-85 (2014) (deciding to leave her tenured position in the academy as a result of "macroaggressions" and "microassaults" that she experienced); Bill Steele, *Something About STEM Drives Women Out*, CORNELL CHRONICLE, Nov. 19, 2013, <http://www.news.cornell.edu/stories/2013/11/something-about-stem-drives-women-out> (citing longitudinal study about professional women leaving the science, technology, engineering and mathematics (STEM) field).

338. Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 125-33 (1999). And "study after study has found sharply lower rates of success in employment discrimination cases brought by women of color than those brought by plaintiffs in general." Joan C. Williams, *Double Jeopardy? An Empirical Study With Implications for the Debates Over Implicit Bias and Intersectionality*, 37 HARV. J. L. & GENDER 185, 235 (2014) [hereinafter Williams, *Double Jeopardy?*].

339. GARY NAMIE & RUTH F. NAMIE, *THE BULLY-FREE WORKPLACE: STOP JERKS, WEASELS, AND SNAKES FROM KILLING YOUR ORGANIZATION* 31-35 (2011) [hereinafter NAMIE & NAMIE, *THE BULLY-FREE WORKPLACE*]. The Workplace Bullying Institute estimated that the City of San Francisco paid \$10.3 million to settle lawsuits caused by the City's defense of "indefensible discrimination and general bullying across 5 years." Workplace Bullying Institute, *San Francisco Defends Employee Misconduct - \$10.3 Million* (Apr. 15, 2013), <http://www.workplacebullying.org/2013/04/15/sf-costs/>.

340. NAMIE & NAMIE, *THE BULLY-FREE WORKPLACE*, *supra* note 339, at 34.

341. *See id.* at 104-05.

proven unable to help employees because “HR is not a profession that advocates for employees.”<sup>342</sup> HR and other internal departments are functions of the employer. Even well-meaning HR employees have to do what the employer (their boss) tells them to do; therefore, they have an inherent conflict of interest and lack of independence. Studies also show a tradition of “sham investigations” by internal departments.<sup>343</sup> It is like asking the fox to guard the chicken coop. These same studies also find that the result of “sham investigations” is (1) “no consequences of any kind for the perpetrator,” and (2) “the target frequently receives retaliation for filing the complaint.”<sup>344</sup> The name of the game for individual actors defending against charges of discrimination is deny, deny, and deny.<sup>345</sup> Also, internal complaint processes often run counter to the goals of anti-discrimination laws because discrimination grievances are often re-casted as “typical managerial problems over personality conflicts.”<sup>346</sup> This is why enforcement through lawsuits has to fill in the gap.<sup>347</sup>

In Title VII cases, there is a right to trial by jury,<sup>348</sup> but these cases rarely survive summary judgment in the federal courts.<sup>349</sup> Some cases

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342. *Id.* at 128-29.

343. *Id.* at 140.

344. *Id.*

345. See Eyer, *supra* note 38, at 1335 n.201 (citing Laura Beth Nielsen et al., *Uncertain Justice: Litigating Claims of Employment Discrimination in the Contemporary United States* 17, 33-34 (Am. B. Found., Research Paper No. 08-04, 2008)). See also NAME & NAME, THE BULLY AT WORK, *supra* note 62, at 123 (“When an employer responds to your complaint, denial begins. Several people, departments, and institutions both inside and out get involved.”).

346. Tanya Katerí Hernández, *A Critical Race Feminism Empirical Research Project: Sexual Harassment & the Internal Complaints Black Box*, 39 U.C. DAVIS L. REV. 1235, 1244 (2006) (citing Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC’Y REV. 497, 515 (1993)).

347. “But we must go on to say that while it may be true that morality cannot be legislated, behavior can be regulated. It may be true that the law cannot change the heart but it can restrain the heartless.” Dr. Martin Luther King, Jr., Speech at Western Michigan University (Dec. 18, 1963), available at <http://www.wmich.edu/sites/default/files/attachments/u34/2013/MLK.pdf>.

Absent the “stick” of effective judicial monitoring, proposals for private institutional reform must rely on private employers themselves (and/or institutional intermediaries such as HR consultants) to be the guardians of effective reform. But, there are profound reasons to be skeptical of the efficacy of relying on employers and HR consultants as a means of promoting true change. If, as psychology scholars have documented, most people do not see discrimination in all but the most egregious circumstances, how can we expect even good-faith private institutional actors to meaningfully detect the problems they are trying to correct?

Eyer, *supra* note 38, at 1335.

348. Civil Rights Act of 1991, Section 102, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

349. Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203 (1993); Mollica, *supra* note

do not even survive a motion to dismiss.<sup>350</sup> Many judges take it upon themselves to decide employment lawsuits by ruling in favor of employers before these cases get to a jury (“the objectively reasonable persons”).<sup>351</sup> Most employees cannot afford to appeal these decisions,<sup>352</sup> particularly when many of them end up unemployed because of challenging the misconduct.<sup>353</sup> And sometimes they cannot find another job because they are labeled “troublemakers” (whistleblowers without whistleblower protections).<sup>354</sup>

The majority of employees who are victims of discrimination and harassment do not have the financial and legal resources (access to counsel) that employers have.<sup>355</sup> In addition, employers retain institutional power over most of the evidence and witnesses.<sup>356</sup> Therefore, litigation is a cat and bird chase, like in the Warner Brothers cartoon *Sylvester and Tweety Bird*.<sup>357</sup> Sylvester the cat was always trying to eat Tweety (a canary).<sup>358</sup> Despite the obvious size imbalance, Tweety always managed to escape Sylvester’s attempts to eat him.<sup>359</sup> Unlike in the cartoon, a plaintiff-employee (the bird) is in the litigation proceeding (the cage) with a defendant-employer (the cat) whose odds of winning the fight are excellent because, in addition to its obvious power advantages, there is no Granny to protect the bird.<sup>360</sup> In fact, a judge will most likely help the employer to achieve its ultimate goal at the

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38, at 168-69; Van Detta, *supra* note 38, at 106.

350. See e.g., *Morales-Cruz v. University of Puerto Rico*, 676 F.3d 220 (1st Cir. 2012) (affirming dismissal of law professor’s gender discrimination claim); *Mangum*, 551 F. Supp. 2d at 444 (dismissing female firefighter’s hostile work environment claim). Luckily for the plaintiff in *Morales-Cruz*, in addition to the federal case, she had access to an administrative appeal, which was ultimately decided in her favor in June 2013. E-mail from Myrta Morales Cruz (June 11, 2014) (on file with author).

351. See generally *Beiner*, *supra* note 338, at 71 (analyzing statistical and anecdotal information in discrimination cases and the judiciary’s attitude towards these claims). Of all categories of litigants, discrimination plaintiffs have the lowest rate of success (5%). *Eyer*, *supra* note 38, at 1276. Most of these plaintiffs (86%) lose their case at the motion to dismiss or motion for summary judgment stage. *Id.*

352. See Jack A. Raisner & Wayne N. Outten, *Employment Discrimination in the Second Circuit District Courts 1993-94*, 14 QLR 707, 714 (1994).

353. Rhode, *Litigating Discrimination*, *supra* note 29, at 333.

354. See *id.*

355. See *Beiner*, *supra* note 338, at 127.

356. See *id.*

357. Matthew Hunter, *A History of Sylvester in Warner Brothers Cartoons*, <http://toolooney.goldenagecartoons.com/sylvester.htm> (last visited June 19, 2014).

358. *Id.*

359. *Id.*

360. Granny was Sylvester’s and Tweety’s owner. *Id.* She protected Tweety from Sylvester’s ultimate goal of eating the canary. *Id.*

motion to dismiss or motion for summary judgment stage.

Additionally, evidence, including witness accounts of fellow employees, may still be under the control of the defendant employer.<sup>361</sup> Colleagues with corroborating evidence do not come forward “for fear of jeopardizing their own positions.”<sup>362</sup> Furthermore, plaintiffs and their attorneys face disproportionate sanctions, which have a chilling effect in even the most meritorious cases.<sup>363</sup> Women of color face an even tougher uphill battle trying to convince jurors and the legal system that we are telling the truth and that we did not deserve the harassment.<sup>364</sup>

So why is it that most employees lose their cases at the hands of federal judges? “Surprisingly, there have been few robust attempts to answer this core question. Thus, while we have extensive data demonstrating that discrimination litigants fare poorly in the courts, we know very little about why.”<sup>365</sup> Therefore, we need to identify why the more systematic approach to eradicating unlawful workplace conduct is not occurring in the federal courts. We must inform judges about the realities of today’s workplaces and the abuse, discrimination, and harassment that some employees endure.<sup>366</sup> And we must persuade

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361. “The plaintiff’s success typically depends upon what is *in the defendant’s files*, to which the plaintiff has little or no access before the litigation.” Elizabeth M. Schneider & Hon. Nancy Gertner, “*Only Procedural*”: *Thoughts on the Substantive Law Dimensions of Preliminary Procedural Decisions in Employment Discrimination Cases*, 57 N.Y.L. SCH. L. REV. 767, 775 (2013).

362. Deborah L. Rhode, *Diversity and Gender Equity in Legal Practice*, 82 U. CIN. L. REV. 871, 888 (2014) [hereinafter Rhode, *Diversity and Gender Equity in Legal Practice*] (citing Deborah L. Rhode & Joan Williams, *Legal Perspectives on Employment Discrimination*, in *SEX DISCRIMINATION IN THE WORKPLACE* 243 (Faye J. Crosby, Margaret S. Stockdale & S. Ann Ropp eds. 2007); Riordan v. Kempiners, 831 F.2d 690, 697 (7th Cir. 1987)).

363. See Crenshaw, *supra* note 267, at 1470; Matthew G. Vansuch, *Icing the Judicial Hellholes: Congress’ Attempt to Put Out “Frivolous” Lawsuits Burns a Hole Through the Constitution*, 30 SETON HALL LEGIS. J. 249, 310-11 (2006). A study found that “minority plaintiffs in employment discrimination lawsuits—in particular African Americans—are much more likely than white plaintiffs to file without a lawyer.” Amy Myrick, Robert L. Nelson & Laura Beth Nielsen, *Race and Representation: Racial Disparities in Legal Representation for Employment Civil Rights Plaintiffs*, 15 N.Y.U. J. LEGIS. & PUB. POL’Y 705, 707 (2012). In the same study, one of the participants, an African-American woman, explained that she proceeded *pro se* because no lawyers wanted to represent her in her federal case. *Id.* at 734. She said that “[she] went down and talked with [lawyers], and they told [her] that . . . lawyers can be fined or something for bringing in frivolous suits. And so [she] couldn’t really find anyone that wanted to take the case.” *Id.* The administrators of the study found this odd because the case file included a “rare positive finding from the [Illinois] Commission of Human Rights on parts of her claim dealing with retaliation and unequal treatment, which is a strong indication that they were not frivolous.” *Id.*

364. Ontiveros, *supra* note 269, at 824-25.

365. Eyer, *supra* note 38, at 1277.

366. Judges are only the starting point in the legal system because jurors also need to overcome the resistance to find discrimination even when all the evidence glaringly points to it. *See*

judges to consider their own biases.

One of the difficulties in getting the judiciary to understand the realities that many employees face in the workplace is the disconnect of federal judges from the role of employees.

Federal judges don't have a "boss," in any meaningful sense of the word. Indeed, many of them have not had a boss for a very long time. They enjoy virtually unassailable job security. They are used to the people working immediately around them — clerks, secretaries, staff attorneys — doing what the judge wants. And when they have an unpleasant interaction with a colleague, it is still an unpleasant interaction among equals.<sup>367</sup>

But even if federal judges are in equal positions with other judges within their hierarchy, how many times would a male federal judge get to call a female federal judge a "bitch" before she and other judges agree that the term is being used *in a gendered way* and that such use "create[s] a working environment in which [the female judge] could rationally consider herself at a disadvantage in relation to her male co-workers by virtue of being a woman"?<sup>368</sup> This hypothetical question is based on actual cases.<sup>369</sup> And it is not far-fetched; some judges violate employment laws.<sup>370</sup> In my hypothetical the perpetrator and target are

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Eyer, *supra* note 38, at 1293-1302. Many Americans cannot reconcile their belief in "meritocracy" with discrimination on the job. *Id.* at 1304-11. Additionally, there are cognitive processes at work, such as someone's views on the existence or non-existence of discrimination, which predispose a person to see discrimination or not see it. *Id.* at 1311-18.

367. Nancy Leong, FEMINIST LAW PROFESSORS, *When the Harasser is the Boss* (Mar. 30, 2011), <http://www.feministlawprofessors.com/2011/03/when-the-harasser-is-the-boss/>.

368. This hypothetical mirrors the type of hypotheticals raised by Supreme Court Justices. See Richard Wolf, *Supreme Court Seeks Answers from 'Wild Hypotheticals'*, USA TODAY (Oct. 23, 2013, 7:01 p.m.), <http://www.usatoday.com/story/news/politics/2013/10/23/supreme-court-hypothetical-questions/3108881/>.

369. See Robert J. Gregory, *You Can Call Me a "Bitch" Just Don't Use the "N-Word": Some Thoughts on Galloway v. General Motors Service Parts Operations and Rogers v. Western Southern Life Insurance Co.*, 46 DEPAUL L. REV. 741, 753-56 (1997) (criticizing grant of summary judgment in favor of employer/defendant in hostile work environment case where a woman was repeatedly called "bitch" and "sick bitch"). *But see* Passananti v. Cook County, 689 F.3d 655 (7th Cir. 2012) (reversing grant of summary judgment and holding that "question of whether the frequent and hostile use of the word 'bitch' by the employee's supervisor was a gender-based epithet that contributed to a sexually hostile work environment was for the jury").

370. See e.g., Martha Neil, *Federal Judge Samuel Kent Resigns, as Senate Impeachment Trial Looms*, Jun 25, 2009, [http://www.abajournal.com/news/article/federal\\_judge\\_samuel\\_kent\\_resigns\\_as\\_senate\\_impeachment\\_trial\\_looms/](http://www.abajournal.com/news/article/federal_judge_samuel_kent_resigns_as_senate_impeachment_trial_looms/) ("Kent pleaded guilty to obstruction of justice . . . in a case concerning his testimony about his since-admitted nonconsensual sexual contact with two federal court employees in Texas"). In the legal system we seem to forget that judges are human beings who sometimes act on racially and sexist discriminatory impulses just like many other persons in American workplaces.

judges. I did this to encourage judges to try to place themselves in the shoes of employees in the cases that are brought before them.<sup>371</sup>

Some judges may naturally align themselves, implicitly or explicitly, with the interests of employers rather than with the plight of employees. And this is even more dangerous after the U.S. Supreme Court decisions in *Bell Atlantic Corp. v. Twombly*<sup>372</sup> and *Ashcroft v. Iqbal*.<sup>373</sup> *Twombly* and *Iqbal*'s "plausibility standard" has made it more difficult for plaintiffs to survive the motion to dismiss stage.<sup>374</sup> The Supreme Court has essentially given judges "an invitation for the exercise of judicial subjectivity, for judges to 'fill in the gaps' of the truncated factual or legal record with what 'they know' or, more significantly, what they *think* they know."<sup>375</sup> This is highly problematic in employment cases because judges will now rely even more on "cognitive processes" that have been shown by social psychological research to produce bias.<sup>376</sup> The biases of particular judges are formed based on their backgrounds and experiences.<sup>377</sup>

The root of some federal judges' bias in favor of employers may stem from the similar roles and characteristics shared by most judges and employers. First, the federal bench, the forum where most employment cases are litigated, is still dominated by White men.<sup>378</sup> Accordingly, most federal judges do not have to contend with the issues that employees who are plaintiffs in Title VII cases (mostly women and minorities) confront. Second, many judges come to the bench from

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371. Admittedly, judges, as their own bosses with lifetime appointments, are very far removed from the experience of most employees. But they should at least try to understand what the workplace is like for employees.

372. 550 U.S. 544 (2007).

373. 556 U.S. 662 (2009).

374. See Schneider & Gertner, *supra* note 361, at 772-75.

375. *Id.* at 773.

376. *Id.* at 775.

377. See *id.* at 776 ("[I]n a discrimination case, perhaps even more than most, what is plausible to one judge may not be plausible to another."). The diversity (or lack thereof) of background and experiences of federal law clerks also impacts judicial decision-making. See Harvey Gee, *Judicial Perspective and Mentorship at the Supreme Court: A Review Essay on In Chambers: Stories of Supreme Court Law Clerks and their Justices*, Edited by Todd C. Peppers and Artemus Ward, 51 DUQ. L. REV. 217, 228-29 (2013). Law clerks inform judges and engage in discussions with them about the ultimate outcomes of cases. See *id.* at 229. "[A]ccording to the Administrative Office of the Court, a decline in the number of minority federal judicial law clerks continued between the fiscal years 2006 and 2010." *Id.* (citing Todd Ruger, *Statistics Show No Progress in Federal Court Law Clerk Diversity*, NATIONAL L.J. (May 2, 2012), [http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202551008298&Statistics\\_show\\_no\\_progress\\_in\\_federal\\_court\\_law\\_clerk\\_diversity&slreturn=20120913002730](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202551008298&Statistics_show_no_progress_in_federal_court_law_clerk_diversity&slreturn=20120913002730)).

378. Kevin R. Johnson & Luis Fuentes-Rohwer, *A Principled Approach to the Quest for Racial Diversity on the Judiciary*, 10 MICH. J. RACE & L. 5, 7 (2004) (citation omitted).

large firms or from U.S. Attorney's offices where they previously advocated for the interests of big business and the federal government.<sup>379</sup> If they do not have a working class background, it is harder for them to consider the circumstances of working class people.<sup>380</sup> Third, for all intents and purposes, federal judges are employers themselves. Federal judges make employment decisions, including whom they hire, promote, and terminate.<sup>381</sup> They have great discretion over how they run their chambers and over their employees' conditions of employment.<sup>382</sup> Individually and collectively, federal judges act as employers in every sense of the word,<sup>383</sup> although employees cannot sue them for any violations of employment laws.<sup>384</sup> Federal judiciary employees cannot file lawsuits against the judicial branch for unlawful discrimination, sexual harassment, or other types of unlawful employment actions.<sup>385</sup>

The proclivity of some federal judges to see things from the employer's perspective (their bias) is evident in *University of Texas Southwestern Medical Center v. Nassar*,<sup>386</sup> a case in which the Court raised the standard of causation in retaliation cases under Title VII.<sup>387</sup> The Court's plurality (Chief Justice Roberts and Justices Alito, Kennedy, Scalia, and Thomas), all White men with the exception of Justice Thomas, goes out of its way to protect the "financial and

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379. *The Homogeneous Federal Bench*, N.Y. TIMES, Feb. 6, 2014, [http://www.nytimes.com/2014/02/07/opinion/the-homogeneous-federal-bench.html?ref=opinion&\\_r=3](http://www.nytimes.com/2014/02/07/opinion/the-homogeneous-federal-bench.html?ref=opinion&_r=3). Seventy-one percent of President Obama's federal judicial nominees are corporate attorneys. Bendery, *supra* note 45.

380. Gertner, *A Judge Hangs Up Her Robes*, *supra* note 71, at 60.

381. See Todd C. Peppers, Michael W. Giles & Bridget Tainer-Parkins, *Inside Judicial Chambers: How Federal District Court Judges Select and Use Their Law Clerks*, 71 ALB. L. REV. 623, 627, 631 (2008).

382. See Stephen J. Choi, G. Mitu Gulati & Eric A. Posner, *Are Judges Overpaid? A Skeptical Response to the Judicial Salary Debate*, 1 J. LEGAL ANALYSIS 47 (2009).

383. See Peppers, Giles & Tainer-Parkins, *supra* note 377, at 627, 631-32.

384. During the 106th Congress (1999-2000), Rep. Jesse L. Jackson, Jr. introduced a bill that would have amended Title VII of the Civil Rights Act of 1964 to include the federal judiciary, but the bill did not become a law. *Congress Addresses Legislation on Range of Judiciary-Related Issues*, THE THIRD BRANCH, April 1999, [http://www.uscourts.gov/News/TheThirdBranch/99-04-01/Congress\\_Addresses\\_Legislation\\_on\\_Range\\_of\\_Judiciary-Related\\_Issues.aspx](http://www.uscourts.gov/News/TheThirdBranch/99-04-01/Congress_Addresses_Legislation_on_Range_of_Judiciary-Related_Issues.aspx). The Federal Judiciary crafts its own employment grievance plan called the "Federal Judiciary Model Employment Dispute Resolution Plan (Model EDR Plan)." Administrative Office of the U.S. Courts, Human Resources, [http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/AdministrativeOffice/DirectorAnnualReport/AnnualReport\\_2010/HumanResources.aspx](http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/AdministrativeOffice/DirectorAnnualReport/AnnualReport_2010/HumanResources.aspx).

385. Federal judiciary employees are "excepted service personnel" whose only process is available under the Model EDR Plan as adopted by the particular court. *Dotson v. Griesa*, 398 F.3d 156, 160-61, 163 (2d Cir. 2005), *cert denied*, 547 U.S. 1191 (2006).

386. 133 S. Ct. 2517 (2013).

387. The "but-for" tort type causation standard adopted by the Court makes it easier for employers to prevail on motions for summary judgment (something that the majority expressly considered). See *id.* at 2532.

reputational” interests of employers, including by making up a hypothetical situation about a wronged employer and a scheming employee who sets up the employer for a retaliation claim.<sup>388</sup> But the plurality does not come up with a hypothetical where the employee is the wronged party and the employer (acting through an individual or individuals) is the schemer that lies or fabricates a “legitimate, non-discriminatory reason for the alleged adverse employment action” to cover up its wrongdoing.<sup>389</sup> Justice Ginsburg, dissenting and joined by Justices Breyer, Kagan, and Sotomayor, recognized that the plurality is driven by a “zeal” to protect employers.<sup>390</sup> She stated in the last portion of her opinion: “Indeed, the Court appears driven by a *zeal* to reduce the number of retaliation claims filed against employers.”<sup>391</sup>

The case of *Ledbetter v. Goodyear Tire & Rubber Company*<sup>392</sup> provides another illustration of the disconnect of some federal judges from the reality of everyday employees. Lilly Ledbetter sued Goodyear under Title VII and the Equal Pay Act of 1963, alleging that sex discrimination-based poor performance evaluations she received earlier in her career with Goodyear resulted in lower pay than her male colleagues received throughout her tenure with the company.<sup>393</sup> At the

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388. *Id.* at 2531-32.

389. In many employment cases, part of the employer’s defense rests on whether the employer can “articulate a legitimate, non-discriminatory reason for the alleged adverse employment action.” See e.g., Natasha T. Martin, *Pretext in Peril*, 75 MO. L. REV. 313, 321 (2010) (analyzing burden-shifting analysis in Title VII cases); see also Sandra F. Sperino, *Litigating the FMLA in the Shadow of Title VII*, 8 FIU L. REV. 501, 507-14 (2013) (exploring “how courts needlessly apply the three-part burden-shifting test from *McDonnell Douglas Corp. v. Green*, developed in Title VII cases, to FMLA claims”). A devious supervisor, for example, can set up an employee and fabricate a legitimate, non-discriminatory reason. Moreover, individuals who act for employers can blatantly lie and make up a “legitimate, non-discriminatory reason.” Some federal judges, as the plurality in *Nassar*, go out of their way to give employers every benefit of the doubt. See e.g., *Rocky v. Columbia Lawnwood Reg. Med. Ctr.*, 54 F. Supp. 2d 1159 (S.D. Fla. 1999); *Bettis v. Toys “R” Us*, No. 06-80334-CIV, 2009 WL 995476 (S.D. Fla. Apr. 13, 2009); *Shannon v. Potter*, No. 06-81301-CIV, 2008 WL 4753732 (S.D. Fla. Oct. 29, 2008); *Zedeck v. Target Corp.*, No. 07-60364-CIV, 2008 WL 2225661 (S.D. Fla. May 29, 2008); *Sabatier v. Suntrust Bank*, No. 06-20418-CIV, 2008 WL 108796 (S.D. Fla. Jan. 4, 2008). These judges ignore the reality that employers act through individuals, human beings who sometimes lie, bully, and discriminate for unlawful reasons. See generally *NAMIE & NAMIE, THE BULLY AT WORK*, *supra* note 62; see also *Hosanna-Tabor*, 132 S. Ct. at 700 (denying employee her FMLA right to return to work, due to alleged concerns about whether she was physically capable of returning to work, despite doctor’s medical clearance, and subsequently terming her assertion of FMLA protections and refusal to quit as “insubordination”).

390. See *id.* at 2547 (Ginsburg J. dissenting).

391. *Id.* (emphasis added).

392. 550 U.S. 618 (2007).

393. *Id.* at 661 (Ginsburg, J., dissenting). The Equal Pay Act claims were dismissed on summary judgment at the district court level. *Id.* at 661.

district court level, a jury awarded her compensation.<sup>394</sup> But the Eleventh Circuit reversed the jury's decision.<sup>395</sup> In the end, the U.S. Supreme Court in a five-four decision held that Ledbetter's claims were statutorily time-barred.<sup>396</sup> Justice Alito wrote the plurality opinion (joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas), all White men with the exception of Justice Thomas.<sup>397</sup> Justice Ginsburg, the only woman on the Court at the time, wrote a strong dissent (joined by Justices Stevens, Souter, and Breyer).<sup>398</sup> She explained the particular circumstances involved in pay disparity cases and why it was difficult for employees to meet the statute of limitations requirement (180 days from when the first paycheck disparity occurred) as interpreted by the plurality.<sup>399</sup> Justice Ginsburg further elaborated:

The Court's insistence on immediate contest overlooks common characteristics of pay discrimination. Pay disparities often occur, as they did in Ledbetter's case, in small increments; cause to suspect that discrimination is at work develops only over time. Comparative pay information, moreover, is often hidden from the employee's view. Employers may keep under wraps the pay differentials maintained among supervisors, no less the reasons for those differentials. Small initial discrepancies may not be seen as meet for a federal case, particularly when the employee, trying to succeed in a nontraditional environment [a male-dominated environment], is *averse to making waves*.<sup>400</sup>

During a lecture at the University of Colorado Law School, Justice Ginsburg explained that Ledbetter probably did not want to "rock the boat" earlier in her career because she would have been labeled a "troublemaker."<sup>401</sup> Justice Ginsburg expounded that Ledbetter might have known that had she sued early on, the employer could simply have said that "it had nothing to do with her being a woman, she just didn't perform as well as the men."<sup>402</sup> But, as time passed and Ledbetter received good performance ratings and productivity awards, that defense was no longer available.<sup>403</sup> Moreover, many employers do not disclose

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394. *Id.* at 622.

395. *Id.* at 622-23.

396. *Id.* at 643.

397. *Id.* at 621-43.

398. *Id.* at 643-61 (Ginsburg, J., dissenting).

399. *Id.*

400. *Id.* at 645 (emphasis added).

401. Justice Ruth Bader Ginsburg, *A Conversation with Associate Justice Ruth Bader Ginsburg*, 84 U. COLO. L. REV. 909, 926 (2013).

402. *Id.*

403. *Id.*

other employees' salaries.<sup>404</sup> Therefore, Justice Ginsburg opined that every time Ledbetter received a paycheck with less pay for equal work her discrimination claim was renewed and she should have had 180 days from each paycheck to file her lawsuit.<sup>405</sup> Justice Ginsburg understood the workplace conditions that a woman like Ledbetter, in a male-dominated job, faced.<sup>406</sup>

The fact that many judges position themselves in the shoes of employers when they review the facts of employment cases may stem from their identification with the privileges and circumstances of employers. These privileges and circumstances may explain why some judges give employers every benefit of the doubt and conclude on motions to dismiss or on motions for summary judgment that even egregious behavior does not rise to a level for which the employer should be held liable.<sup>407</sup> Moreover, when judges themselves are only bound by internal proceedings *that they control*, some of them may have conscious or unexamined biases<sup>408</sup> that lead them to believe that other employers should also be free from answering to charges by employees in a court of law.<sup>409</sup>

To address the perceived bias of federal judges in favor of interests

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404. *Id.*

405. *Id.*

406. *Id.* at 925-26. *See also* Anderson, *supra* note 61, at 1739 (“As a person who had felt the sting of gender discrimination, [Minnesota Supreme Court Justice] Esther [Tomljanovich] brought a fresh perspective to the bench. She knew what it was like to be on the outside looking in—to be ignored or, even worse, treated as invisible.”).

407. *See e.g.*, *Blasdel v. Northwestern University*, 687 F.3d 813 (7th Cir. 2012).

408. “From a legal standpoint, it would be more productive to describe implicit bias as ‘unexamined bias’ rather than ‘unconscious bias.’” Williams, *Double Jeopardy?*, *supra* note 338, at 228.

409. And let us entertain at least another possibility why some judges rule the way they do in discrimination cases. Some federal judges may privately believe that it is okay for employers to discriminate, including for unlawful reasons. *Cf.* John S. Adams, *Federal Judge Admits He Sent Anti-Obama, Racist E-mail*, USA TODAY (Mar. 1, 2012), <http://usatoday30.usatoday.com/news/nation/story/2012-02-29/Montana-judge-racist-email/53307060/1> (“Montana’s U.S. District Chief Judge Richard Cebull on Wednesday admitted to sending a racially charged e-mail about President Obama from his courthouse chambers.”); Debra Cassens Weiss, *Federal Appeals Judge is Accused of Racial Bias for Alleged Comments on Criminal Propensities*, ABA JOURNAL (June 4, 2013 8:33 AM), [http://www.abajournal.com/news/article/federal\\_appeals\\_judge\\_accused\\_of\\_racial\\_bias\\_for\\_alleged\\_comments\\_on\\_crimin/](http://www.abajournal.com/news/article/federal_appeals_judge_accused_of_racial_bias_for_alleged_comments_on_crimin/) (“Judge Edith Jones of the New Orleans-based 5th U.S. Circuit Court of Appeals is back in the news because of a Federalist Society speech in which she allegedly said certain racial groups [(African Americans and Hispanics)] are predisposed to crime.”); Elie Mystal, *Judge Who Sent Racist Email Sent Lots Of Racist Emails. . . Probably Because He’s Racist*, ABOVE THE LAW (Jan. 21, 2014 1:23 PM), <http://abovethelaw.com/tag/judge-richard-cebull/> (reporting about racist e-mails that Richard F. Cebull sent from his courthouse e-mail account when he was the Chief Judge for the District of Montana).

associated with employers, corporate America, and criminal enforcement (prosecutors), the ALJ is asking Congress for more professional diversity on the federal bench.<sup>410</sup> In a report issued on February 6, 2014, the ALJ stated:

A truly diverse judiciary is one that not only reflects the gender, ethnic, sexual orientation, and racial diversity of the nation, but is also comprised of judges who have been advocates for clients across the socio-economic spectrum, seeking justice on behalf of everyday Americans. As this report details, the federal judiciary is currently lacking in judges with experience (a) working for public interest organizations; (b) as public defenders or indigent criminal defense attorneys; and (c) representing individual clients—like employees or consumers or personal injury plaintiffs—in private practice.<sup>411</sup>

Retired U.S. District Court judge Nancy Gertner (now a law professor at Harvard) agrees that it is important for federal judges to come from diverse socioeconomic backgrounds.<sup>412</sup> Professor Anita Hill also advocates for diversity on the bench beyond the “traditional elitist” qualifications.<sup>413</sup> She credits the less than “traditional” professional background of former U.S. Supreme Court Justice Sandra Day O’Connor as a benefit to the highest court of the land.<sup>414</sup>

Many professional women remain silent and do not file lawsuits because the odds of employees winning federal lawsuits are stacked against us, and lawyers and employers know this.<sup>415</sup> The results are even worse for women of color.<sup>416</sup> These pro-employer outcomes in federal lawsuits may encourage discrimination and harassment by institutional actors (individuals) who are well aware that they can walk the line and even cross the line with little chance of being held accountable in a court of law. Women of color have a double target on our backs—race and sex.

When we as a society, including judges, come to a place where we acknowledge that employers (acting through individuals) sometimes abuse, discriminate, and harass employees for unlawful reasons and that

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410. See generally *Broadening the Bench*, *supra* note 70.

411. *Id.* at 4.

412. Gertner, *A Judge Hangs Up Her Robes*, *supra* note 71, at 60.

413. Anita F. Hill, *The Embodiment of Equal Justice under the Law*, 31 NOVA L. REV. 237, 254-55 (2007).

414. *Id.* For a summary of Justice O’Connor’s contributions to U.S. Supreme Court opinions, see Wilson Ray Huhn, *The Constitutional Jurisprudence of Sandra Day O’Connor: A Refusal to Foreclose the Unanticipated*, 39 AKRON L. REV. 373 (2006).

415. See Beiner, *supra* note 338, at 1276.

416. Williams, *Double Jeopardy?*, *supra* note 338, at 225.

such actions should result in civil punishment, maybe more individuals will stop violating discrimination and harassment laws in American workplaces.<sup>417</sup> The hope is that more federal judges will try to see cases from the perspective of employees and allow plaintiffs the opportunity to proceed to trial before juries.<sup>418</sup>

### VIII. PROPOSAL: SPEAK UP AND SUPPORT THE EQUALITY OF EVERY WOMAN IN THE WORKPLACE!

The world has benefited from individual actions by persons that became heroes and heroines by showing the audacity to speak up, to organize, to seek change, and to start movements and revolutions. The United States is the beneficiary of one such movement. It took a revolutionary war and defiance to bring the experiment that is this nation to fruition. Movements and revolutions often begin with the actions of individuals.<sup>419</sup> The actions by women described in this Article demonstrate that change can happen when we dare to confront sexism, racism, elitism, and many other “isms.” Identifying everyday acts of the “isms” in the workplace and challenging them are the types of individual actions that should become a daily process.<sup>420</sup>

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417. Professor Anita Hill expressed a similar sentiment when she explained that she did not file a complaint when the harassment first happened because society was not ready to accept the validity of such claims. HILL, SPEAKING TRUTH TO POWER, *supra* note 8, at 132 (“And until society is willing to accept the validity of claims of harassment, no matter how privileged or powerful the harasser, [not filing complaints] is a choice women will continue to make.”).

418. See *e.g.*, *Hernandez v. Valley View Hosp. Ass’n*, 684 F.3d 950, 957 (10th Cir. 2012) (reversing a district court judge’s grant of summary judgment for the defendant employer because the appellate court found that “a rational jury could find that [the plaintiff’s] workplace was permeated with discriminatory intimidation, ridicule, and insult that was sufficiently severe or pervasive to alter her conditions of employment”).

419. Most people can identify without much trouble at least one individual who started a movement. The first one that came to my mind when I was thinking about this footnote is Rosa Parks.

Most historians date the beginning of the modern civil rights movement in the United States to December 1, 1955. That was the day when an unknown seamstress in Montgomery, Alabama refused to give up her bus seat to a white passenger. This brave woman, Rosa Parks, was arrested and fined for violating a city ordinance, but her lonely act of defiance began a movement that ended legal segregation in America, and made her an inspiration to freedom-loving people everywhere.

Academy of Achievement, *Rosa Parks Biography*, <http://www.achievement.org/autodoc/page/par0bio-1> (last visited June 19, 2014).

420. See Erica González Martínez, *Dutiful Hijas: Dependency, Power and Guilt*, in COLONIZE THIS!, *supra* note 96, at 146. “Fair-minded people often do not want to acknowledge the –isms of their community members and colleagues. . . . But women of color do not have the option of not seeing racism and sexism. They are targets of the –isms and experience them in their professional lives.” Flores Niemann, in PRESUMED INCOMPETENT, *supra* note 21, at 456.

Iman al-Obeidi risked her life to tell on her oppressors. Anita Hill's courageous testimony led women of all races and ethnicities to come forward with their own stories of sexual harassment.<sup>421</sup> Soon after she testified, things began to change.

First, a little more than a month after the hearings, President [George H.W.] Bush signed a civil rights bill [(the Civil Rights Act of 1991)] that he had earlier threatened to veto; the legislation allowed plaintiffs in sexual harassment cases to collect both compensatory and punitive damages and to have their cases heard by a jury. Second, sexual harassment civil lawsuits almost doubled from 1991 to 1993. And finally, in the 1992 congressional elections an unprecedented number of women were elected, a victory commentators attributed in part to women voters' anger with male legislators, such as those on the Senate Judiciary Committee, who "just didn't get it." By this time, too, popular opinion had shifted away from Thomas to Hill.

The U.S. Congress was one place that changed after the Hill-Thomas spectacle.<sup>422</sup>

"Anita Hill single-handedly changed American attitudes toward sexual harassment."<sup>423</sup> She was "a catalyst for change."<sup>424</sup> Professor Catharine MacKinnon explained, during the twenty-year commemoration of Hill's testimony before Congress, that it was Hill's act of coming forward that brought attention to the sexual harassment laws and jurisprudence that had been in the books before the Hill story broke out in 1991.<sup>425</sup> MacKinnon exhorted that, sometimes, it is not

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421. BEREBITSKY, *supra* note 28, at 4.

422. *Id.* at 274 (citing Augustus B. Chochran III, *SEXUAL HARASSMENT AND THE LAW: THE MECHELLE VINSON CASE 173-77* (Lawrence: University Press of Kansas, 2004)). "The irony of senators who had exempted themselves from a wide array of employment laws, including Title VII, in effect adjudicating a sexual harassment case was not lost on observers." *Id.*

423. Deller Ross, *supra* note 19, at 238.

424. *Id.* The U.S. Supreme Court enlarged the remedies (full damages) for sexual harassment under Title IX of the Education Amendments of 1972 soon after Hill's testimony. *Id.* at 229-30 (referring to the unanimous decision in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992)). Professor Deller Ross surmised that the Court possibly "feared the impression that would be created if it ruled against a victim of sexual harassment so soon after Professor Hill's testimony." *Id.* at 230. A year later, the Court issued another unanimous opinion "rejecting a narrow interpretation of what constitutes a 'hostile environment.'" *Id.* at 230 (referring to *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993)). "*Harris* was thus another decisive victory for working women, one that significantly strengthened the definition of illegal 'hostile environment' sexual harassment." *Id.* at 232. The women miner's class certification case was another victory. *See supra* text accompanying note 19.

425. *Anita Hill Testimony – 20 Years Later, Comments by Catherine MacKinnon during Question & Answer Session* (Oct. 15, 2011), available at <http://www.c-spanvideo.org/program/Hill2> (program 302079-1).

necessarily about winning the case.<sup>426</sup> Even if you lose, “sometimes it is important to stand up and do the right thing.”<sup>427</sup>

And file a lawsuit is exactly what Lilly Ledbetter did. When I met her, I asked her if she would try to vindicate her rights in the federal judicial system again knowing how much she had to go through. She responded, without hesitation, that she would do it again.<sup>428</sup> Justice Ginsburg, in her dissenting opinion in Ledbetter’s case, urged Congress to correct the Court’s majority holding.<sup>429</sup> Congress heeded her call and President Obama signed The Lilly Ledbetter Fair Pay Act of 2009 (the statute superseding the *Ledbetter* decision) into law;<sup>430</sup> it was the first legislation enacted during his administration.<sup>431</sup>

Alice Walker, the woman who coined the term “womanist,”<sup>432</sup> also engaged in individual action through her work. When Oprah Winfrey spoke about the movie based on *The Color Purple* book, she qualified that the film was not meant to be a depiction of the entire African-American community.<sup>433</sup> However, some people agreed that Walker spoke the truth of the pain that some Black men inflict on some Black women.<sup>434</sup> For some African Americans the book was a story of liberation.<sup>435</sup> Today, the book is unquestionably recognized as a literary masterpiece that won the Pulitzer Prize and the National Book Award.<sup>436</sup> Gloria Anzaldúa took on her oppressors on behalf of herself and on

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426. *Id.*

427. *Id.* “The time is always right to do what is right.” *Rev. Dr. Martin Luther King, Jr. Quotes*, MLK DAY, <http://mlkday.gov/plan/library/communications/quotes.php> (last visited Dec. 16, 2013).

428. Pamela Foohey, *Pay Discrimination Continues to Be a Problem*, THE HARVARD LAW RECORD, Mar. 13, 2008, <http://hlrecord.org/?p=12804>. Upon information and belief, my question and Ms. Ledbetter’s response were audio recorded at the Harvard Law School where Ms. Ledbetter spoke.

429. Maritza I. Reyes, *Constitutionalizing Immigration Law: The Vital Role of Judicial Discretion in the Removal of Lawful Permanent Residents*, 84 TEMPLE L. REV. 637, 675-76 (2012) (citing *Ledbetter*, 550 U.S. at 661 (Ginsburg, J., dissenting)).

430. See Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, amending 42 U.S.C. § 2000e-5, 29 U.S.C. § 626(d) (2009), signed into law on Jan. 29, 2009.

431. *Id.*

432. Angela Onwuachi-Willig, *Girl, Fight!*, 22 BERKELEY J. GENDER L. & JUST. 254, 258 n.13 (2007) (citing ALICE WALKER, IN SEARCH OF OUR MOTHERS’ GARDENS: WOMANIST PROSE xi-xii (1983); Angela Onwuachi-Willig, *Just Another Brother on the SCT?*, *supra* note 31, at 934 n.10)).

433. *Alice Walker: Beauty in Truth*, *supra* note 276.

434. *Id.*

435. *Id.*

436. 1983 *Winners and Finalists*, THE PULITZER PRIZES, <http://www.pulitzer.org/awards/1983>; *The Color Purple*, NATIONAL BOOK FOUNDATION, <http://www.nbafictionblog.org/nba-winning-books-blog/1983-1.html>.

behalf of many women who did not have the boldness or means to speak their truth. She died a premature death from “diabetic complications that [were] surely exacerbated by her radical lesbian position and the threat she represented to both the master narrative of Anglo-American culture and normative Latino culture.”<sup>437</sup>

Men and women of all races and ethnicities must continue to collaborate toward the goal of equality for all persons in society, including in the workplace. Indeed, history demonstrates that men have helped professional women from the beginning.<sup>438</sup> In my own career, male lawyers and male law professors have served as mentors. My sisters of all races and national origins have supported me and have added a sense of shared experiences.

As scholars, we often come up with theories and proposals that may take years if ever to come into existence. My proposal in this Article can be implemented as soon as a person finishes reading it. I call on the readers (including hopefully judges) to admit that the “isms” are still prevalent in American workplaces as in society. Accordingly, we must make a daily effort to live voluntarily aware of the conscious and unexamined everyday actions and decisions against which we must measure equality.<sup>439</sup> This level of consciousness is necessary to actively identify our own biases and the biases of others in the workplace. Beyond acknowledging and identifying, we must speak up. We should not remain silent when racism and sexism rear their ugly heads.

My proposal is premised on the belief that silence does not solve problems. It is also fundamental and straightforward: actions by individuals can produce changes and even begin movements.<sup>440</sup> First,

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437. Fernandez, *supra* note 43, at 429. Among Latinas in the United States, it appears that lesbian feminists have been the most outspoken and visible force in the fight for Latinas’ rights and equality.

438. See e.g., Barbara Allen Babcock, *Book Review: Sisters in Law: Women Lawyers in Modern American History* by Virginia Drachman, 50 STAN. L. REV. 1689, 1694 (1998).

439. “Nothing in all the world is more dangerous than sincere ignorance and conscientious stupidity.” *Rev. Dr. Martin Luther King, Jr. Quotes*, MLK DAY, <http://mlkday.gov/plan/library/communications/quotes.php> (last visited Dec. 16, 2013).

440. For an example of how actions by individuals, including telling their stories of abuse, can begin movements, see e.g., Valverde, *Fight the Tower*, *supra* note 76, at 402, 416-18. “One of the most powerful tools of the oppressor is to silence the other; hence, our strongest weapon against the violent assaults in academia is our voice.” *Id.* at 405.

This is a time to mobilize for change. We do this through bringing awareness to the issue [of workplace abuse]. This can be done at symposiums, at conferences, through social media, in our classes, in our living rooms, or even over the phone. It happens every time we share our stories, information, and resources. We are raising awareness for ourselves and for others. It is important to highlight the abuses. What more can the system, and those that operate in its complicity and uncritical manner, do to you that they have

we must speak and write to inform employers, employees, and other stakeholders (including activists, advocates, legislators, and judges) that the fact that some women remain silent about workplace abuse does not mean that widespread abuse is not happening or that women who complain are less credible. Some women remain silent because professional and workplace norms silence us. We must also inform people about the particular experiences of different women.<sup>441</sup> Community and cultural norms also silence women of color. Second, we must act and seek change. Individuals in workplaces can further the cause of equality by doing something when we experience or witness oppression (in all the different and emerging forms).<sup>442</sup> Sometimes, not joining in the oppressive tactics or not providing cover for wrongdoers is the best a person is willing to do. This may be better than actively or passively participating in the wrongdoing by “going along to get along” with the wrongdoers.<sup>443</sup> The “go along and get along” career tactic has caused great damage to individuals, institutions, and the U.S. economy, especially in areas such as accounting and law when individuals have failed to exert influence to try to get the leadership “to do the right thing.”<sup>444</sup> Finally, we must find allies and organize to transform our

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not already done? It is time to act.

*Id.* at 416. Professor Valverde and a group of allies have begun to develop a network to challenge and stop the abuse of women of color in academia. *Id.* at 417-18.

441. See e.g., PRESUMED INCOMPETENT, *supra* note 21. There are all kinds of employment hierarchies where women find ourselves doubly or triply subordinated. See e.g., Lorraine K. Bannai, *Challenged X 3: The Stories of Women of Color Who Teach Legal Writing*, 29 BERKELEY J. GENDER L. & JUST. 275 (2014).

442. While the analysis of bullying as an oppressive tactic in the workplace is beyond the scope of this Article, it is important to acknowledge this growing phenomenon. Studies show that women bear the brunt of bullying by men and women in the workplace. 2014 WBI U.S. Workplace Bullying Survey, WORKPLACE BULLYING INSTITUTE 4-5, available at <http://workplacebullying.org/multi/pdf/WBI-2014-US-Survey.pdf>. Like sexual harassment, bullying may turn out to be a tool in the systemic subordination and exclusion of working women. See DUFFY & SPERRY, *supra* note 10, at 88. In organizations that have been traditionally male, some individuals subject women to sexual harassment and job discrimination in order to make the workplace hostile to them. *Id.* In law school faculties, bullying has been used to “domesticate” and “tame” female law professors into conforming to acceptable gender norms. Ann C. McGinley, *Reproducing Gender*, *supra* note 218, at 146 n.230 (citations omitted).

443. “Men who would not engage in harassing behavior themselves may condone it in others because they agree that women must be ‘kept in their place.’” Robert L. Allen, *Stopping Sexual Harassment: A Challenge for Community Education*, in RACE, GENDER, AND POWER IN AMERICA, *supra* note 7, at 135. When a woman of color speaks out publicly and names her abuser(s), it becomes open season on her. The attacks come from all sides. See HILL, SPEAKING TRUTH TO POWER, *supra* note 8, at 281-83 (citing David Brock’s “fraudulent portrayal” of Hill in *The Real Anita Hill*).

444. See Roy Snell, *How Much Influence Do You Have in Your Organization?*, 16 NO. 2 J. HEALTH CARE COMPLIANCE 3, 3 (2014) (citing as examples employees who went along to get along

individual speaking and actions into collective speaking and activism.<sup>445</sup>

As legal scholars, we often propose legal solutions that depend on many people and the passage of time (to pass through the necessary processes) for implementation, such as legislative action.<sup>446</sup> But, “[t]he law *alone* cannot change our social condition.”<sup>447</sup> I suggest that individual actions, including speaking up, when weighed cumulatively over a person’s lifetime and multiplied by the individual actions of several people over our lifetimes, can have the force of a movement without pomp and circumstance but with nonetheless palpable results. This is particularly true if several individuals agree to make this a goal in a particular work setting.

We must also speak up about the failure of federal judges to enforce employment laws. It is important to monitor and publicize what happens in the federal courts in cases that impact women’s right to be free from discrimination and hostility at work. The concept of a “Court Watch” has been implemented by chapters of the National Organization for Women to monitor the administration of justice in family law cases.<sup>448</sup>

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and remained silent at Penn State, Enron, and Tyco).

If we *noticed* ourselves “going along to get along” then we could resist, or at least go along self-consciously. But if we do not even notice ourselves adjusting as needed so as to become agreeable company for potential allies, our ability to master this ever-present threat to our autonomy is compromised. The abdication is motivated by self-preservation, but also in a way by a deficiency of self-love. One is letting oneself become a self that one cannot afford to examine too closely—a self unworthy of esteem.

David Schmitz, *Adam Smith on the Dark Side of Capitalism*, 11 GEO. J. L. & PUB. POL’Y 371, 385 (2013) (citing PATRICK HANLEY, ADAM SMITH AND THE CHARACTER OF VIRTUE 39 (2009)).

445. See e.g., Gonzalez & Harris, *Presumed Incompetent: Continuing the Conversation*, *supra* note 21; Reyes, Kupenda, Onwuachi-Willig, Wildman & Wing, *Reflections on Presumed Incompetent*, *supra* note 67; EagleWoman, *supra* note 97; Bannai, *supra* note 441; Kupenda, *Challenging Presumed (Im)Morality*, *supra* note 55; Ping, *Who Killed Soek-Fang Sim*, *supra* note 122; Arriola, *It’s Not Over*, *supra* note 150; Eleanor Swift, *Better Than Going to Court? Resolving a Claim of Discrimination Through a University’s Internal Grievance Process*, 29 BERKELEY J. GENDER L. & JUST. 337 (2014); Meera E. Deo, *Looking Forward to Diversity in Legal Academia*, 29 BERKELEY J. GENDER L. & JUST. 352 (2014); Valverde, *Fight the Tower*, *supra* note 76; Fernandez, *supra* note 43; Vest, *supra* note 337.

446. See, e.g., Reyes, *Constitutionalizing Immigration Law*, *supra* note 429, at 693-94 (proposing statute granting immigration judges discretion and outlining factors that they should consider when deciding whether to deport longtime lawful permanent residents); David C. Yamada, *Crafting a Legislative Response to Workplace Bullying*, 8 EMPLOYEE RTS. & EMP. POL’Y J. 475, 498-508 (2004) (proposing anti-workplace bullying legislation).

447. MACKINNON, FEMINISM UNMODIFIED, *supra* note 15, at 26 (emphasis added). Of course, we should not discount the value of enacting laws as part of the overall strategy. As Dr. Martin Luther King, Jr. recognized, we may not be able to change discriminatory behaviors by changing the hearts of people, but we can regulate behaviors that harm fellow human beings by making them unlawful and enforcing the laws. See Dr. Martin Luther King, Jr., Speech, *supra* note 347.

448. See e.g., National Organization for Women, Palm Beach County, Families Against Court

We can use the same approach in the federal courts. Ultimately, the costs of allowing abuse in American workplaces and losing productive employees are financially and morally damaging to institutions and to the U.S. economy.<sup>449</sup> We must continue to call attention to the fact that the laws that are supposed to provide protection from discrimination and harassment are not serving their intended purpose.<sup>450</sup> Women continue to be discriminated and harassed because we are women (because of sex). Women of color are also discriminated and harassed because of race and the intersectionality of race and sex. Professional women continue to remain silent and do not report the misconduct or file lawsuits because retaliation, such as being “blacklisted” as “troublemakers,” is a deterrence, including within the legal community that is supposed to uphold the rule of law.<sup>451</sup>

It takes walking consciously aware to be able to judge whether true and meaningful equality is being achieved. We should not forget that the “isms” are personal—they are used to subordinate and discriminate against persons, one person at a time or groups of persons. Therefore, we must beware of using the excuse “it is not personal” when the unequal treatment might be personal/political and prompted by racism, sexism, any other “ism,” or a combination thereof.<sup>452</sup> Ultimately, a voluntary level of awareness is necessary to identify, measure, and confront the individual and cumulative inequalities that women face on a daily basis throughout our lives, including in our places of employment. Following the strategy of doing something for the cause of equality in our daily lives as individuals brings us closer to achieving equality as the end goal.<sup>453</sup>

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Travesties, <http://factscourtwatch.com/> (last visited July 12, 2014).

449. See generally NAMIE & NAMIE, *THE BULLY-FREE WORKPLACE*, *supra* note 339. The costs of workplace bullying, for example, are an estimated \$250 billion annually in the United States. See DUFFY & SPERRY, *supra* note 10. Organizations often lose productive employees and suffer moral and economic damages (including low employee morale and litigation costs) because of workplace harassment. See DROMM, *supra* note 216, at 14.

450. See Koppel, *supra* note 37.

451. See Rhode, *Diversity and Gender Equity in Legal Practice*, *supra* note 362, at 871.

452. See Flores Niemann, in *PRESUMED INCOMPETENT*, *supra* note 21, at 456. The preference in the workplace for those who share similar race characteristics becomes in essence racism. See Reyes, *Opening Borders*, *supra* note 91, at 24-25 n.190 (comparing tribalism to racism) (citations omitted).

453. See *supra* Introduction and note 2 and accompanying text. “One of our challenges as feminist law professors is to teach our students to speak out when they witness injustice rather than passively reap the benefits of the struggles of prior generations. But in order to do this, we need to practice what we preach in our own institutions. Our job is not simply to share knowledge but to model for our students the principles of equality in day-to-day practice.” Maritza Reyes, *Women in the Media as in Society?*, *FEMINIST LAW PROFESSORS* (Mar. 14, 2012),

## IX. CONCLUSION

“Equality guarantees are everywhere, but nowhere is there equality.”<sup>454</sup> Over a century ago, Egyptian Judge Qassem Amin recognized, in his book *The Liberation of Women*, that improving the status of women helps to develop nations.<sup>455</sup> President Obama told the nation during his 2014 State of the Union Address: “It’s time to do away with workplace policies that belong in a ‘Mad Men’ episode.”<sup>456</sup> Women are a force, often made invisible, that keeps individuals, families, communities, institutions, and countries afloat. But we are still waiting for the day when women all over the world can finally share equal power with men for the benefit of humankind.<sup>457</sup> Women must stop being silenced, silencing ourselves, and silencing other women.<sup>458</sup> “[W]e need to find the power in our voices and speak them, even if they do not appear to be heard.”<sup>459</sup> We must fight the men-made norms that infringe upon our equality, dignity, and human rights.

Moving from silence to speech is for the oppressed, the colonized, the exploited, and those who stand and struggle side by side a gesture of defiance that heals, that makes life and new growth possible. It is that act of speech, of “talking back,”<sup>460</sup> that is no mere gesture of empty words, that is the expression of our movement from object to sub-

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<http://www.feministlawprofessors.com/2012/03/women-media-society/>.

454. CATHARINE A. MACKINNON, ARE WOMEN HUMAN? 105 (2006).

455. See Caroline Howley, *Middle East Egyptian Women’s Rights: A Century On*, BBC NEWS (Oct. 23, 1999), [http://news.bbc.co.uk/2/hi/middle\\_east/483309.stm](http://news.bbc.co.uk/2/hi/middle_east/483309.stm) (arguing that improving the status of women would help Egypt develop as a nation).

456. President Barack Obama, *President Barack Obama’s State of the Union Address* (Jan. 28, 2014), <http://www.whitehouse.gov/the-press-office/2014/01/28/president-barack-obamas-state-union-address>.

457. “A truly equal world would be one where women ran half our countries and companies and men ran half our homes. . . . The laws of economics and many studies of diversity tell us that if we tapped the entire pool of human resources and talent, our collective performance would improve.” SANDBERG, *supra* note 211, at 7.

458. “[I]t would be a mistake to conclude that silence and the condition of being silenced as a woman is an experience that is universally shared by women of color. bell hooks is a notable example of a writer who has taken issue with this construct of gendered silence.” Montoya, *Silence and Silencing*, *supra* note 152, at 872.

459. Antoinette Sedillo Lopez, *Latinas in Legal Education Through the Doors of Opportunity: Assimilation, Marginalization, Cooptation or Transformation?*, 13 AM. U. J. GENDER SOC. POL’Y L. 109, 117-18 (2005).

460. In the Southern Black community, “talking back” or “back talk” means speaking as an equal to an authority figure. BELL HOOKS, TALKING BACK, *supra* note 117, at 5. There are similar sayings (in Spanish) in the Latina/o community. See, e.g., ANZALDÚA, THE NEW MESTIZA, *supra* note 291, at 76. Jesus rewarded a woman for “talking back,” after she replied in disagreement with something he said to her. See Mark 7:24-30.

ject—the liberated voice.<sup>461</sup>

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461. BELL HOOKS, *TALKING BACK*, *supra* note 117, at 9.

## APPENDIX

[C]onsider the life of Sor (Sister) Juana Inés de la Cruz, a Mexican nun who died in 1695. At the age of seven, Juana had made a surprising announcement. She wanted to attend the University of Mexico (which had opened its doors in 1553, a century before Harvard). She offered to dress as a boy, but it was hopeless. A university education was supposedly over Juana's head. Never mind that she had been reading since the age of three or that she learned Latin just for fun. Forget that she stumped a jury of forty university professors at the age of seventeen, or that Juana became known throughout Mexico for her poetry. Like other women of her class, she had two alternatives: marry and devote her energies to husband and children, or become a nun. Juana chose convent life, which offered a little more independence than marriage. She became Sor Juana, as she is known to history. She collected and read books by the hundred, studied mathematics, composed and performed music, and even invented a system of musical notation. Her poetry was published in Europe. Some of it criticized hypocritical male condemnation of women's sexual morality . . . When she published a brilliant reply to one of her century's most celebrated biblical scholars, the fathers of the church became worried. Her scientific interests, they said—and all her other interests, too, except for religious devotion—were unnatural in a woman. This was the wisdom of her age. She could not defy it alone, and ultimately, she consented. She sold her library, instruments, everything, and devoted herself to atonement for the sin of curiosity. Broken, she confessed to being “the worst of women.” Soon after, she died while caring for her sisters during a plague.<sup>462</sup>

Shakespeare had a sister; but do not look for her in Sir Sidney Lee's life of the poet. She died young—alas, she never wrote a word. . . . Now my belief is that this poet who never wrote a word and was buried at the crossroads still lives. She lives in you and in me, and in many other women who are not here tonight, for they are washing up the dishes and putting the children to bed. But she lives; for great poets do not die; they are continuing presences; they need only the opportunity to walk among us in the flesh. This opportunity, as I think, it is now coming within your power to give her. For my belief is that if we live another century or so—I am talking of the common life which is the real life and not of the little separate lives which we live as individuals—and have five hundred a year each of us and rooms of our own; if we have the habit of freedom and the courage to write exactly

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462. JOHN CHARLES CHASTEEN, *BORN IN BLOOD & FIRE: A CONCISE HISTORY OF LATIN AMERICA* 65-66 (2d ed. 2006).

what we think; if we escape a little from the common sitting-room and see human beings not always in their relation to each other but in relation to reality . . . if we face the fact, for it is a fact, that there is no arm to cling to, but that we go alone and that our relation is to the world of reality . . . then the opportunity will come and the dead poet who was Shakespeare's sister will put on the body which she has so often laid down. Drawing her life from the lives of the unknown who were her forerunners, as her brother did before her, she will be born. As for her coming without that preparation, without that effort on our part, without that determination that when she is born again she shall find it possible to live and write her poetry, that we cannot expect, for that would be impossible. But I maintain that she would come if we worked for her, and that so to work, even in poverty and obscurity, is worthwhile.<sup>463</sup>

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463. VIRGINIA WOOLF, *A ROOM OF ONE'S OWN* 113-14 (Harcourt Brace Jovanovich 1981) (1929), reprinted in CATHARINE A. MACKINNON, *SEX EQUALITY* 543 (2007).