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# ARTICLES

## THE POWER OF INSULTS

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### ABSTRACT

*Insults work on both a structural level and a personal level. This Article argues that the economic and political power elite has effectively hurled insults at civil rights activists, plaintiffs, and their lawyers to undermine civil rights reform. It has long been understood that the civil rights community must engage in cultural, political, and legal work to attain effective reforms. But insufficient attention has been paid to how the power elite uses the cultural tool of insults to undermine these reforms.*

*Limitations on effective civil rights reform range from constraints on the private attorney general model of enforcement to the ban on the Legal Services Corporation's use of class action lawsuits. Insults have played an important and previously unrecognized role in the creation of these limitations. After discussing the undertheorized phenomenon of the power of public insults, this Article presents a case study of defense pleadings filed in accessibility cases brought under the Americans with Disabilities Act. These pleadings reflect how defendants can use insults as part of their litigation strategy to make it difficult for plaintiffs to attain effective relief under a statute designed to create structural reform.*

*Rather than worrying about whether civil rights activists should go high when the power elite goes low, this Article argues that it is crucial that civil rights statutes be constructed with a stronger foundation. Then, plaintiffs will be better*

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*able to withstand the barrage of insults they typically encounter when seeking effective relief. Straw houses are too easy to blow down.*

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## INTRODUCTION

Since the founding of our Republic, politicians have engaged in vociferous, insulting behavior to attain and retain power in society.<sup>1</sup> In the late eighteenth and early nineteenth centuries, politicians would respond to perceived insults—such as being called “a worthless scoundrel, a poltroon and a coward”<sup>2</sup> or a “bowl of skimmed milk”<sup>3</sup>—by seeking a duel.<sup>4</sup> “Raised by an immigrant mother on a subsistence farm on the Carolina frontier,”<sup>5</sup> President Andrew Jackson, for example, was taught that he needed to establish and prove his status as a gentleman by dueling.<sup>6</sup> “A gentleman dueled only with other gentlemen. If insulted by an underling, a gentleman responded by thrashing the upstart with a cane or horsewhip.”<sup>7</sup> Even in the early nineteenth century, the deployment of and response to insults was class-based. “Everywhere, dueling was considered the prerogative of upper class gentlemen, who decreed that the unwashed rabble had no honor to defend and thus were ineligible to spill blood on the sacred field of honor.”<sup>8</sup> The deployment of base insults was an important tactic of the power elite to maintain their control in society, including the support of slavery.<sup>9</sup>

Today, although there are fewer instances when politicians threaten to engage or engage directly in violence, politicians continue to hurl insults.<sup>10</sup> Following

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<sup>1</sup> See, e.g., Peter Feuerherd, *The First Ugly Election: America, 1800*, JSTOR DAILY (July 4, 2016), <https://daily.jstor.org/first-ugly-election-america-1800/> [<https://perma.cc/2E8X-PVQX>] (“The election pitted John Adams . . . against his own vice president Thomas Jefferson . . . . Both candidates suffered personal attacks; Adams, for his perceived lack of masculine virtues, Jefferson for rumors that he had fathered children with one of his slaves and, enamored with French revolutionary ideas, had plans to install a Bonaparte-like dictatorship in America. His heterodox Christianity also raised charges of atheism.”).

<sup>2</sup> Peter Carlson, *Pistols at Dawn*, AM. HIST. MAG., Feb. 2011, at 32, 34.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* (“The era between the Revolution and the Civil War was a time when many respectable, educated men eagerly avenged even the slightest of insults by repairing to the local ‘field of honor’ and blasting holes in each other.”).

<sup>5</sup> *Id.* at 35.

<sup>6</sup> *Id.* (“But in the New World, where pioneers carved a country out of a wilderness, class lines were blurred. The result was a social insecurity that resulted in a desire to ‘prove’ that one was a gentleman. One way to prove it was to fight a duel with anyone who seemed to challenge your status.”).

<sup>7</sup> *Id.* at 36.

<sup>8</sup> *Id.*

<sup>9</sup> See JOANNE B. FREEMAN, *THE FIELD OF BLOOD: VIOLENCE IN CONGRESS AND THE ROAD TO CIVIL WAR* 214-34 (2018) (documenting how members of Congress were beaten and bullied to intimidate them into supporting slavery).

<sup>10</sup> See Gary D. Bond et al., ‘Lyn’ Ted’, ‘Crooked Hillary’, and ‘Deceptive Donald’: *Language of Lies in the 2016 US Presidential Debates*, 31 APPLIED COGNITIVE PSYCHOL. 668, 668 (2017) (listing insults used by many of the 2016 presidential candidates). *But see* William Cummings, “This Is Endangering Lives”: Ilhan Omar Claims Spike in Death Threats After Trump Tweet, USA TODAY (Apr. 14, 2019, 5:25 PM), <https://www.usatoday.com/story/news/politics/2019/04/14/nancy-pelosi-security-concern-ilhan-omar-donald-trump/3467004002/> [<https://perma.cc/5XG4-DKYR>] (detailing increase in death threats reported by Minnesota

the release of the lewd Access Hollywood video,<sup>11</sup> for example, then-Vice President Joe Biden bragged that he would have “beat[en] the hell out of”<sup>12</sup> then-presidential candidate Donald Trump in high school. Although their sparring was limited to words, not fists, this Article argues that, just as in the early nineteenth century, the financial and political “power elite”<sup>13</sup> is likely to have many more powerful tools to deploy and respond to insults than do disadvantaged members of society, who must face the verbal equivalent of a cane or horsewhip if they seek to respond forcefully to insulting words or behavior of the “power elite.”<sup>14</sup>

President Donald Trump’s well-known verbal insignia has been his powerful use of insults to further his financial<sup>15</sup> and political ambitions.<sup>16</sup> From the moment when he descended the escalator at Trump Tower to announce his

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Representative Ilhan Omar after Trump posted inflammatory video with images of her alongside images of World Trade Center engulfed in flames); Meghan Keneally, *A Look Back at Trump Comments Perceived by Some as Encouraging Violence*, ABC NEWS (Oct. 19, 2018, 10:55 AM), <https://abcnews.go.com/Politics/back-trump-comments-perceived-encouraging-violence/story?id=48415766> [<https://perma.cc/85QK-X8XQ>] (suggesting criticisms that Trump promoted violence after he praised congressman who assaulted reporter).

<sup>11</sup> See David A. Fahrenthold, *Trump’s Lewd Chat Captured on Tape*, WASH. POST, Oct. 8, 2016, at A01.

<sup>12</sup> See Clare Foran, *Biden: ‘I Shouldn’t Have Said’ I Would Fight Trump*, CNN POL. (Mar. 28, 2018, 4:13 PM), <https://www.cnn.com/2018/03/28/politics/biden-trump-fight/index.html> [<https://perma.cc/6YQS-Q2KJ>].

<sup>13</sup> The term “power elite” was coined by C. Wright Mills to draw attention to the interconnected organization of power in the United States through the corporate, military, and political elite as well as celebrities. See generally C. WRIGHT MILLS, *THE POWER ELITE* (1956). Writing in 1956, he argued that there is a “higher immorality” that “is a systematic feature of the American elite; its general acceptance is an essential feature of the mass society.” *Id.* at 343. Today, the power elite must also be understood in economic terms. “There is strong evidence that economic status largely determines the strength of one’s political voice.” Daniel P. Tokaji, *Vote Dissociation*, 127 YALE L.J.F. 761, 774 (2018).

<sup>14</sup> See, e.g., John Wagner, *Trump Says Latest Accuser, E. Jean Carroll, Is ‘Totally Lying’ and ‘Not My Type,’* WASH. POST, June 25, 2019, at A03 (detailing how President Trump insulted appearance of sexual assault survivor who spoke out against him); Tucker Carlson, Opinion, *The Media’s New Star Witness Against Trump Is Unraveling and Only Trying to Sell Books*, FOX NEWS (June 26, 2019), <https://www.foxnews.com/opinion/tucker-carlson-the-medias-new-star-witness-against-trump-is-unravelling-and-only-trying-to-sell-books> [<https://perma.cc/C3D8-BPYJ>] (calling Carroll’s statements about her assault “wacky soundbites from someone trying to sell a book”).

<sup>15</sup> His use of insulting behavior was part of his celebrity appeal in *The Apprentice*. See Lizzy Halberstadt & Cait Munro, *Donald Trump’s 5 Most Offensive Moments from The Apprentice*, N.Y. MAG.: VULTURE (Aug. 8, 2016), <https://www.vulture.com/2016/08/most-offensive-moments-from-the-apprentice.html>. This Article will discuss his effective use of insults in the political field rather than the business world.

<sup>16</sup> See Oscar Winberg, *Insult Politics: Donald Trump, Right-Wing Populism, and Incendiary Language*, 12-2 EUR. J. AM. STUD. (SPECIAL ISSUE), Summer 2017, at 1, 10 (“The reality TV celebrity was uniquely positioned within the traditions of right-wing populism and conservative media to benefit from an unabashed variety of insult politics.”).

campaign while issuing anti-immigrant and anti-Mexican insults<sup>17</sup> to the moments when, as President of the United States, he hurled insults at African American football players<sup>18</sup> and female accusers of sexual assault,<sup>19</sup> the country has learned that his latest insult is not likely to be his last or even harm his reputation. This Article argues that many members of the economic and political power elite, like Donald Trump, have effectively used insults to help achieve their ambitions, which include undermining the civil rights of groups that have been historically subordinated.<sup>20</sup> These insults need to be understood not merely as personal attacks on discrete individuals or groups of individuals but as tools that often help deflect attention away from important issues to undermine the attainment of progressive policies.

A well-known example can help illustrate this thesis. In November 2015, candidate Donald Trump mocked reporter Serge Kovaleski at a campaign rally by flapping his arms to imitate Kovaleski's congenital joint condition,

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<sup>17</sup> Trump said: "When Mexico sends its people, they're not sending their best. They're not sending you. They're not sending you. They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people." *Full Text: Donald Trump Announces a Presidential Bid*, WASH. POST (June 16, 2015, 1:03 PM), <https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/>.

<sup>18</sup> See, e.g., Bryan Armen Graham, *Donald Trump Blasts NFL Anthem Protestors: 'Get That Son of a Bitch off the Field,'* THE GUARDIAN (Sept. 23, 2017, 6:43 PM), <https://www.theguardian.com/sport/2017/sep/22/donald-trump-nfl-national-anthem-protests> [<https://perma.cc/5EFV-Q87H>].

<sup>19</sup> Trump provided the following description of Dr. Christine Blasey Ford's testimony at a campaign rally:

Trump, in a riff that has been dreaded by White House and Senate aides, attacked the story of Christine Blasey Ford at length – drawing laughs from the crowd. The remarks were his strongest attacks yet of her testimony.

"'I don't know. I don't know.' 'Upstairs? Downstairs? Where was it?' 'I don't know. But I had one beer. That's the only thing I remember,'" Trump said of Ford, as he impersonated her on stage.

"I don't remember," he said repeatedly, apparently mocking her testimony.

Josh Dawsey & Felicia Sonmez, *Trump Mocks Kavanaugh Accuser Christine Blasey Ford*, WASH. POST (Oct. 2, 2018, 10:15 PM), [https://www.washingtonpost.com/politics/trump-mocks-kavanaugh-accuser-christine-blasey-ford/2018/10/02/25f6f8aa-c662-11e8-9b1c-a90f1daae309\\_story.html](https://www.washingtonpost.com/politics/trump-mocks-kavanaugh-accuser-christine-blasey-ford/2018/10/02/25f6f8aa-c662-11e8-9b1c-a90f1daae309_story.html).

<sup>20</sup> See Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979) ("Structural reform is premised on the notion that the quality of our social life is affected in important ways by the operation of large-scale organizations, not just by individuals acting either beyond or within these organizations."). This Article presumes that structural reform seeks to end the subordination of disempowered groups. See generally Ruth Colker, *Anti-Subordination Above All: A Disability Perspective*, 82 NOTRE DAME L. REV. 1415 (2007); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986); Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 644 (1983) (arguing that the liberal state "coercively and authoritatively constitutes the social order in the interest of men as a gender").

arthrogryposis.<sup>21</sup> Trump's behavior led to public discussion about whether his campaign could survive such boorish behavior.<sup>22</sup> But few can usually recall why Trump was upset with Kovaleski.<sup>23</sup> On November 21, 2015, Trump had made a false claim about people cheering for the 9/11 attacks from rooftops in New Jersey<sup>24</sup> to support his campaign position that the United States needed to curtail Muslim immigration and thereby reverse the immigration reform that had occurred under President Obama.<sup>25</sup> When his claim was challenged, he repeated that "[t]here were people over in New Jersey that were watching it, a heavy Arab population, that were cheering as the buildings came down."<sup>26</sup> A couple days later, Trump defended his false claim by citing a 2001 *Washington Post* article by Kovaleski.<sup>27</sup> When Kovaleski criticized Trump for distorting his news report, Trump mocked and imitated his arm gestures.<sup>28</sup> Trump then doubled down on this insult by saying,

At the time I did the act, I did the whole thing with groveling. And I said he's groveling, he said, "no, no, the article, I was wrong on the article." I was doing a whole big number. "I was wrong, I promise you, I made a mistake when I wrote the article." He was groveling, grovel, grovel, grovel. That was the end of it. All of a sudden, I get reports that I was imitating a reporter who was handicapped. I would never do that.<sup>29</sup>

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<sup>21</sup> See Jose A. Del Real, *Trump Denies He Mocked Journalist*, WASH. POST, Nov. 27, 2015, at A02.

<sup>22</sup> See Irin Carmon, *Donald Trump's Worst Offense? Mocking Disabled Reporter, Poll Finds*, NBC NEWS (Aug. 11, 2016, 3:24 AM), <https://www.nbcnews.com/politics/2016-election/trump-s-worst-offense-mocking-disabled-reporter-poll-finds-n627736> [<https://perma.cc/D8DN-UDM7>] (providing polling on response to Trump mocking Kovaleski).

<sup>23</sup> When I have presented this Article, not more than one audience member has ever indicated that he or she remembers why Trump ridiculed Kovaleski.

<sup>24</sup> At a campaign rally on November 21, 2015, in Birmingham, Alabama, Trump said: "I watched when the World Trade Center came tumbling down. And I watched in Jersey City, N.J., where thousands and thousands of people were cheering as that building was coming down. Thousands of people were cheering." Lauren Carroll, *Fact-Checking Trump's Claim that Thousands in New Jersey Cheered when World Trade Center Tumbled*, POLITIFACT (Nov. 22, 2015, 6:17 PM), <https://www.politifact.com/truth-o-meter/statements/2015/nov/22/donald-trump/fact-checking-trumps-claim-thousands-new-jersey-ch/> [<https://perma.cc/MWF4-RKHT>].

<sup>25</sup> See Linda Qiu, *Donald Trump's Top 10 Campaign Promises*, POLITIFACT (July 15, 2016, 11:45 AM), <https://www.politifact.com/truth-o-meter/article/2016/jul/15/donald-trumps-top-10-campaign-promises/> [<https://perma.cc/92BG-XPPP>].

<sup>26</sup> See Carroll, *supra* note 24.

<sup>27</sup> See Del Real, *supra* note 21.

<sup>28</sup> *Id.* (describing Trump flapping his arms to imitate Kovaleski's congenital joint condition).

<sup>29</sup> See Glenn Kessler, *Donald Trump's Revisionist History of Mocking a Disabled Reporter*, WASH. POST (Aug. 2, 2016, 3:00 AM), <https://www.washingtonpost.com/news/fact-checker/wp/2016/08/02/donald-trumps-revisionist-history-of-mocking-a-disabled-reporter/>.

Notice the dynamic of the insults. A wealthy celebrity who was a political candidate made an unsubstantiated and insulting claim.<sup>30</sup> It was part of his anti-immigrant rhetoric to support banning Muslims from entering the United States and curtailing immigration from Mexico.<sup>31</sup> The purpose of his proposals was to undermine the immigration reform that had occurred under President Obama.<sup>32</sup> Within three days of Trump making this false claim, which itself is deeply insulting to Muslims and Arabs, the media turned its attention to whether Trump mocked Kovalski. Trump supported this diversion by saying that Kovalski was “groveling.”<sup>33</sup> By the time actress Meryl Streep, during her Golden Globes speech, repeated the allegation that Trump had insulted Kovalski, *The New York Times* reported that Trump had “appeared”<sup>34</sup> to mock Kovalski and made no mention of the underlying anti-immigrant stance of Trump that spurred the insulting behavior.<sup>35</sup> The insult helped transform the immigration debate into a debate about whether Trump had insulted Kovalski<sup>36</sup> rather than whether Muslims should be prevented from immigrating to the United States and whether the United States should continue Obama’s Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”) and Deferred Action for Childhood Arrivals (“DACA”) programs.<sup>37</sup>

As this example illustrates, insults can be highly effective against disadvantaged individuals and groups in society because they deflect public attention away from harmful public policies and the need for civil rights reform. In this example, the insult was directed at a person with a disability; the reform was in the area of immigration law. But diversionary insults are not limited to deflecting public attention away from the need for immigration reform. This

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

<sup>31</sup> See Qiu, *supra* note 25 (illustrating Trump’s “campaign promise[s]” of racial distaste).

<sup>32</sup> See Miriam Valverde, *DACA Remains, but Trump Administration Eliminated DAPA*, POLITIFACT (Jan. 11, 2019, 3:44 PM), <https://www.politifact.com/truth-o-meter/promises/trumpometer/promise/1443/terminate-barack-obamas-immigration-executive-orde/> [<https://perma.cc/XX93-VNRM>] (reporting that Trump’s ten-point immigration plan includes terminating “President Obama’s two illegal executive amnesties”).

<sup>33</sup> See Kessler, *supra* note 29.

<sup>34</sup> Daniel Victor & Giovanni Russonello, *Meryl Streep’s Golden Globes Speech*, N.Y. TIMES (Jan. 8, 2017), <https://www.nytimes.com/2017/01/08/arts/television/meryl-streep-golden-globes-speech.html>.

<sup>35</sup> See *id.*

<sup>36</sup> See Liz Spayd, *Not ‘She Said, He Said.’ Mockery, Plain and Simple.*, N.Y. TIMES: PUB. EDITOR (Jan. 10, 2017), <https://www.nytimes.com/2017/01/10/public-editor/trump-streep-golden-globes.html> (discussing how Streep’s Golden Globe’s speech impacted the immigration debate).

<sup>37</sup> Trump’s ten-point immigration plan included the following:

Immediately terminate President Obama’s two illegal executive amnesties (Deferred Action for Parents of Americans and Lawful Permanent Residents and Deferred Action for Childhood Arrivals). All immigration laws will be enforced—we will triple the number of ICE agents. Anyone who enters the U.S. illegally is subject to deportation. That is what it means to have laws and to have a country.

Valverde, *supra* note 32.



Article argues that one should understand public insults to be an important tool that the financial and political power elite use to undermine nearly all areas of civil rights reform. It is their public insult playbook.

Part I offers a taxonomy of insults by considering the mechanisms that allow the power elite to use insults to deflect public attention away from important civil rights issues. This Part suggests that one can better understand the power of insults by recognizing their relevance to a social group and their innovative characteristics.

Part II briefly recounts the political left's understanding of how to attain effective legal change through a combination of cultural, political, and legal strategies. The literature on civil rights reform has insufficiently theorized the role that public insults play in undermining both constitutional and statutory civil rights advances. In order to have a model of effective civil rights reform, one must consider the tools available to the power elite to undermine those advances.

Part III tells the story of how Congress, the courts, and society have combined to undermine structural reform through cultural, political, and legal strategies by using the example of accessibility litigation under Title III of the Americans with Disabilities Act of 1990 ("ADA").<sup>38</sup> By requiring public accommodations to be accessible, ADA Title III is a legislative arena where Congress has required structural reform; nonetheless, Title III litigation provides a compelling illustration of the failure of structural reform due to interconnected cultural, political, and legal strategies used by the power elite.<sup>39</sup> In response to the onslaught of insults hurled at plaintiffs and their attorneys, Congress has even sought to further weaken the enforcement scheme—for example, by requiring a lengthy notice period.<sup>40</sup> This case study offers a sobering, contemporary account of the power of insults irrespective of the rise of the Trump presidency.

Part IV considers how civil rights advocates can more effectively attain genuine structural reform despite this barrage of public insults. Former First Lady Michelle Obama famously said, "When they go low, we go high"; by contrast, former Attorney General Eric Holder said, "When they go low, we kick them!"<sup>41</sup> This Article supports neither approach, arguing instead that, like insults themselves, the response needs to be contextual. Nonetheless, civil rights built on a stronger foundation might be better able to withstand the power of insults.

## I. INSULTS

### A. *Taxonomy of Insults*

Professor Michele Wellsby and her coauthors have defined "insults" as "verbal expression[s] that convey[] a negative (e.g., offensive, degrading)

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<sup>38</sup> See Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. §§ 12101-12213 (2018).

<sup>39</sup> See *id.*

<sup>40</sup> See H.R. 620, 115th Cong. (2017).

<sup>41</sup> See Carla Herreria, *Eric Holder Revises Michelle Obama's Famed Quote: 'When They Go Low, We Kick Them,'* HUFFPOST (Oct. 10, 2018, 8:45 PM), [https://www.huffingtonpost.com/entry/eric-holder-amends-michelle-obama-mantra\\_us\\_5bbe767ce4b054d7ddef4a8d](https://www.huffingtonpost.com/entry/eric-holder-amends-michelle-obama-mantra_us_5bbe767ce4b054d7ddef4a8d) [<https://perma.cc/HVT8-HJK8>].

meaning.”<sup>42</sup> Another pair of researchers, Professors José Mateo and Francisco Yus, have defined insults as “utterances with which speakers intend to offend their interlocutors, by saying or doing something rude or insensitive that offends them.”<sup>43</sup>

Both of these definitions focus on the intended meaning of the speaker: Did the speaker intend to convey an offensive message? While these definitions capture many of the examples used in this Article, Professor Ivan Milić offers a more nuanced definition of insults<sup>44</sup> that may be more useful in understanding their connection to undermining civil rights reform. Milić defines an insult relative to the following three criteria:

the standard *S* of the relevant social group, the time of the utterance *t*, and the addressee *A*. On this picture, a linguistic act *x* counts as an insult if and only if (i) *x* is recognized as *demeaning* by the standard of the relevant social group at *t* and (ii) *x* is demeaning when addressed at *A*.<sup>45</sup>

Wellsby’s definition of insults likely meets Milić’s criteria if one assumes that her definition of what “conveys” an offensive meaning takes into account the response of a relevant social group.

Mateo and Yus offer what Milić defines as an “attitudinal”<sup>46</sup> definition of insult—only asking about the intentions of the individual who conveyed the insult. That definition can be both overinclusive and underinclusive. For example, Milić observes that the attitudinal definition would count as an insult the use of the term “250!” by a Chinese tourist who is traveling in Europe.<sup>47</sup> While that term is insulting in China, he suggests it is not useful to consider that term insulting in Europe.<sup>48</sup> In that example, the definition of “insult” would be overinclusive. In order to avoid the problem of overinclusiveness, Milić thinks it is more useful to ask if a term is insulting in the particular social space in which it is used.<sup>49</sup> The underinclusiveness problem is obvious: a speaker can do great harm to members of an audience through insults even if the speaker is oblivious to the derogatory aspect of his or her speech.<sup>50</sup>

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<sup>42</sup> Michele Wellsby et al., *Some Insults Are Easier to Detect: The Embodied Insult Detection Effect*, FRONTIERS PSYCHOL., Nov. 2010, at 1, 3.

<sup>43</sup> José Mateo & Francisco Yus, *Towards a Cross-Cultural Pragmatic Taxonomy of Insults*, 1 J. LANGUAGE AGGRESSION & CONFLICT 87, 88 (2013).

<sup>44</sup> See Ivan Milić, *What Counts as an Insult?*, 33 ACTA ANALYTICA 539, 543 (2018).

<sup>45</sup> *Id.* at 547.

<sup>46</sup> *Id.* at 543.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* (“This much suggests that one’s attempt to insult may *misfire* and the insult need not take place despite speaker’s intentions.”).

<sup>49</sup> *Id.* at 548.

<sup>50</sup> See Alia E. Dastagir, *Microaggressions Don’t Just ‘Hurt Your Feelings,’* USA TODAY (Feb. 28, 2018, 4:41 PM), <https://www.usatoday.com/story/news/2018/02/28/what-microaggressions-small-slights-serious-consequences/362754002/> [<https://perma.cc/5GKF-A6H9>] (reporting that public health experts say there is a “growing body of research that suggests the accumulated impact of these stressors affect long-term health and can contribute

This Article finds Milić's definition of insults useful in helping to draw the connection between insults and their impact on a broader society. Milić insists that one should judge whether speech is insulting within the context of the "relevant social group."<sup>51</sup> He then responds to the likely criticism of that approach—namely, that "an act can be both insulting and non-insulting within the same context of utterance"<sup>52</sup>—by noting that there can be multiple social groups.<sup>53</sup> The only relevant question in determining whether speech is insulting (in that time and place) is whether the speech is deemed insulting by *any* social group.<sup>54</sup> The connection of an insult to a group-based conception of harm is helpful to this Article's thesis. While it is commonly understood that insults cause harm to the discrete individual who is insulted,<sup>55</sup> this Article argues that one needs to understand the power of insults to cause a group-based harm—the ability to deflect attention away from an issue of national importance to help undermine attempts to attain structural civil rights reform. Understanding the structural or social component of insults helps reveal that link.

While Mateo and Yus do not describe the social component of insults, their work is nonetheless helpful in understanding what kind of language produces the most powerful insults.<sup>56</sup> They argue that four factors affect how insults are produced and interpreted: "(a) the conventional or innovative quality of the insult; (b) the underlying intention, which can be either to offend, to praise, or to establish (or foster) social bonding; (c) the (in)correct outcome of the interpretation of the insult; and (d) the addressee's reaction or lack thereof."<sup>57</sup>

Mateo and Yus's focus on the power of "innovative" insults is helpful to understanding the effectiveness of many of Trump's insults.<sup>58</sup> They argue that

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to higher rates of mortality and depression"). These kinds of insults are sometimes called "microaggressions." *See id.*

<sup>51</sup> Milić, *supra* note 44, at 539.

<sup>52</sup> *Id.* at 547.

<sup>53</sup> *See id.*

<sup>54</sup> *See id.* at 550-51 ("The nature of insults is such that, if the act is justifiably regarded as insulting by a relevant social group (even when there are two or more relevant groups involved), this cannot be changed by any further considerations. At best, the speaker can show that her act was blameless, and thus excuse herself.").

<sup>55</sup> *See* Jeff Traiger & Daniel B. Weddle, *Cruel Curriculum: Peer-on-Peer Abuse in Law Schools*, 22 TEMP. POL. & C.R. L. REV. 301, 309 (2013) ("Bullies are often confident and popular . . . and can use [their] wit to attack peers with cruel humor that intimidates not only the victim but those witnesses that might have come to the victim's aid but for the fear of retaliation."); Richard A. Friedman, Opinion, *The Neuroscience of Hate Speech*, N.Y. TIMES, Nov. 1, 2018, at A25 ("[W]hen someone like President Trump dehumanizes his adversaries, he could be putting them beyond the reach of empathy, stripping them of moral protection and making it easier to harm them."); Nigel Barber, *The Psychology of Insults*, PSYCHOL. TODAY (Nov. 21, 2016), <https://www.psychologytoday.com/us/blog/the-human-beast/201611/the-psychology-insults> [<https://perma.cc/6VXZ-3TWK>] ("[P]ecking-order logic of insults means that if the recipient is shamed, then the insulter rises in status relative to the victim.").

<sup>56</sup> *See* Mateo & Yus, *supra* note 43, at 87.

<sup>57</sup> *Id.* at 87-88.

<sup>58</sup> *See id.* at 87.

conventional insults lose their power due to overuse, whereas “innovation also plays an important part in the creation of an insulting utterance. Indeed, skilled insulters (for instance, professional comedians or experts in verbal insult-connoted dueling) devise highly innovative expressions to carry out their offense.”<sup>59</sup> Trump’s use of innovative expressions may account for some of his success with insults—his campaign even marketed some of his innovative jabs as fundraiser t-shirts.<sup>60</sup> His innovative “Pocahontas” slur against Senator Elizabeth Warren arguably harmed her presidential aspirations and deflected attention away from her policy proposals.<sup>61</sup> And his litany of insults against the Republican presidential field in 2016 was arguably effective at limiting the field’s appeal in the primaries.<sup>62</sup>

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<sup>59</sup> *Id.* at 94.

<sup>60</sup> See Mary Papenfuss, *Sharp Twitter Critics Jab ‘Childish’ Trump Campaign T-Shirt Featuring ‘Pencil-Neck’ Schiff*, HUFFPOST (Mar. 30, 2019, 4:47 AM), [https://www.huffpost.com/entry/pencil-neck-schiff-trump-campaign-twitter\\_n\\_5c9f12b6e4b0bc0daca8f730](https://www.huffpost.com/entry/pencil-neck-schiff-trump-campaign-twitter_n_5c9f12b6e4b0bc0daca8f730) [<https://perma.cc/GP8Q-PX5S>] (discussing Trump’s bully-like campaign approach).

<sup>61</sup> See Alexandra Hutzler, *Donald Trump Suggests He Set ‘Pocahontas Trap’ for Elizabeth Warren: She’s Been ‘Hurt Very Badly,’* NEWSWEEK (Feb. 1, 2019, 10:32 AM), <https://www.newsweek.com/donald-trump-elizabeth-warren-pocahontas-1314580> [<https://perma.cc/5G4H-NZBK>]. Consistent with the innovation thesis, Trump has created a new racist slur against Warren because the old one was getting overused. See Zachary B. Wolf, *Trump’s Racist Elizabeth Warren Taunts Have Entered a New Phase*, CNN POL. (Feb. 12, 2019, 4:48 AM), <https://www.cnn.com/2019/02/11/politics/trump-elizabeth-warren-racist-tweets/index.html> [<https://perma.cc/7JK5-H8N9>] (“President Donald Trump can’t merely slur Elizabeth Warren with the nickname ‘Pocahontas’ anymore. That’s old hat. To effectively torment and tease her, he now seems to feel compelled to throw in an allusion to shameful episodes from US history. This weekend, it was a not-subtle allusion to the Trail of Tears . . .”).

<sup>62</sup> See Vladimir Duthiers, *List of Jeb Bush Insults*, CBS NEWS (Aug. 8, 2016), <https://www.cbsnews.com/video/a-list-of-insults-donald-trump-has-hurled-at-jeb-bush/> (listing insults Trump threw against Jeb Bush including “low energy,” “puppet,” “lightweight,” “too soft,” “sad sack,” “embarrassment to his family,” and “not a man”); Paul LeBlanc, *Carly Fiorina Says Trump’s ‘Horseface’ Insult Has Brought Politics to ‘a New Low,’* CNN POL. (Oct. 18, 2018, 10:04 PM), <https://www.cnn.com/2018/10/18/politics/carly-fiorina-donald-trump-horse-face-cnntv/index.html> [<https://perma.cc/KXV2-Z4M2>] (“Fiorina . . . had her own appearance attacked by then-candidate Trump during the 2016 election. ‘Look at that face,’ he told *Rolling Stone* magazine of Fiorina. ‘Would anyone vote for that? Can you imagine that, the face of our next president?!’”); Maya Rhodan, *3 Times Donald Trump Insulted His Cabinet Nominee Ben Carson*, TIME (Dec. 5, 2016), <http://time.com/4590239/donald-trump-ben-carson-insults/> [<https://perma.cc/MJE2-FSVT>] (noting that Trump insulted Carson as “a very low energy person” with a “pathological temper” who “could cripple the presidency”); Josh Wood, *Which Republicans Will Take On Trump in 2020?*, THE GUARDIAN (Feb. 14, 2019, 11:36 PM), <https://www.theguardian.com/us-news/2019/feb/14/trump-2020-republicans-against-president-never-trumpers> [<https://perma.cc/SAV9-ZPQX>] (documenting how Trump called Marco Rubio “Little Marco” and called Ted Cruz “Lynin’ Ted”).

President Trump has been a master at the effective use of insults to deflect attention away from important civil rights issues even when the insult was not especially innovative. As posited by Milić, social groups in society considered Trump's insults to be deeply demeaning, and, in each case, the respective social group was a disadvantaged group in society.

Three examples from different civil rights areas can illustrate the effectiveness of Trump's insults. First, after weeks of restraint, he mocked Dr. Christine Blasey Ford's sexual assault testimony at a campaign rally by making it sound untruthful.<sup>63</sup> The partisan political crowd responded to his mockery "with laughter and applause."<sup>64</sup> Trump's taunts may have helped solidify support for Brett Kavanaugh's nomination to the Supreme Court.<sup>65</sup> Rather than see these taunts as merely harmful to Ford, or even "gaslighting,"<sup>66</sup> one should understand these insults as part of a political campaign to support a conservative Supreme Court nominee and thereby weaken various civil rights advances that are within a single vote of being reversed by the U.S. Supreme Court.<sup>67</sup> While

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<sup>63</sup> See *supra* note 19 and accompanying text.

<sup>64</sup> Allie Malloy, Kate Sullivan & Jeff Zeleny, *Trump Mocks Christine Blasey Ford's Testimony, Tells People to 'Think of Your Son,'* CNN POL. (Oct. 3, 2018, 7:47 AM), <https://www.cnn.com/2018/10/02/politics/trump-mocks-christine-blasey-ford-kavanaugh-supreme-court/index.html> [<https://perma.cc/MKB8-SS33>] (reporting on crowd's response to Trump's mockery of Ford). Similarly, when Anita Hill accused then-Supreme Court nominee Clarence Thomas of sexual misconduct in 1991, she was characterized by prominent conservative commentator David Brock as "a little bit nutty and a little bit slutty." Tina Nguyen, *Anita Hill Was Forced to Put Up with These Incredibly Sexist Comments*, VANITY FAIR (Apr. 7, 2016), <https://www.vanityfair.com/news/2016/04/anita-hill-sexism>.

<sup>65</sup> But see Marc A. Thiessen, Opinion, *Ford's Case Against Kavanaugh Continues to Erode*, WASH. POST (Oct. 4, 2018, 3:41 PM), [https://www.washingtonpost.com/opinions/fords-case-against-kavanaugh-continues-to-erode/2018/10/04/32e66b62-c7ee-11e8-9b1c-a90f1daae309\\_story.html](https://www.washingtonpost.com/opinions/fords-case-against-kavanaugh-continues-to-erode/2018/10/04/32e66b62-c7ee-11e8-9b1c-a90f1daae309_story.html) (recognizing that partisan crowd "roared its approval" but arguing, "If Kavanaugh is confirmed, Trump will get the credit. Until then, Trump should keep his mouth shut").

<sup>66</sup> See Stephanie A. Sarkis, *11 Warning Signs of Gaslighting*, PSYCHOL. TODAY (Jan. 22, 2017), <https://www.psychologytoday.com/us/blog/here-there-and-everywhere/201701/11-warning-signs-gaslighting> [<https://perma.cc/K5XK-EN6N>] ("Gaslighting is a tactic in which a person or entity, in order to gain more power, makes a victim question their reality.").

<sup>67</sup> See Press Release, ACLU, Summary of Supreme Court Nominee's Rulings and Writings Sent to Senate (Aug. 15, 2018), <https://www.aclu.org/press-releases/aclu-releases-report-judge-brett-kavanaughs-civil-liberties-and-civil-rights-record> [<https://perma.cc/9GBE-7ULN>] (noting Kavanaugh's previous opinion in abortion case). See *generally* *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (5-4 decision) (overturning Texas abortion statute); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (5-4 decision) (overturning state bans on same-sex marriage); *Fisher v. Univ. of Tex.*, 570 U.S. 297 (2013) (5-4 decision) (upholding affirmative action rule in admissions). Relatedly, Trump's sexist, demeaning comments to women serve to impede conversations about the need for structural reforms on behalf of women. Thus, after a Republican primary debate, the media turned to Trump's comments about the meaning of his insult toward Fox News journalist Megyn Kelly concerning her "blood coming out of her wherever" instead of whether candidate Trump supported women's rights. See Holly Yan, *Donald Trump's 'Blood' Comment About Megyn*

the country discussed Trump's insulting behavior towards Ford in that news cycle, the U.S. Senate confirmed a Justice to the Supreme Court who will likely help dismantle broad areas of civil rights enforcement, including reproductive rights for women.<sup>68</sup>

Second, Trump's insults against football players who take a knee during the National Anthem are an attempt to deter these players from seeking structural change.<sup>69</sup> Trump characterizes NFL players' kneeling as conveying "total disrespect."<sup>70</sup> While the kneeling football players have explicitly expressed that they are seeking to draw attention to racial inequality and police brutality,<sup>71</sup> Trump has insisted that the "issue of kneeling has nothing to do with race."<sup>72</sup> His insults manage to divert attention away from the fact that only three police officers have been convicted in fifteen high-profile deaths of black Americans between 2014 and 2016,<sup>73</sup> that the criminal justice system has long been known for the disparate value it attaches to the lives of whites in comparison with blacks,<sup>74</sup> and that Trump's Justice Department has systematically sought to

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*Kelly Draws Outrage*, CNN POL. (Aug. 8, 2015, 1:57 PM), <https://www.cnn.com/2015/08/08/politics/donald-trump-cnn-megyn-kelly-comment/index.html> [<https://perma.cc/6D2C-3Q6T>].

<sup>68</sup> See *Judge Kavanaugh and Reproductive Rights: A Fact Sheet*, CTR. FOR REPROD. RTS., <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/factsheets/Judge-Kavanaugh-and-Reproductive-Rights-Fact-Sheet.pdf> [<https://perma.cc/V3QM-E7ZM>] (last visited Dec. 21, 2019) (suggesting that Kavanaugh is prepared to overrule *Roe v. Wade*).

<sup>69</sup> See, e.g., Armen Graham, *supra* note 18 ("But do you know what's hurting the game more than that?" [Trump] said. "When people like yourselves turn on television and you see those people taking the knee when they're playing our great national anthem. The only thing you could do better is if you see it, even if it's one player, leave the stadium.").

<sup>70</sup> See Mark Osborne, Luke Barr & Dean Schabner, *Trump: 'Standing with Locked Arms Is Good, Kneeling Is Not Acceptable,'* ABC NEWS (Sept. 24, 2017, 9:23 AM), <https://abcnews.go.com/US/nfl-players-blast-trump-kneeling-players-fired/story?id=50037845> [<https://perma.cc/ZT99-48P3>] ("Goodell is 'trying to justify the total disrespect certain players show to our country,' Trump tweeted.").

<sup>71</sup> See Clark Mindock, *Taking a Knee: Why Are NFL Players Protesting and When Did They Start to Kneel?*, THE INDEPENDENT (Feb. 4, 2019, 12:30 AM), <https://www.independent.co.uk/news/world/americas/us-politics/taking-a-knee-national-anthem-nfl-trump-why-meaning-origins-racism-us-colin-kaepernick-a8521741.html> [<https://perma.cc/5GMV-MRK5>].

<sup>72</sup> P.R. Lockhart, *Trump's Reaction to the NFL Protests Shows How He Fights the Culture War*, VOX (Feb. 4, 2018, 4:30 PM), <https://www.vox.com/identities/2018/2/4/16967902/nfl-protests-patriotism-race-donald-trump-super-bowl> [<https://perma.cc/QBZ7-L99Z>].

<sup>73</sup> See Jasmine C. Lee & Haeyoun Park, *15 Black Lives Ended in Confrontations with Police. 3 Officers Convicted.*, N.Y. TIMES (Oct. 5, 2018), <https://www.nytimes.com/interactive/2017/05/17/us/black-deaths-police.html>.

<sup>74</sup> See Lockhart, *supra* note 72 ("Trump managed to change the subject by casting protesting NFL players – the majority of whom are black; all of whom were drawing explicit attention to racial inequality – as a danger to the ideals of America."). See generally *McCleskey v. Kemp*, 481 U.S. 279 (1987) (upholding death penalty despite statistical study indicating that it was more frequently imposed on African American defendants and defendants killing white victims than on white defendants and defendants killing African

undermine the ability of civil rights organizations to attain effective police reform.<sup>75</sup>

Third, Trump’s depiction of Haitian and African immigrants as being from “shithole countries”<sup>76</sup> and castigation of Mexican Americans as drug dealers and rapists<sup>77</sup> diverts public attention away from the court decisions questioning his constitutional authority to repeal DACA.<sup>78</sup>

These three examples from three different aspects of civil rights reform—gender,<sup>79</sup> race, and immigration—show the same pattern of using public insults to deflect attention away from the important need for civil rights reform. Thus, those insults not only directly demeaned social groups but also helped limit the ability of those groups to attain progressive policies in the future.

### B. *Insults in Context*

To fully understand the power of insults, however, one must also understand that they are especially effective in the hands of the economic “power elite.”<sup>80</sup> When disadvantaged groups hurl insults, they are likely to be ineffective,<sup>81</sup>

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American victims); Darren Lenard Hutchinson, “*Continually Reminded of Their Inferior Position*”: *Social Dominance, Implicit Bias, Criminality, and Race*, 46 WASH. U. J.L. & POL’Y 23 (2014) (documenting history of racist criminal law enforcement).

<sup>75</sup> See generally, e.g., Memorandum from Attorney Gen. Sessions to Heads of Civil Litigating Components, U.S. Attorneys (Nov. 7, 2018), <https://www.justice.gov/opa/press-release/file/1109621/download> [<https://perma.cc/8ZAF-YA4L>] (limiting use of consent decrees in cases involving state and local law enforcement).

<sup>76</sup> See Jen Kirby, *Trump Wants Fewer Immigrants from “Shithole Countries” and More from Places like Norway*, VOX (Jan. 11, 2018, 5:55 PM), <https://www.vox.com/2018/1/11/16880750/trump-immigrants-shithole-countries-norway> [<https://perma.cc/TA9V-3RWD>].

<sup>77</sup> See Z. Byron Wolf, *Trump Basically Called Mexicans Rapists Again*, CNN POL. (Apr. 6, 2018, 1:38 PM), <https://www.cnn.com/2018/04/06/politics/trump-mexico-rapists/index.html> [<https://perma.cc/98NW-33RF>].

<sup>78</sup> See *U.S. District Court in D.C. Orders that the DACA Termination Memo Be Vacated – but Not for at Least 90 Days*, NAT’L IMMIGR. L. CTR. (Apr. 25, 2018), <https://www.nilc.org/wp-content/uploads/2018/04/DACA-DDS-summary-judgment-alert-2018.pdf> [<https://perma.cc/6TZ7-ZRFX>] (discussing court judgments in favor of DACA over Trump Administration’s attempts to terminate program). See generally Joanna Walters, *What Is Daca and Who Are the Dreamers?*, THE GUARDIAN (Sept. 14, 2017, 11:30 AM), <https://www.theguardian.com/us-news/2017/sep/04/donald-trump-what-is-daca-dreamers> [<https://perma.cc/GN49-K8TN>] (explaining that DACA was created to allow children brought to the U.S. illegally to have a “temporary right to live, study and work in America”).

<sup>79</sup> For an excellent discussion of “gender trolling,” which is a particular method of insulting women, see KARLA MANTILLA, *GENDERTROLLING* 132 (2015) (arguing that we should understand gender trolling as part of a “pattern of harassment . . . to keep women subordinated economically, socially, and politically”).

<sup>80</sup> See MILLS, *supra* note 13, at 343 (arguing that “higher immorality” exists as “a systematic feature of the American elite; its general acceptance is an essential feature of the mass society”).

<sup>81</sup> See Alexi McCammond, *Red-State Democrats Face GOP Wrath over Kavanaugh*, AXIOS (Oct. 1, 2018), <https://www.axios.com/democrats-who-vote-no-on-kavanaugh-face-gop-backlash-e34cf3d5-9dfe-490b-85ff-3d8c39fd859e.html> [<https://perma.cc/9YQX->

because disadvantaged groups typically lack the economic and hierarchical structures to facilitate the effectiveness of insults over the power elite. When disadvantaged groups seek to hurl insults, the power elite is able to respond by suggesting that the true victims of discrimination are white, heterosexual, nondisabled men.<sup>82</sup> Public insults are not an abstract concept devoid of their context; Mateo and Yus argue that context matters.<sup>83</sup> These examples show how the economic and political context matters. Insults are especially effective when deployed by the economic and political power elite.

The Supreme Court's decision in *Trump v. Hawaii*,<sup>84</sup> in contrast with its decision in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,<sup>85</sup> perfectly illustrates the selective deployment and protection of insults by and on behalf of the power elite.<sup>86</sup> In *Masterpiece Cakeshop*, it was Charlie Craig and Dave Mullins who were initially insulted when bakeshop owner Jack Phillips refused to bake them a cake, saying "I just don't make cakes for same sex weddings."<sup>87</sup> This action was a straightforward violation of Colorado's antidiscrimination law that prohibited places of public accommodation from discriminating on the basis of sexual orientation.<sup>88</sup> The case proceeded through

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UQLR] (describing GOP anger and engagement over Kavanaugh nomination); Ramesh Ponnuru, *The Mob and Judge Kavanaugh*, NAT'L REV. (Sept. 27, 2018, 10:24 AM), <https://www.nationalreview.com/magazine/2018/10/15/the-mob-and-judge-kavanaugh/> (criticizing Democrats for believing Kavanaugh allegations "on the flimsiest of pretexts").

<sup>82</sup> See Jennifer Rubin, Opinion, *Trump Doubles Down on Male Victimhood*, WASH. POST (Oct. 3, 2018, 10:30 AM), <https://www.washingtonpost.com/news/opinions/wp/2018/10/03/trump-doubles-down-on-male-victimhood/> (highlighting that Trump voiced concern for men falsely accused of rape following his mockery of Dr. Blasey Ford's testimony); Jeremy Diamond, *Trump Says It's 'a Very Scary Time for Young Men in America,'* CNN POL. (Oct. 2, 2018, 2:47 PM), <https://www.cnn.com/2018/10/02/politics/trump-scary-time-for-young-men-metoo/index.html> [<https://perma.cc/X9E7-H64Q>] ("Trump on Tuesday said he believes the reaction to the allegations of sexual assault and other misconduct against Supreme Court nominee Brett Kavanaugh makes it 'a very scary time for young men in America.'"); David Weigel, *Glenn Beck Got 20,000 People to Turn Out for an 'All Lives Matter' Rally*, WASH. POST (Aug. 31, 2015, 10:42 PM), <https://www.washingtonpost.com/news/post-politics/wp/2015/08/31/glenn-beck-got-20000-people-to-turn-out-for-an-all-lives-matter-rally/>.

<sup>83</sup> Mateo & Yus, *supra* note 43, at 95 (discussing use of insults to express different feelings toward audience based on context and emotional overtones).

<sup>84</sup> 138 S. Ct. 2392, 2408 (2018).

<sup>85</sup> 138 S. Ct. 1719, 1732 (2018) (holding that "the State's interest could have been weighed against Phillips' sincere religious objections in a way consistent with the requisite religious neutrality that must be strictly observed").

<sup>86</sup> For an excellent discussion of this contrast, see generally Daniel P. Tokaji, *Denying Systemic Equality: The Last Words of the Kennedy Court*, 13 HARV. L. & POL'Y REV. 310 (2019) (arguing that unifying feature of Supreme Court's voting, speech, and religion decisions in 2017-2018 term was denial of systemic equality).

<sup>87</sup> *Masterpiece Cakeshop*, 138 S. Ct. at 1724 ("I'll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don't make cakes for same sex weddings.").

<sup>88</sup> See *id.* at 1725 ("Today, the Colorado Anti-Discrimination Act (CADA) carries forward the state's tradition of prohibiting discrimination in places of public accommodation.



a multistep investigative process—a state administrative law judge found that Phillips had violated state law,<sup>89</sup> the seven-member Colorado Civil Rights Commission affirmed that decision,<sup>90</sup> and the three-member Colorado Court of Appeals also affirmed.<sup>91</sup> In total, eleven adjudicators heard Craig and Mullins’s case and concluded that Phillips had violated the Colorado statute and that relief was appropriate against the bakeshop.<sup>92</sup>

Phillips, however, persisted in his defense and brought his case to the U.S. Supreme Court. He succeeded in persuading a majority of the Court that he was the victim in this instance—a victim of intentional discrimination based on his Christian beliefs.<sup>93</sup> This is the lone statement made by one member of the Civil Rights Commission that the Court used to support that conclusion:

I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the [H]olocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.<sup>94</sup>

This statement was found to violate the requirement of a fair and neutral enforcement of Colorado’s antidiscrimination law because of its use of the word “despicable” and alleged comparison of Phillips’s actions to those of slavery and the Holocaust,<sup>95</sup> even though those views were not embraced in any written opinion justifying enforcement of the Colorado statute. The commissioner did not actually make a comparison; he merely stated a historical fact about the justifications for slavery and the Holocaust. He also said he spoke for himself, not for the seven-member Commission. Further, those views were not essential to the enforcement of the Colorado statute. Phillips never contested that he refused to sell the cake to Craig and Mullins because of his disapproval of their sexual orientation.

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Amended in 2007 and 2008 to prohibit discrimination on the basis of sexual orientation . . .”).

<sup>89</sup> See *id.* at 1726 (“The ALJ first rejected Phillips’ argument that declining to make or create a wedding cake for Craig and Mullins did not violate Colorado law. . . . And the ALJ determined that Phillips’ actions constituted prohibited discrimination on the basis of sexual orientation . . .”).

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

<sup>91</sup> See *Craig v. Masterpiece Cakeshop, Inc.*, 2015 COA 115, ¶ 2, 370 P.3d 272, 276. The Colorado Supreme Court declined to hear the case. See *Masterpiece Cakeshop*, 138 S. Ct. at 1727.

<sup>92</sup> See *Masterpiece Cakeshop*, 138 S. Ct. at 1719 (giving previous history of the action).

<sup>93</sup> *Id.* at 1728-31; *id.* at 1731 (holding that “Commission’s treatment of Phillips’ case violated the State’s duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint”).

<sup>94</sup> See *id.* at 1729 (quoting transcript at 11-12).

<sup>95</sup> *Id.* at 1730 (“[T]he court cannot avoid the conclusion that these statements cast doubt on the fairness and impartiality of the Commission’s adjudication of Phillips’ case.”).

Although the result of the Supreme Court's decision is to force Colorado to take no enforcement action against Phillips, one might praise the decision for giving teeth to the rule that government officials are not supposed to engage in overt expressions of religious hostility as part of their justifications for their actions. Because government actors are more likely to express hostility towards minority religions than majority religions, one might hope that this ruling could protect religious minorities from government insults.

Unfortunately, the Supreme Court's decision in *Trump v. Hawaii* makes it clear that the current Supreme Court will only craft decisions that protect the Christian majority rather than the Muslim minority from public insults. In *Masterpiece Cakeshop*, the Court was faced with *one* arguably anti-Christian comment from one member of a seven-person tribunal in a context where nonreligion-based explanations could justify the tribunal's decision to enforce the state's nondiscrimination policy. (Phillips did not deny that he had refused to bake the cake because of the customers' sexual orientation.) By contrast, in *Trump v. Hawaii*, the Court was faced with overwhelming evidence that one person—the President of the United States—engaged in overt religious bias when he announced and implemented his immigration executive orders. Justice Sotomayor detailed some of that evidence in her dissent:

- On December 7, 2015, then-candidate Trump called “for a total and complete shutdown of Muslims entering the United States” and kept that statement “on his campaign website until May 2017 (several months into his Presidency).”<sup>96</sup>
- In January 2016, he said that he did not want to “rethink” his position on “banning Muslims from entering the country.”<sup>97</sup>
- In March 2016, he asserted that “[w]e’re having problems with the Muslims, and we’re having problems with Muslims coming into the country.” He then “called for surveillance of mosques in the United States, blaming terrorist attacks on Muslims’ lack of ‘assimilation’ and their commitment to ‘sharia law.’”<sup>98</sup>
- In March 2016, “he opined that Muslims ‘do not respect us at all’ and ‘don’t respect a lot of the things that are happening throughout not only our country, but they don’t respect other things.’”<sup>99</sup>
- When his campaign started talking about “radical Islamic terrorism” rather than a “Muslim ban,” he explained, “I actually don’t think it’s a rollback. In fact, you could say it’s an expansion.” Trump claimed he changed his terminology because “[p]eople were so upset when [he] used the word Muslim.”<sup>100</sup>

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<sup>96</sup> *Trump v. Hawaii*, 138 S. Ct. 2392, 2435 (2018) (Sotomayor, J., dissenting).

<sup>97</sup> *Id.* at 2435-36.

<sup>98</sup> *Id.* at 2436 (alteration in original).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* (alterations in original).

- On January 27, 2017, when Trump moved to apparently religiously neutral terminology in his first immigration executive order, he “read the title, looked up, and said ‘We all know what that means.’”<sup>101</sup> He also explicitly said that the executive order was “designed ‘to help’ the Christians in Syria.”<sup>102</sup>
- While litigation was ongoing about his second anti-immigration executive order, Trump told his supporters at a campaign rally that “it was ‘very hard’ for Muslims to assimilate into Western culture.”<sup>103</sup>
- As a candidate, Trump also “told an apocryphal story about United States General John J. Pershing killing a large group of Muslim insurgents in the Philippines with bullets dipped in pigs’ blood in the early 1900s.”<sup>104</sup> As President, he referenced that story and then said: “Study what General Pershing . . . did to terrorists when caught. There was no more Radical Islamic Terror for 35 years!”<sup>105</sup>
- “On November 29, 2017, President Trump ‘retweeted’ three anti-Muslim videos, entitled ‘Muslim Destroys a Statue of Virgin Mary!’, ‘Islamist mob pushes teenage boy off roof and beats him to death!’, and ‘Muslim migrant beats up Dutch boy on crutches!’ Those videos were initially tweeted by a British political party whose mission is to oppose ‘all alien and destructive polite[al] or religious doctrines, including . . . Islam.’”<sup>106</sup>

Despite this overwhelming evidence of anti-Muslim bias by the President of the United States to support his immigration policies, the Supreme Court majority concluded that there was insufficient evidence that “the primary purpose of the Proclamation is to disfavor Islam and its adherents by excluding them from the country.”<sup>107</sup> As Professor Daniel Tokaji has said, “The Court’s disregard for the overwhelming evidence of President Trump’s animus toward Muslims is painful enough. But placing this decision alongside the others from the Term makes it look even worse . . . . The Kennedy Court had its favored children and left no doubt of who they were.”<sup>108</sup>

The contrast between *Masterpiece Cakeshop* and *Trump v. Hawaii* is a very powerful example of the non-neutrality of the power of insults. President Trump can wield insults with impunity even when they flatly contradict basic First

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 2437.

<sup>104</sup> *Id.* at 2436.

<sup>105</sup> *Id.* at 2438 (omission in original).

<sup>106</sup> *Id.* (alterations in original) (footnote omitted) (citation omitted).

<sup>107</sup> *Id.*

<sup>108</sup> Tokaji, *supra* note 86, at 576 (claiming that Court established pattern of deciding for certain political and religious groups and against minority groups).

Amendment norms of religious neutrality.<sup>109</sup> As a member of the power elite, he has a Teflon coating; the Supreme Court used the lowest possible scrutiny to assess the constitutionality of his actions against a religious minority.<sup>110</sup> Context matters. Not all insults are treated equally under the law.

Trump's insults, of course, are well known. But Trump's insults are only effective today because of a long tradition of the power elite being able to use insults to limit the effectiveness of progressive policies. Other authors who have been concerned about the lack of power that disadvantaged groups have in the political process have disregarded the role that insults play in maintaining the power of the economic elite.<sup>111</sup> Professor Bertrall L. Ross, II, for example, has written a compelling description of the systemic ways that politicians ignore the needs of economically disadvantaged members of society.<sup>112</sup> He argues that Trump was able to win the presidency, in part, because he connected an "anti-immigration, anti-trade message with a mobilization strategy that targeted white working class communities."<sup>113</sup> Rather than only trying to understand Trump's success as attributable to "irrational voting behavior"<sup>114</sup> on behalf of the white working class, he argues that one needs to understand how Trump directly addressed the interests of white, working-class voters to win the election.<sup>115</sup>

Although Professor Ross makes a compelling argument to help explain Trump's success, his argument would be even stronger if he acknowledged the power of insults. While acknowledging that Trump used "racism to appeal to his base,"<sup>116</sup> Ross fails to appreciate the role that insults played in diverting attention away from the ways that many of Trump's policies would actually hurt the interests of the poor and working class. "Build the wall" might play nicely to the racist views of these white, working-class voters, but it is unlikely to help them

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<sup>109</sup> See, e.g., *Trump v. Hawaii*, 138 S. Ct. at 2436-39 (listing instances when candidate Trump disparaged Muslims).

<sup>110</sup> As Tokaji notes: "Although the Court has long applied heightened scrutiny to religious discrimination as well as racial discrimination, it applied only rational basis review to Proclamation 9645. The majority offered little explanation and no relevant precedent for its decision to apply this deferential standard." Tokaji, *supra* note 86, at 575 (footnotes omitted).

<sup>111</sup> In addition to Professor Bertrall Ross, see *infra* note 112, Professor Nicholas Stephanopoulos provides a compelling account of the political powerlessness of blacks, women, and the poor, but he does not consider the role that insults may play in maintaining their powerlessness. See generally Nicholas O. Stephanopoulos, *Political Powerlessness*, 90 N.Y.U. L. REV. 1527 (2015).

<sup>112</sup> See generally Bertrall L. Ross, II, *Addressing Inequality in the Age of Citizens United*, 93 N.Y.U. L. REV. 1120 (2018).

<sup>113</sup> *Id.* at 1198 (noting how candidate Trump's racial comments were tied to economic arguments that appealed to white, working-class voters).

<sup>114</sup> *Id.* at 1197 (claiming that "irrational voting behavior" does not adequately describe how Trump campaign mobilized poor voters).

<sup>115</sup> *Id.* ("In his campaign, Trump targeted the economic interests of those who had been left behind and ignored in the presidential campaigns of the past thirty years.")

<sup>116</sup> *Id.* at 1198 (noting how Trump's racism was only part of his appeal to economic circumstances of working-class voters).

financially.<sup>117</sup> As Ross observes, “Trump’s populism, thus far, has proven to be more rhetoric than real policies favorable to the working class.”<sup>118</sup> The power of that rhetoric (or what this Article calls insults) must be part of an understanding of the financial elite’s ability to maintain its power in society at the expense of the poor and working class.

A disability example can underscore how the power elite effectively hurl insults against those trying to effectuate civil rights reform for attributes that the power elite would praise in the hands of political conservatives. In 1990, Congress enacted broad-ranging reform by requiring public spaces to be accessible through the passage of Title III of the ADA.<sup>119</sup> Congress also required that these rules be primarily enforced through a private enforcement model whereby private plaintiffs seek injunctive relief and then attain attorney’s fees from the defendant if successful.<sup>120</sup> This private model of enforcement seeks to use the private marketplace to enforce civil rights rules.<sup>121</sup>

But then, when private lawyers used the mechanism established by Congress to enforce the ADA, they were attacked with various insults. Their actions were called “nuisance” lawsuits and the lawyers were accused of “gam[ing]” or “plaguing” the system, “abusive” tactics, and “shakedown” litigation. The lawyers themselves were called “drive-by” litigators and “hired guns.”<sup>122</sup> These tactics deflected attention away from the need for structural reform. For instance, calling plaintiffs who use wheelchairs “drive-by” plaintiffs when they sue a large number of establishments deflects attention away from the need to have broad enforcement of disability laws. A lawsuit can attain structural reform by making the entity accessible for many other persons with disabilities rather than merely the individual plaintiff. The threat of litigation can also encourage voluntary compliance. But defendants, the courts, and the media disparage plaintiffs with disabilities unless they fit a very narrow archetype<sup>123</sup>—a local resident who uses a wheelchair; visits the nearby entity on a daily basis; and repeatedly, politely requests that the entity’s owner make the facility accessible so that plaintiff can access it with a nondisabled companion who will assist with any “minor” inconveniences.<sup>124</sup> These strategies force plaintiffs to seek advances inefficiently, one plaintiff at a time against one business at a time.

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 1199.

<sup>119</sup> Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. §§ 12101-12213 (2018) (outlining in §§ 12181-12189 the requirements for public accommodations).

<sup>120</sup> *See id.* § 12188(a)(2) (injunctive relief provision).

<sup>121</sup> For further discussion, see *infra* Section III.B.

<sup>122</sup> Using these search terms on Westlaw, the author located 725 pleadings involving ADA Title III lawsuits (file available from author upon request). For examples of the use of these insults, see *infra* Part III.

<sup>123</sup> *See generally* Adam A. Milani, *Wheelchair Users Who Lack “Standing”*: Another Procedural Threshold Blocking Enforcement of Titles II and III of the ADA, 39 WAKE FOREST L. REV. 69 (2004).

<sup>124</sup> *See infra* Section III.D.

By contrast, when Donald Trump announced his campaign for President in 2016, he bragged about his wealth as a factor in his qualifications to become President.<sup>125</sup> Whereas in previous presidential elections, mainstream candidates were criticized for their displays of their wealth,<sup>126</sup> the lesson from Trump's successful candidacy is that many American voters revere a candidate who strongly embraces his "wealth and privilege,"<sup>127</sup> especially if he is an anti-system candidate. "The support for anti-system candidates like Trump is symptomatic of an increasing sense among many citizens that the real levers of power lie not in the hands of voters but rather with wealthy political insiders."<sup>128</sup> But, of course, such people are only revered if they have genuine wealth and privilege, not if they are upstart civil rights lawyers who are trying to earn a living.

This examination of the power of insults therefore leads to three conclusions: First, innovative insults may be especially effective, and Trump has done an excellent job deploying them. Second, insults do not merely harm the person who is insulted; they also can deflect attention away from broader social, political, and legal issues. Third, the effect of insults depends on context. The economic power elite has more power to hurl effective insults than do people from disadvantaged communities. By applying all three of these lessons, one can better understand how public insults have been a powerful tool to curtail civil rights reform.

## II. THE TOOLS OF STRUCTURAL REFORM

While community organizers, sociologists, and contemporary constitutional theorists agree that civil rights activists need cultural, political, and legal tools to attain effective structural reform, they differ on how these tools should work together.<sup>129</sup> Community organizers and sociologists emphasize the importance

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<sup>125</sup> See Dominic Rushe, *'I'm Really Rich': Donald Trump Claims \$9bn Fortune During Campaign Launch*, THE GUARDIAN (June 16, 2015, 12:21 PM), <https://www.theguardian.com/us-news/2015/jun/16/donald-trump-reveals-net-worth-presidential-campaign-launch> [<https://perma.cc/3HYQ-T8E3>] ("I have total net worth of \$8.73bn," he said. "I'm not doing that to brag. I'm doing that to show that's the kind of thinking our country needs.").

<sup>126</sup> See, e.g., Michael McGrath, *Why Voters Love Donald Trump's Wealth - but Despised Mitt Romney's*, THE GUARDIAN (Mar. 15, 2016, 4:38 PM), <https://www.theguardian.com/us-news/2016/mar/15/donald-trump-wealth-money-mitt-romney> [<https://perma.cc/3FEP-4F6S>] ("In 2012, Mitt Romney was ridiculed for his appreciation of 'Papa' John Schnatter's Kentucky estate (including personal golf course), not to mention the infamous, secretly recorded '47%' address. Go back a bit further and there's John Kerry's disastrous windsurfing habit, John McCain's eight houses and George HW Bush's inability to price-check a gallon of milk.").

<sup>127</sup> *Id.* ("But those assets and vulnerabilities belonged to less seismic campaigns and less bombastic candidates. And perhaps if previous candidates had embraced their wealth and privilege to the same extent as Trump, they might have been lauded in much the same way.").

<sup>128</sup> Daniel P. Tokaji, *Vote Dissociation*, 127 YALE L.J.F. 761, 763 (2018).

<sup>129</sup> See, e.g., DEVON W. CARBADO & MITU GULATI, *ACTING WHITE?: RETHINKING RACE IN "POST-RACIAL" AMERICA* 17 (2013) (arguing that antidiscrimination law has only helped a subset of African Americans who are not "too black" in that they are not racially salient as

of grassroots work, while constitutional theorists emphasize that legal tools can build on and buttress political efforts. All three groups of theorists struggle to explain how to respond to the power of insults from the power elite.

This Article adds another dimension to thinking about the difficulties of attaining long-lasting reform.<sup>130</sup> It is important to recognize that the power elite will be working hard to further narrow the victories attained by the political left and that their work may be made easier by the inherently narrow nature of the initial civil rights victory. If one recognizes that the victories achieved by civil rights activists are likely to be narrow and individualistic, then one can better understand the power and potential of the power elite to narrow them further. While some of the scholarly work on civil rights reform recognizes that the power elite can undermine or impede advances,<sup>131</sup> none of this scholarship considers the *interaction* between the limited scope of victory attained by civil rights activists and the power elite's use of the power of insults.

#### A. *Community Organizers*

Saul Alinsky, a community-organizing icon—sometimes characterized as the “father of community organizing”<sup>132</sup>—authored *Reveille for Radicals*<sup>133</sup> in 1946 and *Rules for Radicals*<sup>134</sup> in 1971. He argued for indigenous radicalism based on community action with aphorisms such as, “Ridicule is man’s most potent weapon” and, “A tactic that drags on too long becomes a drag.”<sup>135</sup> Although Alinsky did not participate in formal party politics, he influenced both Barack Obama and Hillary Clinton.<sup>136</sup> In his early political career, Obama was attacked

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African Americans); MARK ENGLER & PAUL ENGLER, *THIS IS AN UPRISING: HOW NONVIOLENT REVOLT IS SHAPING THE TWENTY-FIRST CENTURY*, at xv-xvii (2016) (describing conditions under which nonviolent revolt, rather than more mainstream tactics, can help attain change); FRANCES FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE’S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL* 181-84 (1977) (recognizing explosive power of grassroots defiance in civil rights movement); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 36 (2d ed. 2008) (arguing that courts can be effective producers of significant social reform when certain conditions exist, such as support from some citizens, low levels of opposition from all citizens, and incentives or costs to induce compliance).

<sup>130</sup> See *infra* Part II.

<sup>131</sup> See ROSENBERG, *supra* note 129, at 12 (contrasting failure of civil rights campaign in Albany, Georgia, with later successes).

<sup>132</sup> See Dylan Matthews, *Who Is Saul Alinsky, and Why Does the Right Hate Him So Much?*, VOX (July 19, 2016, 10:58 PM), <https://www.vox.com/2014/10/6/6829675/saul-alinsky-explain-obama-hillary-clinton-rodham-organizing> [<https://perma.cc/F34T-82MV>].

<sup>133</sup> See generally SAUL D. ALINSKY, *REVEILLE FOR RADICALS* (1946).

<sup>134</sup> See generally SAUL D. ALINSKY, *RULES FOR RADICALS: A PRAGMATIC PRIMER FOR REALISTIC RADICALS* (1971).

<sup>135</sup> See Josh Jones, *Saul Alinsky’s 13 Tried-and-True Rules for Creating Meaningful Social Change*, OPEN CULTURE (Feb. 21, 2017), <http://www.openculture.com/2017/02/13-rules-for-radicals.html> [<https://perma.cc/DYU4-JMUK>] (quoting ALINSKY, *supra* note 134, at 126-27).

<sup>136</sup> See Matthews, *supra* note 132 (“The fact that Hillary Clinton and Barack Obama both seriously engaged with his ideas — and that Clinton knew him personally — makes it possible

for being a follower of the radical icon.<sup>137</sup> Clinton's senior thesis at Wellesley College focused on Alinsky, whom she interviewed for the project.<sup>138</sup>

In addition to catchy aphorisms, Alinsky also believed in the importance of community networks and, in 1940, founded the Industrial Areas Foundation ("IAF"), a national network of local faith- and community-based organizations.<sup>139</sup> Today, the organization has more than fifty affiliates<sup>140</sup> and claims success for helping to raise the minimum wage, making housing more affordable, and increasing the availability of Meals on Wheels.<sup>141</sup> Alinsky's model is based on civic action, including disruptive tactics and strong networks of community-organizing groups. And, as reflected in IAF's continuing work, his model has achieved much success.<sup>142</sup>

While Alinsky believed strongly in community *organizing*, he did not align himself with any political *movement*. Alinsky's successor, Edward Chambers, aptly explained, "[W]e're not building movements. Movements go in and out of existence. As good as they are, you can't sustain them. Everyday people need incremental success over months and sometimes years."<sup>143</sup> For Alinsky, the formula for success was building "democratic power among people seeking to improve the conditions of their own lives."<sup>144</sup> Rather than expect quick, short-term results, community organizers motivated by Alinsky's tenets understood the need to persist for the long term to attain sustainable reform.<sup>145</sup>

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to connect them with an American political tradition well to the left of the mainline, Democratic-party liberalism.").

<sup>137</sup> See *id.*

<sup>138</sup> See *id.*

<sup>139</sup> INDUS. AREAS FOUND., <http://www.industrialareasfoundation.org> [https://perma.cc/PJ3B-36UP] (last visited Dec. 21, 2019).

<sup>140</sup> See *Find an IAF Affiliate Near You*, INDUS. AREAS FOUND., <http://www.industrialareasfoundation.org/affiliate-members#all> [https://perma.cc/N7RZ-EMWS] (last visited Dec. 21, 2019).

<sup>141</sup> See INDUS. AREAS FOUND., *supra* note 139 (describing victories in minimum-wage increases and affordable-housing projects); see also *Senior Issues*, INDUS. AREAS FOUND., <http://www.industrialareasfoundation.org/issuesvictories/16> [https://perma.cc/295E-NPLM] (last visited Dec. 21, 2019) (describing IAF's projects organizing affordable low-income senior housing and expansion of Nevada Meals on Wheels).

<sup>142</sup> In a conversation with Arlene Mayerson, Directing Attorney of the Disability Rights Education & Defense Fund, on January 5, 2019, in New Orleans, Louisiana, I learned that early disability rights activists were trained to follow the Alinsky organizing principles to resist attempts by the federal government to restrict enforcement of Section 504 of the Rehabilitation Act of 1973. For a discussion of some disability rights protests under the Alinsky model, see Brittany Shoot, *The 1977 Disability Rights Protest that Broke Records and Changed Laws* (Nov. 9, 2017), <https://www.atlasobscura.com/articles/504-sit-in-san-francisco-1977-disability-rights-advocacy> [https://perma.cc/77FJ-TDH6].

<sup>143</sup> EDWARD T. CHAMBERS, *ROOTS FOR RADICALS: ORGANIZING FOR POWER, ACTION, AND JUSTICE* 80 (2003).

<sup>144</sup> See ENGLER & ENGLER, *supra* note 129, at 38.

<sup>145</sup> See Matthews, *supra* note 132.



In recent years, his work has inspired Tea Party organizers.<sup>146</sup> The Tea Party is credited with pulling the Republican Party to the political right and undercutting Obama's presidency; it became part of the economic and political power elite as it became incorporated within the Republican congressional majority.<sup>147</sup> Its success suggests that Alinsky's tenets may be even more effective when harnessed by the power elite because its organizers can build on their preexisting, hierarchical structural advantages, including access to financial resources.

#### B. *Sociologists*

Writing in 1977, Professors Frances Fox Piven and Richard A. Cloward disputed the widely held notion, furthered by Alinsky, that successful social movements need long-standing, formal organizational structures.<sup>148</sup> In a painstakingly careful study, Piven and Cloward traced why some poor people's movements succeeded while others failed.<sup>149</sup> The flaw, they argued, is that it is "not possible to compel concessions from elites that can be used as resources to sustain oppositional organizations over time."<sup>150</sup> They contended that the formal organizational structures usually fade after a period of advocacy ends and, when they do not fade, that the formal organization that remains has abandoned the oppositional politics that gave rise to its existence in the first place.<sup>151</sup> The organizers typically "blunt[] or curb[] the disruptive force which lower-class people were sometimes able to mobilize."<sup>152</sup>

Piven and Cloward's work proposed a new understanding of how political transformations can take place. Rather than focus on building a national, mass-based movement to attain reform, they argued that local organizations can attain local victories through a series of disruptions that, in turn, may require a federal response. For example, they argued that the Southern Christian Leadership Conference ("SCLC") engaged in "mass defiance of caste rules, followed by arrests and police violence," but "did not build local organizations to obtain local

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<sup>146</sup> Brooke Obie, *The Right-Wing Media Hates Alinsky, Except When He's Shaping Their Movement* (Feb. 1, 2010, 6:14 PM), <https://www.mediamatters.org/worldnetdaily/right-wing-media-hates-alinsky-except-when-hes-shaping-their-movement> [<https://perma.cc/TS75-GEEJ>] (discussing Tea Party leader Michael Patrick Leahy's statement encouraging conservative radicals to follow Alinsky's tactics).

<sup>147</sup> See Vanessa Williamson, Theda Skocpol & John Coggin, *The Tea Party and the Remaking of Republican Conservatism*, 9 *PERSP. ON POL.* 25, 35 (discussing Tea Party's impact within Republican Party).

<sup>148</sup> See PIVEN & CLOWARD, *supra* note 129, at x (explaining that activists' belief in formal organization is based on false assumptions).

<sup>149</sup> See *id.* at xii (finding that organizers failed to seize opportunity from rise of unrest and curbed lower-class people's disruptive force).

<sup>150</sup> *Id.* at xxi.

<sup>151</sup> *Id.* ("But insurgency is always short-lived. . . . As for the few organizations which survive, it is because they become more useful to those who control the resources on which they depend than to the lower-class groups which the organizations claim to represent.")

<sup>152</sup> *Id.* at xxii.

victories.”<sup>153</sup> While recognizing that this tactic left local people unorganized and vulnerable to retaliation by whites and arguably rested on a strategy of “create a crisis and pray,” they argued that it worked.<sup>154</sup> They claimed that that strategy resulted in the “literal fragmenting of the regional foundation of the Democratic Party”<sup>155</sup> to force legislative concessions to African Americans. By contrast, they argued that such success would not have come about if organizers waited for black, poor southerners to organize on a national scale.<sup>156</sup> Unlike Alinsky, their theory accounted for the response of the power elite to organizing efforts, although the strategies of the elite were not a primary focus of their study.

Piven and Cloward’s work may also strengthen our understanding of the power of the Tea Party movement. The Tea Party movement may be criticized for not having a clear national agenda.<sup>157</sup> It was initially decentralized and splintered. Yet as Piven and Cloward may have projected, it attained enormous political power and may have helped lead to the later rise of Donald Trump.

Why then, one might ask, did the Occupy Wall Street movement not attain similar success? While Professor Michael Levitin has argued that the Occupy Wall Street movement has regrouped around a variety of causes,<sup>158</sup> no one would describe it as having achieved as much impact on the American landscape as did the Tea Party movement. Implicitly disagreeing with Piven and Cloward, Professor Todd Gitlin argues that the lack of a national network and connection to conventional political actors may explain the failure of the Occupy Wall Street movement.<sup>159</sup> While recognizing that Occupy did garner some small victories, he argued, “[A]bsent an extended strategy, experienced networks, and a stabilizing organizational structure, Occupy cannot parlay small victories into action for long-term potential.”<sup>160</sup> The Tea Party movement may have gained greater success than Occupy Wall Street because of its willingness to back candidates who would run for political office and align with a traditional political party. Although the Tea Party movement may have begun as a splintered and decentralized movement, it was willing to align itself with the more traditional Republican Party and its power elite. In other words, Piven and Cloward may be wrong to downplay the importance of the emergence of a national agenda or, at least, allegiance to a national political party.

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<sup>153</sup> *Id.* at 283.

<sup>154</sup> *Id.* at 282-83.

<sup>155</sup> *Id.* at 283.

<sup>156</sup> *Id.* (“We did not think that local organizations of the southern black poor . . . would have ever gained the political influence necessary to secure a Civil Rights Act of 1964 or a Voting Rights Act of 1965 . . .”).

<sup>157</sup> See Sam Tanenhaus, *History vs. the Tea Party*, N.Y. TIMES, Jan. 15, 2012, at SR8.

<sup>158</sup> See Michael Levitin, *The Triumph of Occupy Wall Street*, THE ATLANTIC (June 10, 2015), <https://www.theatlantic.com/politics/archive/2015/06/the-triumph-of-occupy-wall-street/395408/> (arguing that success of Occupy Wall Street movement is in success of resulting splinter groups).

<sup>159</sup> See Todd Gitlin, *Occupy’s Predicament: The Moment and the Prospects for the Movement*, 64 BRIT. J. SOC. 3, 20-24 (2013).

<sup>160</sup> *Id.* at 22.

Thus, Professors Daniel Kreiss and Zeynep Tufekci argue that a group needs to align itself with an organizational structure to be successful.<sup>161</sup> In contrast to Piven and Cloward, they argue that the civil rights movement “developed a tactical repertoire that was distinct from the political valuation of the organizational form and decision-making structure of the movement.”<sup>162</sup> They argue that the civil rights movement and the Occupy Wall Street movement, while both decentralized, also had a different concept of leadership and that Occupy Wall Street’s insistence on a horizontal leadership strategy led to its demise.<sup>163</sup> By contrast, they argue that the Tea Party activists worked with the Republican Party and conservative media outlets to achieve legislative victories.<sup>164</sup> Kreiss and Tufekci argue that “social transformation can only exist through some engagement with institutional politics that makes change durable.”<sup>165</sup> Similarly, Professor Amanda Pullum argues that part of the success of the Tea Party lies in the fact that it had “considerable resources, in the form of monetary support, organizational structures, and access to popular media . . . [as well as] two established conservative organizations, FreedomWorks and Americans for Prosperity.”<sup>166</sup> Thus, the views of Gitlin, Kreiss and Tufekci, and Pullum question the account offered by Piven and Cloward. They agree with the necessity of cultural transformations to attain political success but also contend that interaction with institutional politics, as well as conventional economic resources, is necessary to make change durable.

Professors Mark Engler and Paul Engler have tried to apply Alinsky’s and Piven and Cloward’s insights to some recent social and political movements. But their explanation fails to account for the ability of the power elite to resist advances. Drawing on the importance of political disruptions, they tell the story of how what they call “nonviolent revolt” has helped shape successful civil rights movements.<sup>167</sup> They tell many stories of successful civil rights advocacy, showing how seemingly polarizing tactics combined with community activism helped change public attitudes and laid the groundwork for successful civil rights reforms. One chapter tells of the transformation from a time of anti-immigrant vitriol to the embrace of the so-called DREAMers staying in the United States.<sup>168</sup> The story begins in 2005, when Representative Jim Sensenbrenner proposed “a reactionary piece of immigration legislation that would have instated harsh penalties for unauthorized presence in the United

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<sup>161</sup> See Daniel Kreiss & Zeynep Tufekci, *Occupying the Political: Occupy Wall Street, Collective Action, and the Rediscovery of Pragmatic Politics*, 13 CULTURAL STUD. CRITICAL METHODOLOGIES 163, 163-64 (2013) (stating that group success is dependent on engagement in institutional politics).

<sup>162</sup> *Id.* at 163.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 165.

<sup>165</sup> *Id.*

<sup>166</sup> Amanda Pullum, Note, *Social Movement Theory and the ‘Modern Day Tea Party,’* 8/12 SOC. COMPASS 1377, 1379 (2014).

<sup>167</sup> See generally ENGLER & ENGLER, *supra* note 129.

<sup>168</sup> *Id.* at ch. 8.

States, erected a seven-hundred-mile fence along the border . . . and criminalized those assisting undocumented immigrants in obtaining food, housing, or medical services.”<sup>169</sup> The story continues with Minuteman volunteers in 2005 bragging to a reporter that they wanted to kill all immigrants crossing the border illegally. “You break into my country, you die,” they reportedly said.<sup>170</sup> And the story recounts how Fox News’s Lou Dobbs “warned that hordes of unwashed immigrants would bring plagues of tuberculosis, malaria, and even leprosy” to the United States.<sup>171</sup>

Focusing on the power of polarizing tactics, Engler and Engler then explain how immigration rights activists effectively responded. They argue that huge, mass protests by immigration rights activists brought a political sea change. Right-wing candidates entered the general elections “facing down an energized bloc of the immigrant rights movement’s active public supporters.”<sup>172</sup> Immigration activists staged a hunger strike at the Denver office of Obama for America, pushing President Obama to issue executive orders in favor of the DREAMers.<sup>173</sup> “Polarization,” they argued, paid “dividends.”<sup>174</sup> They end this chapter with the hope that Representative Sensenbrenner will reverse himself and say “I’m sorry” to the DREAM Act students.<sup>175</sup> Further, they suggest that “it is possible that the polarized extremism of the Minutemen may soon look just as archaic and bigoted as the White Citizens’ Councils that thrived, for a brief moment, thanks to the ‘unwise and untimely’ clashes generated by the civil rights movement.”<sup>176</sup>

But Engler and Engler’s predictions have not come to pass. Sensenbrenner’s 2019 web page proclaims his strong support for many of the measures he first supported in 2005.<sup>177</sup> In a 2016 interview, Minuteman cofounder Jim Gilchrist

Insist[ed] that it was his group’s actions that led to the conservative fervor over cracking down on illegal immigration. He trace[d] the current Republican discourse on the issue—Donald Trump’s infamous wall, the renewed interest in revoking birthright citizenship, and the calls for mass deportations back to his movement . . . .<sup>178</sup>

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<sup>169</sup> *Id.* at 214.

<sup>170</sup> *Id.* at 216.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 219.

<sup>173</sup> *Id.* at 219-23.

<sup>174</sup> *Id.* at 219.

<sup>175</sup> *Id.* at 223.

<sup>176</sup> *Id.*

<sup>177</sup> See Press Release, Congressman Jim Sensenbrenner, Congressman Sensenbrenner Statement on the End of the DACA Program, <https://sensenbrenner.house.gov/press-releases-statements?ID=B49BEF18-C222-4193-BB17-91343C23785A> [<https://perma.cc/UU72-CWKZ>] (supporting ending DACA program) (last visited Dec. 21, 2019).

<sup>178</sup> See Meredith Hoffman, *Whatever Happened to Arizona’s Minutemen?*, VICE (Mar. 22, 2016, 1:30 PM), [https://www.vice.com/en\\_us/article/xd7jmn/what-happened-to-arizonas-minutemen](https://www.vice.com/en_us/article/xd7jmn/what-happened-to-arizonas-minutemen) [<https://perma.cc/HU3L-224W>].

And in November 2018, in response to Trump's warning about U.S. security being threatened by Central American caravans of migrants, the Texas Minutemen announced that they were going to the border to stop the caravans from moving through Mexico.<sup>179</sup> More recently, a leader of an armed militia held migrants against their will at the New Mexico border, apparently emboldened by Trump's anti-immigrant rhetoric.<sup>180</sup> While the Englers tell a story of a movement that had some short-term success when it borrowed from Alinsky's commitment to ground-up community organizing and Piven and Cloward's commitment to disruptive measures, they were not able to recount a movement that generated the kind of long-term success that these various theorists thought was possible.

Possibly, the Englers should have foreseen how power elites, such as Donald Trump, would use the strategies that they claimed could be effective. The Englers argued that conflict and disruption are important tools for change. They argued that "successful movements are often celebrated as heroic and noble," but "while they are still active, their tactics are never beloved by all. Accepting that reality is part of using conflict and disruption as tools for change."<sup>181</sup> Thus, Trump garnered free publicity during the presidential campaign with his statements that promoted conflict and disruption. His lack of civility received constant criticism. As the Englers predicted, he made "people uncomfortable."<sup>182</sup> People talked about holding their nose while voting for him due to his lack of civility. But at the end of the day, he beat the more conventional candidates (in both the primary election and general election) who "preferr[ed] to look moderate and reasonable."<sup>183</sup>

Thus, one should understand President Trump's success as part of a broader social movement with goals for structural change—goals that were reflected by the Minutemen in 2005.<sup>184</sup> The Minutemen were not just a bunch of vigilantes. They wanted immigrants deported; they even wanted immigrants to be executed at the border.<sup>185</sup> Similarly, President Trump had his message: build a wall,

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<sup>179</sup> See Mary Lee Grant & Nick Miroff, *Stirred by Trump's Call to Arms, Militias Head South*, WASH. POST, Nov. 4, 2018, at A02.

<sup>180</sup> See Kayla Epstein, Lindsey Bever & Eli Rosenberg, *An Armed Militia Was "Detaining" Migrants at the Border. The FBI Arrested Its Leader.*, WASH. POST (Apr. 22, 2019, 5:39 PM), <https://www.washingtonpost.com/immigration/2019/04/21/an-armed-militia-was-detaining-migrants-border-fbi-arrested-its-leader/> (reporting that armed militias have been emboldened by Trump's "assertion that the arrivals constitute an 'invasion'").

<sup>181</sup> ENGLER & ENGLER, *supra* note 129, at 223.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> See Janet I. Tu & Lornet Turnbull, *Minutemen Watch U.S.-Canada Border*, SEATTLE TIMES (Oct. 4, 2005, 12:00 AM), <https://www.seattletimes.com/seattle-news/minutemen-watch-us-canada-border/> [<https://perma.cc/MN3F-Z7SH>] ("[The Minutemen's] aim is not a call to arms but rather an attempt to avert the 'political, economic and social mayhem' that could result from the 'chaotic neglect' of America's borders . . .").

<sup>185</sup> See David Holthouse, *Minutemen, Other Anti-immigrant Militia Groups Stake Out Arizona*, S. POVERTY L. CTR. (June 27, 2005), <https://www.splcenter.org/fighting-hate/intelligence-report/2005/minutemen-other-anti-immigrant-militia-groups-stake-out->

“Make America Great Again,” and get out of free-trade deals.<sup>186</sup> Although critics argue that Trump is not disciplined because he sends out tweets at early morning hours criticizing his opponents in highly personal terms,<sup>187</sup> he is arguably consistent and disciplined. His opponents know (and fear) his insults.<sup>188</sup> With discipline, he and the Republican Party leaders managed to turn the detractors of then-Judge Brett Kavanaugh into an “angry mob.”<sup>189</sup> President Trump is a case study on how “moderate and reasonable” loses to “rude and rash.”<sup>190</sup> His ability to shut down the entire U.S. government over his insistence to “build the wall”<sup>191</sup> is one of many examples of his use of public insults to maintain the support of a nativist base.<sup>192</sup>

President Trump’s success at social disruption should raise the question whether those kinds of disruptive forces are even more powerful when

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arizona-border [<https://perma.cc/KYY8-N3LU>] (describing development and tactics of Minutemen and similar vigilante militias).

<sup>186</sup> Qiu, *supra* note 25 (listing ways Trump promised to “make America great again,” including building wall and renegotiating or withdrawing from North American Free Trade Agreement and Trans-Pacific Partnership).

<sup>187</sup> See, e.g., Denver Post Editorial Bd., Editorial, *Colorado’s Leaders Must Decry Trump’s Racist Tweets*, DENVER POST (July 18, 2019, 9:34 AM), <https://www.denverpost.com/2019/07/18/editorial-colorado-congressmen-and-women-must-decry-trumps-racist-tweets/> (“His online rants lack substance and contain an inappropriate number of personal attacks that are unhealthy for this nation.”).

<sup>188</sup> See Christopher Cadelago, *Nickname and Shame: Trump Taunts His 2020 Democratic Rivals*, POLITICO (Oct. 2, 2018, 5:04 AM), <https://www.politico.com/story/2018/10/02/2020-democrats-trump-nicknames-856800> [<https://perma.cc/34JW-KX6Q>] (“People close to Trump say he’s convinced that the nicknames and other public ridicule he employed against the likes of Bush and Rubio shaped public opinion against them and – maybe more important – got inside their heads and rattled their confidence as candidates.”).

<sup>189</sup> See Matt Viser & Robert Costa, *GOP Finds Its Own Foil to Resist: The ‘Angry Mob,’* WASH. POST, Oct. 9, 2018, at A01 (“Republicans have cast the Trump resistance movement as ‘an angry mob,’ a term used by many of them . . .”).

<sup>190</sup> See Bobby Azarian, *The Psychology Behind Donald Trump’s Unwavering Support*, PSYCHOL. TODAY (Sept. 13, 2016), <https://www.psychologytoday.com/us/blog/mind-in-the-machine/201609/the-psychology-behind-donald-trumps-unwavering-support> [<https://perma.cc/AL2L-4KZL>] (explaining why Trump retains support despite or because of his insulting behavior).

<sup>191</sup> See Richard Cowan & Jeff Mason, *Trump Threatens Years-Long Government Shutdown, Emergency Powers to Build Wall*, REUTERS (Jan. 4, 2019, 1:07 AM), <https://www.reuters.com/article/us-usa-shutdown/trump-threatens-years-long-government-shutdown-emergency-powers-to-build-wall-idUSKCN1OY0D3> [<https://perma.cc/462X-E7NJ>] (“Trump is withholding his support for a bill that would fully fund the government until he secures money for the wall.”).

<sup>192</sup> See Zak Cheney-Rice, *Trump Never Actually Believed in the Wall*, N.Y. MAG.: INTELLIGENCER (Jan. 10, 2019), <http://nymag.com/intelligencer/2019/01/trump-never-believed.html> [<https://perma.cc/FP6A-5TA9>] (“The president, of course, recalls better than anyone that ‘Build the wall!’ chants whipped his nativist base into a frenzy when he was a candidate, ringing out through campaign areas and across youth soccer game fields as both rallying cry and racist taunt.”).

marshaled by the power elite. This Article argues that it is possible to disrupt civil rights progress through the power of insults because civil rights progress hangs by such a narrow thread.<sup>193</sup> What the Englers describe as immigration success<sup>194</sup> was merely a couple of executive orders signed by President Obama that could quickly be erased by President Trump.<sup>195</sup> The immigration rights community was not able to attain lasting immigration legislation during the eight years of the Obama Administration.<sup>196</sup> While it took years for Obama to sign a pro-immigrant executive order, it only took a week for Trump to sign his first immigration executive order banning many refugees from entering the United States.<sup>197</sup> Had immigration reform been attained through legislation, it would have been more difficult for President Trump to reverse course.<sup>198</sup> And, of course, President Trump continued to use anti-immigrant rhetoric after amassing the power of the presidency with the ability to issue executive orders; insults continued to be an important tool of the power elite.<sup>199</sup>

### C. *Contemporary Constitutional Theorists*

Community organizers and sociologists are not the only theorists to understand the importance of cultural work, along with legal and political work. Contemporary constitutional theory also tries to account for the importance of cultural forces to attaining successful legal transformations. Professor Reva Siegel, for example, argues that cultural forces work alongside the law to help

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<sup>193</sup> See *infra* Section II.D (explaining success of litigation-by-insult in civil rights cases).

<sup>194</sup> ENGLER & ENGLER, *supra* note 129, at 219.

<sup>195</sup> See Lazaro Zamora, *Obama's Immigration Executive Actions: Two Years Later*, BIPARTISAN POL'Y CTR. (Dec. 9, 2016), <https://bipartisanpolicy.org/blog/obamas-immigration-executive-actions-two-years-later/> [<https://perma.cc/3GUE-LWNQ>] (“Some of these programs were created through guidance memoranda, agency policy, or operational changes that can easily be revoked or changed by the new administration.”).

<sup>196</sup> See, e.g., Amanda Sakuma, *Obama Leaves Behind a Mixed Legacy on Immigration*, NBC NEWS (Jan. 15, 2017, 2:04 PM), <https://www.nbcnews.com/storyline/president-obama-the-legacy/obama-leaves-behind-mixed-legacy-immigration-n703656> [<https://perma.cc/3VE2-CLHQ>].

<sup>197</sup> See Steve Almasy & Darran Simon, *A Timeline of President Trump's Travel Bans*, CNN (Mar. 30, 2017, 4:01 AM), <https://www.cnn.com/2017/02/10/us/trump-travel-ban-timeline/index.html> [<https://perma.cc/DYK7-8UDH>].

<sup>198</sup> Cf. *Immigration 101: What's Happening with DACA and the Dream Act?*, AMERICA'S VOICE (Sept. 5, 2017), <https://americasvoice.org/blog/donald-trump-just-overtuned-daca/> [<https://perma.cc/QF66-CMUT>] (“[S]ince [DACA] was created through an executive order, [unlike the Dream Act, which Congress did not pass,] presidents after Obama had the authority to rescind the DACA program at any time.”).

<sup>199</sup> See Massoud Hayoun, *A Federal Judge Rules that Trump's Immigrant Policy Was Racist, but Rights Advocates Remain Concerned for the Future*, PAC. STANDARD (Oct. 5, 2018), <https://psmag.com/social-justice/federal-judge-rules-trump-immigrant-policy-racist> [<https://perma.cc/886S-59MP>] (“Trump[] [posed this] question to a group of lawmakers in January: ‘Why are we having all these people from shithole countries come here?’”).

transform the Supreme Court's understandings of the U.S. Constitution.<sup>200</sup> She tells a compelling story of how the feminist movement's social and political activism helped propel the Supreme Court to recognize sex as a quasi-suspect class under the Constitution despite the states' failure to amend the Constitution by ratifying the Equal Rights Amendment ("ERA").<sup>201</sup> Siegel's work, however, does not provide an adequate explanation for why the power elite was so successful in planting the fear of women being drafted or being raped in gender-neutral bathrooms if the ERA were to be ratified.<sup>202</sup> The power elite's cultural disruptions posed a significant challenge to attaining gender equality.

Further, not everyone accepts this story of constitutional litigation's working in lockstep with cultural forces to attain long-term legal and political success. In her response to Siegel, Professor Robin West argues that the recognition of gender as a quasi-suspect class has not resulted in the kind of broad structural reform that feminists have long sought.<sup>203</sup> The state still does not subsidize childcare,<sup>204</sup> paid pregnancy leave is not a legal right,<sup>205</sup> reproductive choices are increasingly limited and under attack,<sup>206</sup> and the wage gap between women and men stubbornly persists as the courts continue not to recognize comparable-worth cases.<sup>207</sup> Alinsky and Professors Piven and Cloward would likely not be

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<sup>200</sup> Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1326 (2006) ("[O]fficials responsible for interpreting the Constitution might respond to the shifts in popular opinion that a campaign to amend the Constitution produced, even if, by formal measures, the People endorsed the status quo.").

<sup>201</sup> *Id.* at 1324 ("The ERA was not ratified, but the amendment's proposal and defeat played a crucial role in enabling and shaping the modern law of sex discrimination.").

<sup>202</sup> Susan Chira, *Do We Still Need an Equal Rights Amendment?*, N.Y. TIMES, Feb. 17, 2019, at SR3 ("[Critics prevented the passage of the ERA by] warn[ing] of a dystopian post-E.R.A. future of women forced to enlist in the military, gay marriage, unisex toilets everywhere and homemakers driven into the workplace by husbands free to abandon them.").

<sup>203</sup> See Robin West, *Constitutional Culture or Ordinary Politics: A Reply to Reva Siegel*, 94 CALIF. L. REV. 1465, 1475 (2006) ("[The result of the de facto ERA] is not a constitutional meaning embracing a new paradigm of child-raising, work, and political participation.").

<sup>204</sup> See Noah Berlatsky, *Good Day Care Was Once a Top Feminist Priority, and It Should Be Again*, THE ATLANTIC (Apr. 16, 2013), <https://www.theatlantic.com/sexes/archive/2013/04/good-day-care-was-once-a-top-feminist-priority-and-it-should-be-again/275027/> (explaining feminist movement's failed attempt to obtain subsidized childcare).

<sup>205</sup> See Abby Vesoulis, *Millions of Americans Could Finally Get Paid Family Leave—If Lawmakers Can Agree on Who Pays*, TIME (May 16, 2019), <https://time.com/5590167/paid-family-leave-united-states/> [<https://perma.cc/3EE9-CZWH>] ("Whether the two parties can reconcile their differences is what stands in the way of tens of millions more adults in the U.S. labor force getting paid family leave.").

<sup>206</sup> See Associated Press, *Trump Abortion Restrictions Go into Effect Immediately*, CBS NEWS (July 15, 2019, 10:48 PM), <https://www.cbsnews.com/news/trump-abortion-restrictions-go-into-effect-immediately/> [<https://perma.cc/5XCH-RJ57>] ("[T]he [Trump] administration is following 'an ideological agenda' that could disrupt basic [reproductive] health care for many low-income women.").

<sup>207</sup> See Nikki Graf, Anna Brown & Eileen Patten, *The Narrowing, but Persistent, Gender Gap in Pay*, PEW RES. CTR. (Mar. 22, 2019), <https://www.pewresearch.org/fact-tank>



surprised at Professor West's account of the difficulties of attaining success in this area because they would not expect a top-down litigation approach to succeed at attaining lasting reform.<sup>208</sup> West embraces the importance of ground-up cultural work to attain lasting reform but does not fully account for the difficulty of responding to the power elite's domination of the cultural mindset.<sup>209</sup>

While these theorists rightly emphasize the importance of ground-level disruptions to help attain political and legal changes, their theories fail to account for some additional insights offered by this Article. One reason that litigation is insufficiently effective is that the U.S. legal system has built-in rules and policies that heavily favor narrow, individualistic remedies rather than structural reform.<sup>210</sup> Further, and equally importantly, these built-in headwinds to civil rights victories make it especially easy for the power elite to harness public insults to derail whatever victories may be achieved. It is the *intersection* of narrow political and legal rules with public insults that undermines the efforts of the civil rights community. Thus, Professor Siegel may be correct about the important victories attained by constitutional litigation.<sup>211</sup> However, she overstates these successes because she fails to account for the ability of the power elite to undermine narrowly crafted victories.

This observation is critically important to understanding the current cultural, political, and legal environment. Many people are aghast at President Trump's use of public insults to derail civil rights reform and have suggested that the political left should engage in similar tactics.<sup>212</sup> Yet when civil rights activists descend on the U.S. Senate to hold Senators accountable for their failure to respect a woman's claim of sexual assault, they are minimized as an "angry mob."<sup>213</sup> The power elite has on its side a Constitution that was deliberately crafted to allow a minority of the country's population to decide who sits on the

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/2019/03/22/gender-pay-gap-facts/ [https://perma.cc/53NR-U9WX] (“[F]actors that are difficult to measure, including gender discrimination, may contribute to the ongoing wage discrepancy.”).

<sup>208</sup> See, e.g., PIVEN & CLOWARD, *supra* note 129, at 181-84 (recognizing explosive power of grassroots or “bottom-up” defiance, as opposed to top-down approach).

<sup>209</sup> See West, *supra* note 203, at 1485 (“Without popular constitutionalism we could speak to each other, not to create and recreate meaning or assert and challenge definitions of self-identity, but instead to express and respond to manifest need.”).

<sup>210</sup> See Andrea Giampetro-Meyer et al., *Advancing the Rights of Poor and Working-Class Women in an Individualistic Culture*, 2 LOY. POVERTY L.J. 41, 53 (1996).

<sup>211</sup> Siegel, *supra* note 200, at 1330 (describing how proposal for and defeat of ERA attained meaningful change in law of sex discrimination).

<sup>212</sup> For a description of the range of approaches that have been suggested for the political left, see Conor Friedersdorf, *Why Can't the Left Win?*, THE ATLANTIC (May 4, 2017), <https://www.theatlantic.com/politics/archive/2017/05/why-cant-the-left-win/522102/>.

<sup>213</sup> Jessica Taylor & Ayesha Rascoe, *Republicans Seize on 'Angry Mob' Mantra to Keep Their Midterm Base Fired Up*, NPR (Oct. 10, 2018, 8:57 PM), <https://www.npr.org/2018/10/10/656396084/republicans-seize-on-angry-mob-mantra-to-keep-their-midterm-base-fired-up> [https://perma.cc/YR99-MH95].

Supreme Court<sup>214</sup> and to prevent a “radical left-wing mob”<sup>215</sup> from attaining power and voice. Thus, it is no surprise that the grassroots organizers who opposed then-Judge Kavanaugh are characterized as the ones who are “un-American”<sup>216</sup> or need to “grow up,”<sup>217</sup> rather than those who are using antidemocratic forces to ram through Supreme Court candidates whose views are well outside the mainstream of U.S. society.<sup>218</sup> The U.S. Constitution has always been crafted to keep white, propertied men in power;<sup>219</sup> it is not based on the democratic principles reflected in grassroots organizing.

Constitutional law has many built-in limitations that make structural reform exceedingly difficult. For example, the courts often interpret the Constitution to reflect a narrow conception of formal equality<sup>220</sup> and state action,<sup>221</sup> which are

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<sup>214</sup> The President nominates Supreme Court justices who are confirmed with the “Advice and Consent” of the Senate. U.S. CONST. art. II, § 2, cl. 2.

<sup>215</sup> See Kyle Balluck, *Trump Praises McConnell: He ‘Stared Down the Angry Left-Wing Mob’ to Get Kavanaugh Confirmed*, THE HILL (Oct. 14, 2018), <https://thehill.com/homenews/administration/411296-trump-praises-mcconnell-he-stared-down-the-angry-left-wing-mob-to-get> [<https://perma.cc/8DSP-Z6TM>]; Melanie Zanon & Scott Wong, *Democrats See Hypocrisy in GOP Attacks on ‘Liberal Mob,’* THE HILL (Oct. 10, 2018, 6:00 AM), <https://thehill.com/homenews/house/410667-democrats-see-hypocrisy-in-gop-attacks-on-liberal-mob> [<https://perma.cc/CZJ2-MT7G>].

<sup>216</sup> See Libby Locke, Opinion, *The Attack on Kavanaugh Is Un-American*, WALL STREET J., Sept. 27, 2018, at A19 (opining that “[i]t is un-American” to believe survivors in absence of independent corroborating evidence sufficient to meet burden of proof found in civil or criminal trial).

<sup>217</sup> See Eli Rosenberg, *‘Grow Up’: Orrin Hatch Waves Off Female Protestors Demanding to Speak with Him*, WASH. POST (OCT. 5, 2018, 10:09 AM), <https://www.washingtonpost.com/politics/2018/10/05/grow-up-orrin-hatch-waves-off-female-protesters-demanding-speak-with-him/> (“Sen. Orrin G. Hatch (R-Utah) raised the ire of protestors Thursday after telling a group of mostly women who confronted him . . . that he would talk to them when they ‘grow up.’”).

<sup>218</sup> See Robert Barnes & Emily Guskin, *53% Back Further Probe of Kavanaugh*, WASH. POST, Oct. 12, 2018, at A03 (“More Americans disapprove of Brett M. Kavanaugh’s confirmation to the Supreme Court than approve . . .”).

<sup>219</sup> See Andrew Prokop, *Why the Electoral College is the Absolute Worst, Explained*, VOX (Dec. 19, 2016, 10:15 AM), <https://www.vox.com/policy-and-politics/2016/11/7/12315574/electoral-college-explained-presidential-elections-2016> [<https://perma.cc/VDF9-VC4Z>] (“The electoral college is, essentially, a vestigial structure—a leftover from a bygone era in which the founding fathers specifically *did not* want a nationwide vote of the American people to choose their next president.”).

<sup>220</sup> For a discussion of how Justice Ginsburg has attempted to depart from this model of formal equality, see Shira Galinsky, Note, *Returning the Language of Fairness to Equal Protection: Justice Ruth Bader Ginsburg’s Affirmative Action Jurisprudence in Grutter and Gratz and Beyond*, 7 CUNY L. REV. 357, 357-58 (2004) (“Justice Ruth Bader Ginsburg is notable . . . for her open and transparent discussion of societal injustice and racism . . . and her concrete suggestions for developing a more flexible standard in reviewing equal protection cases.”).

<sup>221</sup> For a description of the state action doctrine as “born of overt racial discrimination,” see Isaac Saidel-Goley & Joseph William Singer, *Things Invisible to See: State Action &*

difficult to use if you are seeking to attain structural reform. A formal equality model fails to offer effective remedies, such as busing and the elimination of urban and suburban boundaries, thereby allowing white flight to resegregate our nation's public schools.<sup>222</sup> A narrow state action doctrine might overturn a state statute that outlaws abortion but cannot be used to require the state to fund abortions for poor women.<sup>223</sup> If structural change requires a state that funds health care, housing, and education for everyone, it remains difficult to use an individual rights-based constitutional law system to achieve those kinds of vital goals.

One response to this problem is to say that political and cultural transformations not only need to precede legal changes (as Pivens and Cloward would argue) but also must *follow* such changes. Thus, after *Brown v. Board of Education*,<sup>224</sup> it was more important than ever for parents to work hard to convince government to fund the public schools and create a high-quality educational environment for their children, as well as to fight privatization of education.<sup>225</sup> After *Roe*, it was more important than ever for activists to make sure that doctors were trained in how to perform abortions and that legislation was passed to fund abortion services, as well as to fight anti-abortion efforts.<sup>226</sup> The individualistic nature of the constitutional right does not preclude the political left from finding other forums to push for an extension of that limited right to attain structural reform.

President Trump may be an obvious and recent case study of the power of “rude and rash,” but he is not the only example. “Rude and rash,” or what this Article calls the power of insults, has helped stall many areas of civil rights reform. It is possible for public insults to undermine civil rights advances when the underlying statutory scheme reflects a narrow conception of individual rights.<sup>227</sup> While this Article focuses on the ability of public insults to help derail a disability rights statutory scheme, this observation could be applied to many other areas of civil rights.<sup>228</sup>

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*Private Property*, 5 TEX. A&M L. REV. 439, 439 (2018) (“Born of overt racial discrimination, the [state action] doctrine has inflicted substantial injustice throughout its inglorious history . . .”).

<sup>222</sup> See *Milliken v. Bradley*, 418 U.S. 717, 745 (1974) (refusing to require interdistrict remedies to promote racial integration).

<sup>223</sup> See *Harris v. McRae*, 448 U.S. 297, 311 (1980) (refusing to require government to fund abortions under Medicaid).

<sup>224</sup> 347 U.S. 483, 495 (1954) (“We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place.”).

<sup>225</sup> See Ronald Brownstein, *How Brown v. Board of Education Changed—and Didn’t Change—American Education*, THE ATLANTIC (Apr. 25, 2014), <https://www.theatlantic.com/education/archive/2014/04/two-milestones-in-education/361222/>.

<sup>226</sup> See Alex Ronan, *The First Legal Abortion Providers Tell Their Stories*, N.Y. MAG.: THE CUT (Oct. 13, 2015), <https://www.thecut.com/2015/10/first-legal-abortionists-tell-their-stories.html> [<https://perma.cc/74BC-NWV9>] (detailing changes that unfolded post-*Roe*).

<sup>227</sup> See *infra* Part II (examining public insults’ impact on ADA’s effectiveness).

<sup>228</sup> In a forthcoming book, I apply this thesis to the topics of immigration reform, the marriage equality movement, special education, disability rights, and sexual harassment. See

D. *Application to Statutory Reform*

Although much of the literature on the difficulties of civil rights reform has focused on constitutional law, this Article focuses on the challenges of *statutory* reform. Like constitutional law, civil rights legislation is often not built with a strong foundation to attain structural reform.<sup>229</sup> And after legislation that is inherently limited in its ability to attain structural reform is enacted, it may be even easier for the power elite to further limit that legislation through cultural, political, and legal tools, including public insults. The specific mechanisms that make statutory litigation a limited avenue for structural change are often different from the mechanisms that limit constitutional litigation. However, they share many of the same fundamental challenges in seeking broad-based, effective remedies. Thus, it is easy to find examples that reflect how civil rights advocacy has led to narrow civil rights advances, helping, for example, only the African American who “acts white.”<sup>230</sup>

This Article uses a disability case study to show how a limited statutory right, when combined with a vociferous campaign of public insults, can greatly limit what, on paper, appeared to be a significant civil rights victory. In response to a broad-based political campaign, Congress and administrative agencies enacted a statute and promulgated regulations that, on paper, should create a more accessible society. Beginning in 1992, the ADA required significant alterations to and even reconstruction of facilities to meet stringent accessibility requirements.<sup>231</sup> Although these requirements have arguably changed the default rules regarding expectations of accessibility, violations of these simple rules are everywhere. For example, curb ramps, while typically installed, are also often in disrepair.<sup>232</sup> Voting facilities are often inaccessible, and many voting machines do not permit individuals with visual impairments to vote independently.<sup>233</sup> When people make hotel reservations, they can only hope that

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generally RUTH COLKER, *THE PUBLIC INSULT PLAYBOOK* (forthcoming 2021) (on file with author).

<sup>229</sup> See, e.g., ROSENBERG, *supra* note 129, at 10-21 (recognizing, in “constrained” view of Supreme Court, that institutional limitations render significant social reform impracticable because of limited nature of constitutional rights, lack of judicial independence, and judiciary’s inability to develop appropriate policies).

<sup>230</sup> See ENGLER & ENGLER, *supra* note 129, at 248-50 (describing conditions under which nonviolent revolt, rather than more mainstream tactics, can help attain change).

<sup>231</sup> See Americans with Disabilities Act (ADA) of 1990, Pub. L. No. 101-336, § 501, 104 Stat. 327, 369-70 (codified as amended in 42 U.S.C. §§ 12101-12213 (2018)).

<sup>232</sup> See Winnie Hu, *Disabled New Yorkers Face Trouble with the Curbs*, N.Y. TIMES, Oct. 9, 2017, at A17 (describing litigation and research about inadequacy of curb ramps in New York City, including that 116,000 of city’s existing corner curb ramps do not meet standards); *Court Report Confirms Dismal State of Sidewalks for Disabled New Yorkers*, DISABILITY RTS. ADVOCATES (Aug. 10, 2017), <https://dralegal.org/press/court-report-confirms-dismal-state-sidewalks-disabled-new-yorkers/> [<https://perma.cc/JC4P-9FAD>] (reporting that 80% of New York City sidewalks are not ADA compliant).

<sup>233</sup> See *Blind and Visually Impaired Voters Face Barriers to Voting on Election Day*, DISABILITY RTS. ADVOCATES (July 25, 2013), <https://dralegal.org/press/blind-and-visually-impaired-voters-face-barriers-to-voting-on-election-day/> [<https://perma.cc/7BL4-SSA3>]

the hotel meets their request for an accessible room and that the room is genuinely accessible.<sup>234</sup> It continues to be impossible to make a reservation at a restaurant on the assumption that one can actually enter the front door and use the restroom if one uses a wheelchair, crutches, or a cane.<sup>235</sup>

The power elite has been tremendously successful at harnessing its cultural, political, and legal tools to undermine this attempt at structural change. While one *might* have thought the point of making a hotel accessible to its guests was so that everyone could expect to visit that hotel and enjoy its facilities, the courts have interpreted that right as only applying to the lone guest who was denied access and wants to return when the particular impediment to entry has been eliminated.<sup>236</sup> In other words, a potential structural right has been transformed into a highly individualistic right. How could that happen? This Article argues that it happens through the collaboration of cultural, political, and legal tools.<sup>237</sup> This collaboration is especially effective in the hands of the power elite because of the inherent bias towards limited, individualistic rights built into our legal system through both statutory and constitutional law.<sup>238</sup> This collaboration may

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(describing class action lawsuit for failure to ensure that accessible voting machines for visually impaired individuals functioned effectively on voting day); Matt Vasilogambros, *How Voters with Disabilities Are Blocked from the Ballot Box*, PEW (Feb. 1, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/02/01/how-voters-with-disabilities-are-blocked-from-the-ballot-box> [<https://perma.cc/H4ZB-ABWR>] (noting that nearly two-thirds of inspected polling stations during 2016 election “had at least one impediment to people with disabilities”).

<sup>234</sup> See Vilissa Thompson, *(In)accessible Rooms: The Biggest Lie Told by the Hotel Industry*, RAMP YOUR VOICE (Jan. 12, 2017, 12:30 PM), <https://web.archive.org/web/20191007211218/http://rampyourvoice.com/2017/01/12/inaccessible-rooms-biggest-lie-told-hotel-industry/> [<https://perma.cc/NSR5-V9KX>] (describing hotel guest’s experiences with inaccessibility at major hotel chain).

<sup>235</sup> See David Perry, *Restaurants Haven’t Lived Up to the Promise of the Americans with Disabilities Act*, EATER (May 31, 2017, 9:28 AM), <https://www.eater.com/2017/5/31/15701042/american-disabilities-act-restaurants-compliance> [<https://perma.cc/4MF4-DYMH>] (“Talk to anyone with a disability, especially one related to movement, body type, method of communication, or use of senses such as seeing or hearing, and you’ll hear bad restaurant stories that could have been avoided. Sometimes the stories reveal gross violations of the Americans with Disabilities Act.”).

<sup>236</sup> See, e.g., *Civil Rights Educ. & Enf’t Ctr. v. Hosp. Props. Tr.*, 867 F.3d 1093, 1102 (9th Cir. 2017) (finding that plaintiffs had standing as testers, but not as guests, to sue hotel under Title III of ADA where they intended to visit, were deterred by ADA noncompliance, and would visit hotel after inaccessibility cured); *Pickern v. Holiday Quality Foods Inc.*, 293 F.3d 1133, 1136-37 (9th Cir. 2002) (“[U]nder the ADA, once a plaintiff has actually become aware of discriminatory conditions existing at a public accommodation, and is thereby deterred from visiting or patronizing that accommodation, the plaintiff has suffered an injury.”).

<sup>237</sup> See *infra* Part III (discussing cultural, legal, and political tools to effect change through example of ADA Title III accessibility litigation).

<sup>238</sup> See *supra* Section II.C. (discussing individual rights limitations built into constitutional law but often overlooked by constitutional theorists).

also be effective because of the popular press's willingness to accept a characterization of people with disabilities as greedy and undeserving.<sup>239</sup>

Like other civil rights struggles, the affected community has not just sat on its hands and accepted the public insults. Building on Alinsky's training,<sup>240</sup> the disability rights community held a twenty-eight-day sit-in at a San Francisco federal building to force the federal government to issue regulations to enforce Section 504 of the Rehabilitation Act;<sup>241</sup> engaged in many public demonstrations through ACT UP in support of people with AIDS to change public policy on available medication;<sup>242</sup> and, most recently, engaged in mass demonstrations to stop Congress from repealing important aspects of the Affordable Care Act.<sup>243</sup> The disability rights community has long been active and, at times, even belligerent.<sup>244</sup>

But the disability rights community's belligerent activism has not been effective at maintaining a positive image of the importance of accessibility reform. "Drive-by lawsuits"—a phrase that invokes the image of a gang member fatally shooting an innocent bystander from an automobile—is the dominant theme covered by the media in response to attempts by disability advocates to make public facilities more accessible.<sup>245</sup> These media outlets rarely attempt to

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<sup>239</sup> See *supra* note 232 (describing media use of term "drive-by lawsuits").

<sup>240</sup> See *supra* note 142 (detailing conversation with Arlene Mayerson).

<sup>241</sup> See Kitty Cone, *Short History of the 504 Sit In*, DISABILITY RTS. EDUC. & DEF. FUND, <https://dredf.org/504-sit-in-20th-anniversary/short-history-of-the-504-sit-in/> [<https://perma.cc/8ZJ3-2WDT>] (last visited Dec. 21, 2019) (describing San Francisco federal building sit-in with large spectrum of disability community as "critical" to getting regulations signed).

<sup>242</sup> See Douglas Crimp, *Before Occupy: How AIDS Activists Seized Control of the FDA in 1988*, THE ATLANTIC (Dec. 6, 2011), <https://www.theatlantic.com/health/archive/2011/12/before-occupy-how-aids-activists-seized-control-of-the-fda-in-1988/249302/> (describing national demonstration by AIDS activists and affinity groups demanding that FDA increase access to experimental therapies).

<sup>243</sup> See Maya Rhodan, *Protestors Got Dragged Out of a Hearing on the Republican Health Care Bill*, TIME (Sept. 25, 2017), <http://time.com/4956397/graham-cassidy-republican-health-care-protests/> [<https://perma.cc/R6U7-45BH>] (noting that protesters at Senate Finance Committee hearing about Affordable Care Act budget cuts chanted, "No cuts to Medicaid, save our liberty!").

<sup>244</sup> See Colin Deppen, *Why People with Disabilities Are Protesting like Hell*, HUFFPOST (Oct. 11, 2018, 5:45 AM), [https://www.huffingtonpost.com/entry/people-with-disabilities-protest\\_us\\_5baa3d65e4b07dc0b87e1264](https://www.huffingtonpost.com/entry/people-with-disabilities-protest_us_5baa3d65e4b07dc0b87e1264) [<https://perma.cc/VCT8-UB7U>] (noting that Alisa Grishman, founder of local advocacy group Access Mob and self-described as "a lover and a fighter," has been arrested five times at protests).

<sup>245</sup> See Ken Barnes, Opinion, *The ADA Lawsuit Contagion Sweeping U.S. States*, FORBES (Dec. 22, 2016, 11:05 AM), <https://www.forbes.com/sites/realspin/2016/12/22/the-ada-lawsuit-contagion-sweeping-u-s-states/> [<https://perma.cc/N88Z-2H9S>] (describing drive-by lawsuits as "extortion scheme [that] is now a perfected business plan executed by unethical attorneys"); Evan Gibbs, *Stopping Drive-By Lawsuits*, ABOVE THE LAW (Oct. 2, 2017, 3:00 PM), <https://abovethelaw.com/2017/10/stopping-drive-by-lawsuits/> [<https://perma.cc/WXZ8-AGN6>] (describing drive-by lawsuits as surge in ADA litigation whereby plaintiffs'

even interrogate the slur.<sup>246</sup> Lawsuits brought against corporations, which are still inaccessible decades after the enactment of the ADA, can hardly be put in that category, yet that phrase has stuck with little resistance. And the story of disability activism is largely absent from the many books and articles written about civil rights work.

Professor Michael Waterstone has argued that the difficulties that the disability rights movement has had in effectively enforcing the ADA can be explained by the lack of national consensus before the statute became law.<sup>247</sup> Waterstone argues that passing a major piece of legislation by “flying under the radar” is ultimately ineffective because “society cannot be transformed if it is not paying sufficient attention.”<sup>248</sup> While Waterstone mostly focused on the employment discrimination provisions of the ADA, his argument is equally helpful in understanding the lack of public commitment to the physical structural changes that would be necessary to implement ADA Title III. He argues that because disability is a more “amorphous group identity than that found in other civil rights movements,” it may be especially difficult for those who “are not necessarily natural allies” to urge a particular vision for what might constitute equality.<sup>249</sup> Drawing on Professor Siegel’s work, Waterstone argues that the passage of the ADA was not the result of the kinds of civil rights conflicts that Siegel argued were essential to attaining civil rights transformations.<sup>250</sup> If Waterstone is correct, then disability activists have an especially difficult challenge to enact and then enforce legislation that creates broad structural changes to society. Their own community, with its diffuseness, is an additional impediment to structural reform.

The structural impediments to reform, especially in the disability context, may make it especially difficult for the civil rights community to withstand verbal onslaughts from the power elite. To understand these challenges, one needs to better understand how limited statutory civil rights structures can combine with public insults to undermine civil rights reform, as discussed below.

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attorneys, using attorney’s-fees provision as leverage, often pair with repeat plaintiffs to file dozens or hundreds of ADA actions to reach settlement).

<sup>246</sup> Gibbs, *supra* note 245.

<sup>247</sup> See Michael E. Waterstone, *The Costs of Easy Victory*, 57 WM. & MARY L. REV. 587, 603-08 (2015) (distinguishing understandings of disability equality from other civil rights movements because of diffuse and ambiguous nature of group identity within disability community).

<sup>248</sup> *Id.* at 590-91.

<sup>249</sup> *Id.* at 591. While recognizing that no civil rights community is monolithic, he argues that disability is “exceptional in its diffuseness” because it is made up of different communities with different impairments who “have not had much in common and have not worked together (or even gotten along) as a social or political matter.” *Id.* at 605.

<sup>250</sup> *Id.* at 599, 604 (recognizing “significant difference in kind between the conflict created by the ADA’s passage” and other civil rights groups).

## III. ADA CASE STUDY

A. *Lengthy List of Impediments*

Many legal and political devices can help undermine effective structural reform, and others have documented some of those consequences.<sup>251</sup> The list of doctrines and rules to preclude structural reform is long: class action limitations in *Wal-Mart Stores, Inc. v. Dukes*,<sup>252</sup> standing and mootness rules,<sup>253</sup> attorney's fees limitations in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Services*,<sup>254</sup> Congress prohibiting the Legal Services Corporation ("LSC") from participating in class actions,<sup>255</sup> the withdrawal of the power of the Department of Justice ("DOJ") to enforce the Voting Rights Act in *Shelby County v. Holder*,<sup>256</sup> the statutory requirement of a

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<sup>251</sup> See Julie Davies, *Federal Civil Rights Practice in the 1990s: The Dichotomy Between Reality and Theory*, 48 HASTINGS L.J. 197, 199 (1997) ("[T]he Court's decision regarding waivers of attorneys' fees has affected settlement behavior, strengthening defendants' leverage and converting the process of settlement negotiation into the equivalent of a personal injury negotiation."); Lawrence D. Rosenthal, *Adding Insult to No Injury: The Denial of Attorney's Fees to "Victorious" Employment Discrimination and Other Civil Rights Plaintiffs*, 37 FLA. ST. U. L. REV. 49, 67 (2009) (recognizing most plaintiffs awarded nominal damages in civil rights cases not entitled to attorney's fees because, despite proving violations, courts find "attorney's fees are rarely appropriate unless the plaintiff obtains more than a de minimis victory"); Karen M. Klotz, Comment, *The Price of Civil Rights: The Prison Litigation Reform Act's Attorney's Fee-Cap Provision as a Violation of Equal Protection of the Laws*, 73 TEMP. L. REV. 759, 769 (2000) (recognizing PLRA's attorney's fee-cap provisions limit amount of recoverable fees by prisoner civil rights litigant in three ways: (1) instructs courts to deduct portion of plaintiff's judgment to satisfy attorney's fees, (2) limits substantive amount of attorney's fees to 150% of monetary judgment awarded, and (3) caps attorney's fees to hourly rate of 150% of rates payable to appointed counsel in criminal cases). See generally Jeffrey S. Brand, *The Second Front in the Fight for Civil Rights: The Supreme Court, Congress, and Statutory Fees*, 69 TEX. L. REV. 291 (1990) (discussing difficulties in attaining attorney's fees in civil rights cases).

<sup>252</sup> 564 U.S. 338, 353 (2011) (finding that evidence of "general policy of [gender] discrimination" failed class action commonality requirement absent specificity about how regularly stereotypes affect employment decisions).

<sup>253</sup> See Gene Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 304 (2002) ("[T]he standing rulings of the past three decades demonstrate that the injury standard is not only unstable and inconsistent, but that it also systematically favors the powerful over the powerless."); see also Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 229 (1990) ("[T]he unstated acceptance of the private rights model leads to a refusal to recognize the cognizability of collective rights and collective harms.").

<sup>254</sup> 532 U.S. 598, 605 (2001) (denying attorney's fees when court did not make judgment on merits, even though party prevailed because lawsuit brought about "defendant's voluntary change in conduct" to amend legislation).

<sup>255</sup> See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(7), 110 Stat. 1321, 1321-53 (prohibiting LSC from using funds to assist any person or entity "that initiates or participates in a class action suit").

<sup>256</sup> 570 U.S. 529, 557 (2013).



private attorney general model of enforcing many civil rights statutes,<sup>257</sup> the statutory provision of the sole remedy of injunctive relief in suits against the state,<sup>258</sup> preclusions of a private right of action to enforce disparate impact regulations,<sup>259</sup> mandatory arbitration agreements that keep plaintiffs out of court,<sup>260</sup> impediments to prison litigation through the Prison Litigation Reform Act,<sup>261</sup> pleadings restrictions,<sup>262</sup> and barriers to habeas relief.<sup>263</sup> After all these attempts to narrow the list of potential plaintiffs to a beleaguered and underfunded few, it is no surprise that the defense bar would then seek to strike down the lone remaining plaintiff with strategies such as insulting the plaintiff and their lawyer.

Although many of the items on this list have limited the effectiveness of ADA enforcement, the “private attorney general” model of enforcement is among the most important limitations and deserves more focused attention. Under this model of law enforcement, plaintiffs are typically required to use private lawyers rather than governmental agencies to secure their rights, and those lawyers, in turn, are allowed to attain attorney’s fees if their client prevails.<sup>264</sup> Because their clients are often poor and may not be entitled to large financial remedial awards, this model, in theory, benefits low-income plaintiffs. Contingency fees may work in some areas of the law, where large awards are possible, but contingency fees are not viable in many civil rights cases.<sup>265</sup> Without this model, the

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<sup>257</sup> See, e.g., *infra* Section III.B.

<sup>258</sup> See Ruth Colker, *The Section Five Quagmire*, 47 UCLA L. REV. 653, 657 n.24 (2000) (recognizing that Eleventh Amendment precludes private plaintiff from suing state for injunctive relief).

<sup>259</sup> See *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (“Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602.”).

<sup>260</sup> See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621-32 (2018) (enforcing arbitration clauses for claims alleging employer violated Fair Labor Standards Act).

<sup>261</sup> See generally John Boston, *The Prison Litigation Reform Act: The New Face of Court Stripping*, 67 BROOK. L. REV. 429 (2001) (describing Prison Litigation Reform Act as creating code of special restrictive rules for prison litigants to create unequal justice under the law).

<sup>262</sup> See Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 1-17 (2010) (criticizing how recent decisions have made it exceedingly difficult for plaintiff to have a meaningful day in court).

<sup>263</sup> See, e.g., Leah M. Litman, *Legal Innocence and Federal Habeas*, 104 VA. L. REV. 417, 447-53 (2018) (recognizing two kinds of innocence have conceptual overlap and similar theories of punishment that justify treating innocence as a continuum).

<sup>264</sup> See William B. Rubenstein, *On What a “Private Attorney General” Is—and Why It Matters*, 57 VAND. L. REV. 2128, 2142-56 (2004).

<sup>265</sup> Only injunctive relief is available under ADA Title III. See 42 U.S.C. § 12188(a)(1) (2018) (describing available remedies and procedures); 28 C.F.R. § 36.501(a) (1991) (“Any person who is being subjected to discrimination on the basis of disability in violation of the Act or this part or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of section 303 of the Act or subpart D of this part may institute a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order.”).

government would need to have a much larger role in the enforcement of rights, especially for low-income clients. The awarding of attorney's fees overturns the "American rule," under which all sides bear their own legal expenses.<sup>266</sup>

While the private attorney general model of law enforcement for civil rights violations has been around since the enactment of the Civil Rights Act of 1964, it did not receive much critical attention until Professor John Coffee published in 1983 an article titled *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*.<sup>267</sup> Although his focus was on antitrust litigation, he suggested that the problems in that arena caused by using private attorney generals could eventually extend to civil rights litigation.<sup>268</sup> In many ways, he predicted how courts would cut back on the ability of lawyers to earn a living as private attorney generals because of the perceived sense that they were "bounty hunters" rather than high-minded public interest lawyers.<sup>269</sup> "Bounty hunters" was clearly a powerful slur that would undermine the otherwise positive image of private lawyers using litigation to further the public good.<sup>270</sup>

Professor Coffee credited Judge Frank with coining the term "private attorney general" in 1943.<sup>271</sup> "[H]is felicitous phrase conferred an intellectual legitimacy on practices that otherwise were scorned by the established bar as champerty and maintenance."<sup>272</sup> Coffee recognized the importance of the characterization

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<sup>266</sup> See John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1569 (1993) ("In the United States, the losing party does not generally pay the winner's legal fees. Each party is only obligated to pay his or her own attorney's fees, regardless of the outcome of the litigation." (footnote omitted)).

<sup>267</sup> John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 220 (1983) ("The hard truth is that the private attorney general as a legal institution has not lived up to its early promise. This observation alone should not be surprising, because few things in life work as well in practice as in theory. Thus, the more important assertion, which will be the central focus of this article, is this: *the reasons for this shortfall between the promise and the performance of the private attorney general are entirely predictable and almost inevitable once we examine the incentive structure that current law presents to the private enforcer*. Similarly and more optimistically, these problems are also substantially remediable if we revise that incentive structure.").

<sup>268</sup> *Id.* at 235-36 ("Today, it is clear that in some areas of litigation — private antitrust class actions, securities class actions, shareholder derivative actions, and mass tort and product liability cases — the 'entrepreneurial' private attorneys general predominate, while in other areas — civil rights, environmental law, and poverty law — the 'ideological' private attorneys general are the principal players. This dichotomy may not last much longer.").

<sup>269</sup> *Id.* at 228 ("[C]ourts have begun to narrow and limit substantive statutory rights, seemingly because of their distaste for the process by which such rights are enforced.").

<sup>270</sup> *Id.* at 218 (noting negative connotation of term "bounty hunter").

<sup>271</sup> *Id.* at 216 n.1 (citing *Associated Indus. of N.Y. State, Inc. v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943), *vacated*, 320 U.S. 707 (1943) (per curiam)) ("In essence, the premise of the private attorney general is that announced by Judge Frank: private litigation can produce public good by enforcing statutory and other important policies.").

<sup>272</sup> *Id.* at 217.

of the lawyer's role in such work.<sup>273</sup> "Much can hang on the choice of words, and the phrase 'private attorney general' is as value-loaded in an affirmative sense as the term 'bounty hunter' is in a negative one. Both terms, however, represent only different sides of the same legal coin."<sup>274</sup> Not surprisingly, Coffee's work has been cited by courts considering whether so-called private attorney general lawsuits should be able to move forward and what the appropriate size of attorney's fees should be.<sup>275</sup>

In 2003, Professor Michael Selmi built on Coffee's work to argue that the private attorney general model in class action lawsuits has enriched lawyers while not producing meaningful change for their clients.<sup>276</sup> Then, in 2007, Professor Michael Waterstone wrote an article entitled *A New Vision of Public Enforcement*,<sup>277</sup> in which he looked at whether the private attorney general model is effective in ADA litigation. He observes that the private attorney general model, which was incorporated in the early civil rights laws, had support from liberals and conservatives.<sup>278</sup> "Conservatives championed the role of the private attorney general because it privatized enforcement, thus shrinking the role of the federal government; and liberals supported private actors enforcing civil rights because it freed up civil rights enforcement from any conservative political agenda or administration."<sup>279</sup> In other words, the private attorney general model was a neoliberal conception of law reform under which economic incentives in a private marketplace would be used to attain civil rights remedies.

At the time these rules were embedded in federal law, public interest lawyers could use the class action procedural device while working for the federally funded LSC.<sup>280</sup> Although the private attorney general model may not have made

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<sup>273</sup> *Id.* at 218.

<sup>274</sup> *Id.*

<sup>275</sup> See, e.g., *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 801 (3d Cir. 1995) ("Some commentators blame the system of compensating class action lawyers in a manner that fails to confront fully the differences between class action litigation and classical bipolar litigation for creating incentives that diverge markedly and predictably from their clients' interests. The leading critic is Professor Coffee."); *BTZ, Inc. v. Great N. Nekoosa Corp.*, 47 F.3d 463, 466 n.3 (1st Cir. 1995) (using Coffee's work to support contention that using resources for redundant legal services frustrates congressional policy and adversarial nature of legal system).

<sup>276</sup> Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249, 1331-32 (2003) ("[N]either the harm nor the benefit of the private class action litigation is substantial. Instead, the cases are primarily about transfers of wealth, transfers that are often channeled to entities other than the parties to the suit.").

<sup>277</sup> See generally Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434 (2007).

<sup>278</sup> *Id.* at 442 ("[T]he private attorney general incentives in the enforcement of civil rights had support from both sides of the political aisle.").

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at 442-43 ("Importantly, during the 1960s and 1970s, there was a pattern of vigorous private civil rights enforcement by public interest organizations. These lawyers—who in and of themselves were considered private attorneys general—were erally [sic] financed by a

civil rights enforcement dependent on the political views of the executive branch, it did make them dependent on the continued funding of LSC and the viability of the class action lawsuit by LSC lawyers.<sup>281</sup> But Congress soon changed that rule; now LSC may not bring class action litigation.<sup>282</sup>

Waterstone argues that the cure for this problem of underenforcement through the private attorney general model is to have more public enforcement.<sup>283</sup> He argues that there needs to be a “public commitment to systemic litigation,” especially in areas, like disability accessibility, where “the profit motive for plaintiffs and private attorneys is low, noncompliance appears to be systemic, there is an absence of case development, and individual plaintiffs will have standing difficulties in challenging various forms of discrimination.”<sup>284</sup>

While Waterstone’s argument has much appeal, it suffers from the problem of seeing public enforcement through the executive branch as immune from the cultural and political problems this Article highlights as reflected in the practice of public insults. Professor Samuel Bagenstos has persuasively argued that the public enforcement model is dependent on an executive branch that wants to enforce the civil rights laws.<sup>285</sup> Under the Trump Administration, where the DOJ is using its systemic enforcement authority to threaten the rights of voters,<sup>286</sup> reverse affirmative action,<sup>287</sup> and place children who cross the border into

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blend of foundation and public money (the latter being primarily through [LSC]).” (footnotes omitted)).

<sup>281</sup> *Id.* at 445 (“The political capital and popularity of the civil rights plaintiffs’ bar has also faded. The first step was the dismantling of the (LSC). Organizations that had been effective private attorneys general in civil rights cases had their funds cut.”).

<sup>282</sup> Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(7), 110 Stat. 1321, 1321-53 to -56.

<sup>283</sup> Waterstone, *supra* note 277, at 497 (“The importance of private enforcement cannot be disputed, and it is imperative that judicial opinions limiting the ability of the private civil rights bar to sue acting in the public interest are reversed. But until that happens, and even thereafter, public enforcement should not be let off the hook so easily.”).

<sup>284</sup> *Id.* at 497.

<sup>285</sup> See Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of “Abusive” ADA Litigation*, 54 UCLA L. REV. 1, 9 (2006) (explaining that investigations are not opened for a large proportion of complaints because DOJ has understaffed many areas responsible for public enforcement).

<sup>286</sup> See, e.g., Inae Oh, *Trump Threatens “Maximum Criminal Penalties” in Possible Attempt to Suppress Votes*, MOTHER JONES (Nov. 5, 2018), <https://www.motherjones.com/politics/2018/11/trump-voter-fraud-midterms-threat/> [<https://perma.cc/GUW7-AUY3>] (“On the eve of the midterm elections, President Donald Trump said he had ordered law enforcement officials to monitor the virtually nonexistent problem of voter fraud, warning that ‘maximum criminal penalties’ would be leveled against anyone found attempting to cast a ballot illegally.”).

<sup>287</sup> See, e.g., Erica L. Green, Matt Apuzzo & Katie Benner, *U.S. to Discount Race as a Factor in College Entry*, N.Y. TIMES, July 4, 2018, at A1 (“The Trump administration said Tuesday that it was abandoning Obama administration policies that called on universities to consider race as a factor in diversifying their campuses, signaling that the administration will champion race-blind admissions standards.”).

detention centers,<sup>288</sup> it is hard to see public enforcement as a panacea. The same forces that have shrunk the effectiveness of the private attorney general model have captured the executive branch. Civil rights advocates cannot escape to another branch of government when one seems to be closed because the same cultural and political forces that have closed one branch have infected the other branch. In fact, when the government is most closed to civil rights concerns and enforcement is most needed, a public enforcement model would be at its weakest. This problem permeates not just new cases that might be brought but also existing litigation that has not yet been resolved.<sup>289</sup>

Nonetheless, it is important to recognize—as is well documented in Waterstone’s work—that the “bounty hunter” charge from Coffee in 1983 has now permeated the public’s conception of the private attorney general model of enforcement, including in the civil rights arena.<sup>290</sup> In statutory schemes that permit prevailing parties to attain attorney’s fees, plaintiffs’ lawyers often battle against a conception of them as greedy bounty hunters. Indeed, under state law, courts have explicitly referred to the possibility that private attorney generals would be “bounty hunters” in refusing to recognize a right to attorney’s fees for prevailing parties.<sup>291</sup>

This “bounty hunter” metaphor reflects a theme that was discussed in Part I: insults are used against disadvantaged groups for conduct that is praiseworthy when engaged in by the power elite. The private attorney general model of enforcement is a way to privatize the enforcement of civil rights. It is typically not the model preferred by the civil rights community because that community recognizes it can be difficult to persuade the profit-oriented private bar to take civil rights cases. Private enforcement is part of the neoliberal model to hand

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<sup>288</sup> See, e.g., Grace Segers, *Feds Holding 12,800 Migrant Children in Detention Centers, Report Says*, CBS NEWS (Sept. 13, 2018, 8:03 PM), <https://www.cbsnews.com/news/feds-holding-12800-migrant-children-in-detention-centers-report-says/> [https://perma.cc/3K8J-QVRV] (“The increase is not due to an influx of more migrant children, but rather because fewer children are being released into the custody of sponsors.”).

<sup>289</sup> See, e.g., *Dep’t of Fair Emp’t & Hous. v. Law Sch. Admission Council Inc.*, No. 12-cv-01830, 2018 WL 1156605, at \*2 n.4 (N.D. Cal. Mar. 5, 2018) (observing that DOJ failed to take position on contempt motion in case in which it was one of the original plaintiffs).

<sup>290</sup> See Waterstone, *supra* note 277, at 446–47 (explaining that commentators, specifically Coffee, “soured on the private attorney general” and that these “criticisms have recently been extended to the civil rights private attorney general”).

<sup>291</sup> See *Consumer Def. Grp. v. Rental Hous. Indus. Members*, 40 Cal. Rptr. 3d 832, 846, 855–56 (Ct. App. 2006) (describing use of public interest statute by self-proclaimed “bounty hunter” to attain over \$540,000 in attorney’s fees as a “shake down” at “the *direct expense of the public interest*” and noting general concern that “plaintiff[s], as here, may be nothing but a shell entity for lawyer bounty hunters”); *League of Women Voters v. Detzner*, 188 So. 3d 68, 72 (Fla. Dist. Ct. App. 2016) (rejecting argument for attorney’s fees and noting that “a broadly-applied American [R]ule exception could . . . significantly alter the dynamics of public interest litigation . . . by attracting ‘bounty hunters’ to the area” (first alteration in original) (quoting *State Bd. of Tax Comm’rs v. Town of St. John*, 751 N.E.2d 657, 662 (Ind. 2001))); *Stephenson v. Bartlett*, 628 S.E.2d 442, 445 (N.C. Ct. App. 2006) (rejecting attorney’s fees due to concern about “bounty hunters” in public interest litigation).

over public tasks to the private sector. Profit maximization is fine when conducted by the power elite but not when sought by disadvantaged groups. Candidate Trump could brag about his wealth as part of his qualifications to become President.<sup>292</sup> By contrast, when the private bar takes advantage of the opportunity to earn a living by enforcing the civil rights laws, it is accused of being a “bounty hunter.”<sup>293</sup> This use of insults is to be expected—what is good for the goose is not good for the gander.

B. *ADA’s Private Attorney General Model of Enforcement*

When ADA Title III was introduced as a bill in 1988, it provided for compensatory damages for accessibility violations.<sup>294</sup> Disability rights advocates argued that Congress should adopt the compensatory damages model available under the Fair Housing Act (“FHA”),<sup>295</sup> which prohibits discrimination in the sale or rental of housing to any buyer or renter and permits compensatory and punitive damages through public enforcement.<sup>296</sup> Nonetheless, Congress ultimately enacted injunctive relief<sup>297</sup> through suits brought by private lawyers in exchange for a broad list of covered entities. As Senator Tom Harkin acknowledged on the floor of the Senate, the ADA cosponsors agreed “to cutback the remedies included in the original bill in exchange for a broad scope of coverage . . . in other words to extend protections to most commercial establishments large and small open to the public.”<sup>298</sup> He characterized this decision as a fragile compromise.<sup>299</sup>

Although the ADA requires most enforcement to occur by private lawyers who can receive attorney’s fees if they are successful, the media and defense bar have been very successful at criticizing plaintiffs’ lawyers for using this mode of enforcement.<sup>300</sup> Plaintiff’s attorneys are often wary of bringing ADA

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<sup>292</sup> See Rushe, *supra* note 125.

<sup>293</sup> See, e.g., David Freeman Engstrom, *Private Enforcement’s Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. 1913, 1916-17 (critiquing private bar in context of qui tam litigation, which has produced “bounty-hunting privateers [who] have driven the law in politically unaccountable directions”).

<sup>294</sup> H.R. 4498, 100th Cong. § 9(b)(1) (1988) (“Any person who believes that he or she or any specific class of individuals is being or is about to be subjected to discrimination on the basis of handicap in violation of this Act, shall have a right, by himself or herself, or by a representative, to file a civil action for injunctive relief, monetary damages, or both in a district court of the United States.”).

<sup>295</sup> Fair Housing Act, 42 U.S.C. § 3613(c)(1) (2018) (“In a civil action under subsection (a) of this section, if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award to the plaintiff actual and punitive damages . . .”).

<sup>296</sup> *Id.* §§ 3604, 3612(h), 3613(c) (stating that relief may include actual damages suffered by the aggrieved person and equitable relief as court deems appropriate).

<sup>297</sup> *Id.* § 12188(a)(2) (providing for injunctive relief in private suits by affected parties).

<sup>298</sup> 135 CONG. REC. 19,803 (Sept. 7, 1989) (statement of Sen. Tom Harkin).

<sup>299</sup> *Id.* (“We hope that other Senators will understand how fragile this compromise is and will support it.” (quoting Sen. Harkin)).

<sup>300</sup> See *infra* notes 302-10 and accompanying text.

accessibility cases for fear that they will be vilified as “drive-by litigators.”<sup>301</sup> The media largely furthers this tale of insults, likely creating implicit bias at all stages of the judicial process.

Television journalist Anderson Cooper ran a story for CBS’s *60 Minutes* on December 4, 2016, castigating so-called “drive-by” lawsuits.<sup>302</sup> Cooper’s piece was largely devoted to interviewing business owners who complained about complying with the ADA’s accessibility rules. A few sentences were offered from John Wodatch, retired Section Chief of the DOJ’s Disabilities Rights Section, who tried to explain why the requirements in the law are important but then, in an attempt to seem reasonable, conceded that some lawsuits may be “shakedowns or frivolous.”<sup>303</sup> Cooper emphasized that aspect of Wodatch’s comments instead of his statement that businesses are still largely inaccessible despite twenty-five years’ notice to comply with the ADA.<sup>304</sup> Cooper spent hours interviewing Lainey Feingold, a disability rights attorney, and Ingrid Tisher, a woman with muscular dystrophy, both of whom offered a very strong defense of ADA accessibility lawsuits.<sup>305</sup> Cooper, however, did not use that footage to air their remarks.<sup>306</sup> Tischer was especially incensed because Cooper used her image in the coverage without using her words. She complained: “*60 Minutes* came to OUR house, used us, and told the world people with disabilities are either dupes, greedy, or both.”<sup>307</sup> Rather than offer balanced coverage, CBS merely responded to complaints about their biased coverage with a brief statement titled “*Disabled Viewers Criticize 60 Minutes Story*,” including a handful of links to tweets they had received, one of which supported the original story (and was not written by a self-identified disabled individual).<sup>308</sup>

*The Hill* ran an opinion piece on November 13, 2017, entitled ‘*Drive-By*’ *Lawsuits Under Disabilities Statute Costing Economy*.<sup>309</sup> *Forbes Magazine* published a guest post by Ken Barnes on December 14, 2017, entitled *Congress Should Take Action on ADA ‘Drive-By’ Lawsuits*. Barnes is described as the

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<sup>301</sup> See *supra* note 142 (detailing conversation with Arlene Mayerson).

<sup>302</sup> *What’s a “Drive-By Lawsuit”?*, 60 MINUTES (Dec. 4, 2016), <https://www.cbsnews.com/news/60-minutes-americans-with-disabilities-act-lawsuits-anderson-cooper/> [<https://perma.cc/EG7A-2FY3>].

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> Robyn Powell, Opinion, *Here’s What 60 Minutes Got Wrong About the ADA: Everything*, YAHOO! (Dec. 12, 2016), <https://www.yahoo.com/news/heres-60-minutes-got-wrong-220018024.html> [<https://perma.cc/UHG3-2DSC>].

<sup>306</sup> *Id.* (“Despite being interviewed by Cooper for hours, [Feingold] was not featured in the segment. . . . Tischer’s interview was [also] omitted from the segment.”).

<sup>307</sup> *Id.*

<sup>308</sup> See *Disabled Viewers Criticize 60 Minutes Story*, 60 MINUTES (Dec. 8, 2016), <https://www.cbsnews.com/news/disabled-viewers-criticize-60-minutes-story/> [<https://perma.cc/URR5-XUD5>].

<sup>309</sup> John McMickle, Opinion, *‘Drive-By’ Lawsuits Under Disabilities Statute Costing Economy*, THE HILL (Nov. 13, 2017, 10:40 AM), <https://thehill.com/opinion/finance/360079-drive-by-lawsuits-under-disabilities-statute-costing-economy> [<https://perma.cc/Y3MS-VU2B>].

executive director of “Citizens Against Lawsuit Abuse.”<sup>310</sup> Thus, the onslaught against accessibility litigation permeated the mainstream, financial, and political media. Rather than understand that private attorneys are the primary mechanism for enforcement of ADA Title III and that the rampant continued lack of compliance opens the door for lawyers to sue multiple businesses for violations, these media accounts criticize lawyers for being effective at using the ADA’s enforcement mechanism.<sup>311</sup> Playing on the notion that people with disabilities are incompetent to assess their own needs, the news stories exploit the trope that these lawyers are taking advantage of disabled plaintiffs purely for their own financial gain through attorney’s fees. Lost in these stories is that Congress decided *not* to permit compensatory and punitive damage awards for the disabled plaintiffs so that only their lawyers could attain financial awards.

The responses to this media onslaught cannot be found in widely available media networks. Instead, one would have to look for blog entries from the Equal Rights Center<sup>312</sup> or attend a distance education event sponsored by the ADA National Network.<sup>313</sup> One would have to look in obscure media outlets like the *Times Herald-Record* to find quotes from disability activists who focus on the importance of such lawsuits.<sup>314</sup> As one disability rights advocate said:

If a black man was denied access to a business on the basis of being black, we wouldn’t get upset at the individual, we’d get upset at society for allowing 30 businesses to discriminate on the basis of his minority status. But when it comes to a person with a disability, we suddenly think it’s frivolous.<sup>315</sup>

Concerningly, Senator Jeff Flake used the CBS story to push his bill that would make it even more difficult to bring accessibility lawsuits.<sup>316</sup>

The media onslaught against the ADA’s accessibility requirements is a perfect example of how public insults are especially effective when a legal rule hangs by a narrow thread. The Cooper segment emphasized that a few states allow plaintiffs in accessibility lawsuits to seek modest compensatory damages and ignored the overwhelming majority of states where only injunctive relief is

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<sup>310</sup> Ken Barnes, Opinion, *Congress Should Take Action on ADA ‘Drive-By’ Lawsuits*, FORBES (Dec. 14, 2017), <https://www.forbes.com/sites/realspin/2017/12/14/congress-should-take-action-on-ada-drive-by-lawsuits/#58b568e6f6fa> [<https://perma.cc/B7TD-YUQQ>].

<sup>311</sup> See *supra* notes 302-10 and accompanying text.

<sup>312</sup> See Katherine Pearson, *A Response to Drive-By Lawsuits*, EQUAL RTS. CTR., <https://equalrightscenter.org/response-drive-lawsuits/> [<https://perma.cc/Q8US-8MFT>] (last visited Dec. 21, 2019) (responding to Cooper’s piece and attention drawn to notion of drive-by lawsuits).

<sup>313</sup> See *An Update on ADA Drive-By Lawsuits*, ADA NAT’L NETWORK (Nov. 15, 2017), <https://adata.org/event/update-ada-drive-lawsuits> [<https://perma.cc/3QWU-BS7S>].

<sup>314</sup> See Daniel Axelrod, *Local Woman Sues 5 Businesses over ADA Violation Claims*, TIMES HERALD-REC. (Apr. 9, 2017, 5:12 PM), <https://www.recordonline.com/news/20170409/local-woman-sues-5-businesses-over-ada-violation-claims> [<https://perma.cc/V34T-JCX6>].

<sup>315</sup> *Id.*

<sup>316</sup> See *Disabled Viewers Criticize 60 Minutes Story*, *supra* note 308.



available.<sup>317</sup> And Congress's reaction to such adverse publicity has been to seek to add a notice requirement to ADA Title III, which would make such lawsuits virtually impossible in the future. Private plaintiffs' lawyers would have no way to obtain fees for bringing such lawsuits if the business decides to remedy their accessibility problems within 180 days of receiving specific notice of the accessibility barriers (even though Congress put them on notice in 1990 of the need to remove such barriers).<sup>318</sup>

The bill that would require notice is misleadingly titled the "ADA Education and Reform Act."<sup>319</sup> Under this bill, businesses would be exempt from an ADA lawsuit if they could show they were making "substantial progress" in remedying the specific defects alleged by the plaintiffs. The bill, if enacted, would encourage businesses to fail to be accessible until they are sued and would force plaintiffs with disabilities to wait as long as six months to earn the right to possibly even enter the business. As the American Civil Liberties Union ("ACLU") said in its analysis of the bill: "Businesses have had more than enough 'notification' to comply with disability rights law. People with disabilities deserve equal access today — civil rights should not be delayed or tied up in bureaucratic red tape."<sup>320</sup> Nonetheless, this bill passed in the House of Representatives in 2018 by a 225-to-192 vote, with twelve Democrats voting in favor of the bill.<sup>321</sup> The fragile thread requiring businesses to be accessible is therefore at risk of pulling apart entirely. The pattern of public insults overwhelms the ability of the disability rights community to defend a statute that can determine whether they have the ability to leave their home and go to a local supermarket or restaurant.

One key factor in the defeat of the ADA Education and Reform Act was Senator Tammy Duckworth's eloquent op-ed in *The Washington Post* opposing this measure.<sup>322</sup> As a well-respected member of the Senate who "lost [her] legs

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<sup>317</sup> See generally Stephen A. Rosenbaum et al., *Disability Rights and Public Accommodations: State-by-State*, SE. ADA CTR. (Feb. 2011), [https://adasoutheast.org/publications/ada/public\\_accommodations\\_disability\\_rights\\_state-by-state\\_Final.pdf](https://adasoutheast.org/publications/ada/public_accommodations_disability_rights_state-by-state_Final.pdf) [<https://perma.cc/R75W-PMTT>] (providing state-by-state index of state law protections for people with disabilities). For example, California allows plaintiffs to obtain \$4000 per violation plus punitive damages and attorney's fees. See Unruh Civil Rights Act, CAL. CIV. CODE § 52(a)-(b) (West 2015).

<sup>318</sup> See ADA Education and Reform Act of 2017, H.R. 620, 115th Cong. (2018); see also 164 CONG. REC. H1181 (daily ed. Feb. 15, 2018) (statement of Rep. Nadler).

<sup>319</sup> See H.R. Res. 620, 115th Cong. (2017).

<sup>320</sup> Tyler Ray & Vania Leveille, *Congress Wants to Change the Americans with Disabilities Act and Undermine the Civil Rights of People with Disabilities*, ACLU (Sept. 6, 2017, 5:30 PM), <https://www.aclu.org/blog/disability-rights/congress-wants-change-americans-disabilities-act-and-undermine-civil-rights> [<https://perma.cc/3PRH-99HG>].

<sup>321</sup> See J. Colin Knisely, *House Passes Changes to Title III of the ADA*, DUANE MORRIS BANKING & FIN. L. (Feb. 22, 2018), <https://blogs.duanemorris.com/bankinglaw/2018/02/22/house-passes-changes-to-title-iii-of-the-ada/> [<https://perma.cc/9W6U-ETCT>].

<sup>322</sup> See Tammy Duckworth, Opinion, *Congress Wants to Make Americans with Disabilities Second-Class Citizens*, WASH. POST (Oct. 17, 2017), <https://www.washingtonpost.com/opinions/congress-is-on-the-offensive-against-americans-with-disabilities/2017/10/17>

when an RPG tore through the cockpit of the Black Hawk helicopter [she] was flying over Iraq,” she was able to counter comments from other politicians that ADA violations are not significant,<sup>323</sup> such as Democratic Representative Jackie Speier’s description of the ADA Title III litigation as merely “gotcha stuff.”<sup>324</sup> It is hard to know if grassroots efforts to defeat the Education and Reform Act would have been successful without the additional support of a well-respected and disabled politician who is also a Veteran and thus meets two of the factors (politics and military) to be a member of the power elite.<sup>325</sup> Duckworth’s role shows the importance of the civil rights community’s access to the power elite when sustaining its hard-won structural reforms.

It is no surprise that this pattern of public insults has also permeated ADA accessibility litigation. While not always successful at causing a judge to rule in favor of a defendant (where the accessibility violations are blatant), these attacks increase the cost of litigation and make it more difficult for lawyers to attain reasonable attorney’s fees. In some cases, however, they cause judges to deny class action certification, limit standing, and create inappropriate notice requirements.<sup>326</sup> Public insults are important in their breadth and intensity even when they do not always attain a complete victory for the defendant. In assessing the power of these public insults, it is important to remember that courts virtually never conclude that the plaintiff’s complaints are nonmeritorious. Further, the courts have Rule 11 sanctions and can even shift awards of attorney’s fees to the defendant if the plaintiff’s litigation is truly abusive.<sup>327</sup>

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/f508069c-b359-11e7-9e58-e6288544af98\_story.html (“This offensive legislation would segregate the disability community, making it the only protected class under civil rights law that must rely on ‘education’—rather than strong enforcement—to guarantee access to public spaces.”).

<sup>323</sup> *Id.*

<sup>324</sup> See Mike DeBonis, *House Passes Changes to Americans with Disabilities Act over Activists’ Objections*, WASH. POST (Feb. 15, 2018), [https://www.washingtonpost.com/powerpost/house-passes-changes-to-americans-with-disabilities-act-over-activists-objections/2018/02/15/c812c9ea-125b-11e8-9065-e55346f6de81\\_story.html](https://www.washingtonpost.com/powerpost/house-passes-changes-to-americans-with-disabilities-act-over-activists-objections/2018/02/15/c812c9ea-125b-11e8-9065-e55346f6de81_story.html) (“‘I want public places to be accessible to persons with disabilities,’ [Rep. Jackie Speier] said. ‘I want them fixed, and I’m not interested in making a few attorneys rich, and I’m not interested in gotcha stuff.’”).

<sup>325</sup> See *supra* note 13 (discussing C. Wright Mills’s definition of “power elite”).

<sup>326</sup> See *infra* Section III.D (discussing various situations in which defendant prevailed in pretrial motions in ADA litigation after insulting plaintiff).

<sup>327</sup> See, e.g., *Montoyo-Rivera v. Pall Life Scis. PR, LLC*, 245 F. Supp. 3d 337, 349 (D.P.R. 2017) (imposing Rule 11 sanctions on plaintiff’s lawyer for filing duplicative action); *Footman v. Cheung*, 341 F. Supp. 2d 1218, 1230 (M.D. Fla. 2004) (granting defendant’s motion for Rule 11 sanctions and attorney’s fees); *Seawright v. Charter Furniture Rental, Inc.*, 39 F. Supp. 2d 795, 804, 808 (N.D. Tex. 1999) (awarding attorney’s fees to defendant where plaintiff litigated in bad faith and imposing Rule 11 sanctions where attorney “assert[ed] allegations and other factual contentions . . . that had absolutely no evidentiary support”); *Schutts v. Bently Nev. Corp.*, 966 F. Supp. 1549, 1577 (D. Nev. 1997) (shifting attorney’s fees and imposing Rule 11 sanctions where attorney filed “baseless, meritless, and frivolous” claim); *Bergeron v. Nw. Publ’ns Inc.*, 165 F.R.D. 518, 522 (D. Minn. 1996) (using Rule 11

Inaccessibility is still a low hanging fruit, making it possible for some lawyers to file numerous lawsuits. Yet these lawyers are described as the villains for pointing out the continued pattern of egregious violations.<sup>328</sup> As Professor Samuel Bagenstos said, “It is simply inaccurate to say that ‘legitimate ADA advocates’ should want to get accessibility problems fixed without worrying about whether they will be paid,”<sup>329</sup> and, “Attorneys who handle serial ADA litigation are thus likely to be among the few lawyers for whom public accommodations cases are cheap enough and lucrative enough to be economically worthwhile.”<sup>330</sup> These lawyers are put in this position by Congress and the courts, not by their unreasonably needy determination to get paid for their work, yet the media casts them as villains.<sup>331</sup> What the media and some courts characterize as serial litigation could more properly be described as litigation based on expertise. These lawyers and their clients should be considered heroes rather than “bounty hunters.”

### C. *Boilerplate Litigation by Insult*

Building on the media blitz against ADA plaintiffs, it is common for defendants to try to accuse all plaintiffs of being serial litigators, even when the facts do not support that allegation. For example, Daniel Sharp brought five legal actions, four using the same law firm.<sup>332</sup> Three complaints were against restaurants and one was against a nursing home where he had stayed for an extended period of time. Sharp uses a wheelchair, and each complaint appears to be based on obvious, important problems such as inaccessible tables, lack of accessible parking, inaccessible path of travel, and inaccessible restrooms. At the initial stages of these cases, the defendants used attorney Gregory Francis Hurley,<sup>333</sup> who at the time worked for the law firm Greenberg Traurig, LLP, which aggressively proceeded, through litigation by insult, to have all of the plaintiff’s claims dismissed.

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sanctions to require attorney to “obtain thorough education in the Federal Rules of Civil Procedure”).

<sup>328</sup> Defendants’ Memorandum of Points & Authorities in Support of Their Motion for Summary Judgment or, in the Alternative, Summary Adjudication at 1, *Sharp v. Balboa Islands, LLC*, 900 F. Supp. 2d 1084 (S.D. Cal. 2012) (No. 3:11-cv-00675), 2012 WL 13049198, at \*1 [hereinafter Defendants’ Memorandum] (villainizing attorney who brought multiple ADA suits as serial litigator engaging in “shakedown scheme”).

<sup>329</sup> Bagenstos, *supra* note 285, at 17-18 (footnote omitted).

<sup>330</sup> *Id.* at 13-14.

<sup>331</sup> See, e.g., *What’s a “Drive-By Lawsuit”?*, *supra* note 302.

<sup>332</sup> See generally *Sharp v. Islands Rest.-Carlsbad*, 900 F. Supp. 2d 1114 (S.D. Cal. 2012) (suing restaurant for alleged ADA violations); *Sharp v. Islands Cal. Ariz. LP*, 900 F. Supp. 2d 1101 (S.D. Cal. 2012) (same); *Sharp v. Balboa Islands LLC*, 900 F. Supp. 2d 1084 (S.D. Cal. 2012) (same); *Sharp v. Covenant Care LLC*, 288 F.R.D. 465 (S.D. Cal. 2012) (suing employer for alleged ADA violations); *Sharp v. Waterfront Rests.*, No. 3:99-cv-00200, 1999 WL 1095486 (S.D. Cal. Aug. 2, 1999) (suing restaurant for alleged ADA violations). The firm began as Barboza, Metz & Harrison, LLP, but at some point in 2012 changed its name to Metz & Harrison, LLP.

<sup>333</sup> See *Balboa Islands LLC*, 900 F. Supp. 2d at 1087.

The language below reflects the typical kind of broad, unsubstantiated insult hurled by defendants' law firms in these kinds of accessibility cases:

Unfortunately, there are increasingly widespread reports of vexatious ADA litigation. Courts have described these disability access lawsuits as "shakedown schemes" for statutory damages and attorney's fees.

"The abuse is a kind of legal shakedown scheme . . . the unscrupulous law firm sends a disabled individual to as many businesses as possible in order to have him or her aggressively seek out all violations of the ADA." . . . Of course, "this type of shotgun litigation undermines both the spirit and purpose of the ADA," and "brings into disrepute the important objectives of the ADA by instead focusing public attention on the injustices suffered by defendants forced to expend large sums to amount [sic] defenses to groundless or hyper-technical claims."<sup>334</sup>

After arguing that plaintiff was part of an unethical take-down scheme, defendant specifically argued that plaintiff did not have standing because he "is a serial ADA plaintiff who has at least 4 ADA lawsuits currently pending. Plaintiff's counsel specializes in these drive-by lawsuits and has brought a myriad of them on behalf of a flock of plaintiffs."<sup>335</sup> Defendant's lawyer cut and pasted this same sentence in another case against different defendants, again suggesting that it is inappropriate "serial litigation" for a law firm to bring four or five accessibility cases.<sup>336</sup> Defendant found no need to justify why bringing four or five cases is unethical because it made that argument against the backdrop that the court would be sympathetic to the problem of purportedly unethical lawyering in these kinds of cases. Defendant also saw no reason to explain why it was appropriate for a defendant but not a plaintiff to specialize in disability litigation.

Defendant then piled on the insults by saying that Sharp was not disabled because "he admitted that he could stand with parallel bars, and within the past six months was able to walk approximately 22 feet with the aid of a walker."<sup>337</sup> While the defendant did not succeed in persuading the court to grant its motion for summary judgment on every claim, the defendant's frivolous and insulting arguments did require the plaintiff to waste valuable resources to persuade the court that Sharp was indeed disabled as someone who required parallel bars or a walker to ambulate.<sup>338</sup>

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<sup>334</sup> Defendants' Memorandum, *supra* note 328, at 1 (first omission in original) (citations omitted) (first quoting *Doran v. Del Taco, Inc.*, 373 F. Supp. 2d 1028, 1030 (C.D. Cal. 2005), *vacated*, 237 F. App'x 148 (9th Cir. 2007); and then quoting *Peters v. Winco Foods, Inc.*, 320 F. Supp. 2d 1035, 1041 (E.D. Cal. 2004)).

<sup>335</sup> *Id.* at 2.

<sup>336</sup> See Defendant Islands California Arizona LP's Memorandum of Points & Authorities in Support of Its Motion for Summary Judgment or, in the Alternative, Summary Adjudication at 2, *Islands Cal. Ariz. LP*, 900 F. Supp. 2d 1101 (Nos. 3:11-cv-00671, 3:11-cv-00427), 2012 WL 6865127, at \*2.

<sup>337</sup> *Balboa Islands LLC*, 900 F. Supp. 2d at 1092.

<sup>338</sup> See *id.* ("The Court is at a complete loss as to how this testimony supports Defendants' contention that he can stand and/or walk *independently*. The only inference that could

One might respond to these observations by noting that lawyers are supposed to be assertive and aggressive on behalf of their clients. But accusing a lawyer of engaging in a “take-down scheme” is more than merely aggressive lawyering. Further, this norm of aggressive lawyering overlooks the underlying power imbalance in many civil rights cases. The firm representing the plaintiff in these cases is listed as Metz & Harrison, LLP; their website presents them as having one partner, one of-counsel lawyer, and one senior associate.<sup>339</sup> By contrast, the defendants are represented by Greenberg Traurig, LLP; their website lists them as having 2000 attorneys on three continents.<sup>340</sup> While one could imagine government lawyers who enforce civil rights through lawsuits against large law firms, that kind of work would be much harder for a small firm. Thus, litigation by insult is much more likely to be effective when deployed by defendants because they usually have disproportionate financial resources at their disposal.

#### D. *Litigation by Insult Prevails*

Litigation by insult is often tied to specific legal arguments that make it difficult for plaintiffs and their lawyers to prevail in civil rights cases. They seek to make it difficult for plaintiffs’ lawyers to attain attorney’s fees, try to have cases dismissed for not meeting rigorous pleading requirements, and seek to have plaintiffs thrown out due to technical standing problems. None of these strategies has anything to do with whether plaintiffs have meritorious complaints about inaccessible buildings. If government lawyers were allowed to bring these kinds of cases, few of these arguments would be available. In other words, litigation by insult builds on the challenges and inequities underlying civil rights litigation.

##### 1. Race to Correct

A successful tactic used by defendants is to rush to correct alleged violations and then argue that plaintiffs’ attorneys should not attain any attorney’s fees for bringing these problems to the defendant’s attention.<sup>341</sup> The most favorable precedent on this issue for plaintiffs is the Eleventh Circuit decision in *Sheely v. MRI Radiology Network, P.A.*,<sup>342</sup> in which the court found that a defendant’s

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reasonably be drawn is that in order to stand or walk, Sharp requires the aid of the parallel bars or a walker.”).

<sup>339</sup> See *Attorneys*, METZ & HARRISON, LLP, <http://www.metzharrison.com/attorneys.html> [<https://perma.cc/L78D-2TPR>] (last visited Dec. 21, 2019).

<sup>340</sup> See *Firm History*, GREENBERG TRAUIG, LLP, <https://www.gtlaw.com/en/general/our-firm/firm-history> [<https://perma.cc/JLJ2-7F5E>] (last visited Dec. 21, 2019).

<sup>341</sup> See, e.g., *Access 4 All, Inc. v. BAMCO VI, Inc.*, No. 1:11-cv-61007, 2012 WL 33163, at \*5 (S.D. Fla. Jan. 6, 2012) (concluding that case is moot because “there is nothing in the record to suggest that Defendant’s ADA non-compliance was a continuing and deliberate practice”); *Nat’l All. for Accessibility, Inc. v. Walgreen Co.*, No. 3:10-cv-00780, 2011 WL 5975809, at \*3 (M.D. Fla. Nov. 28, 2011) (finding that “it is ‘absolutely clear’ that the ADA violations identified by Plaintiffs cannot ‘reasonably be expected to recur’”); *Kallen v. J.R. Eight, Inc.*, 775 F. Supp. 2d 1374, 1379 (S.D. Fla. 2011) (stating that it is untenable for plaintiff “to suggest that once the renovations are completed they could be undone”).

<sup>342</sup> 505 F.3d 1173 (11th Cir. 2007).

voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of that practice.<sup>343</sup>

Even in the Eleventh Circuit, however, district courts have routinely found ADA accessibility cases to be moot and denied attorney's fees.<sup>344</sup> This is especially true in cases against large corporate defendants who can quickly marshal resources to try to solve any accessibility issues alleged in a complaint and then ask for sympathy for their decades-long failure to comply. One good example is an accessibility lawsuit filed against Walgreens's Lake City, Florida, store by the National Alliance for Accessibility.<sup>345</sup> Plaintiffs alleged that the store had numerous architectural barriers, such as inaccessible parking spaces, entrances, paths of travel, and restroom facilities.<sup>346</sup> All of these accessibility problems were visible. In fact, shortly after the suit was filed, Walgreens hired an expert who submitted a report detailing instances of noncompliance.<sup>347</sup> As the court noted (as a factor in Walgreens's favor), the defendant never argued that it was originally in compliance.<sup>348</sup>

Citing *Sheely*, the district court examined whether the conduct was isolated or unintentional, whether cessation of offending conduct was "motivated by a genuine change of heart or timed to anticipate suit," and whether defendant had acknowledged liability to determine whether to dismiss the case as moot.<sup>349</sup> Even though Walgreens had a duty since the ADA was enacted in 1990 to ensure that such apparent accessibility defects were not present and readily found the violations once a lawsuit was commenced, the court concluded that Walgreens's violations were "unknowing and unintentional."<sup>350</sup> It viewed Walgreens's expenditure of "substantial resources to make its store ADA-compliant" as a "genuine[] attempt[] to comply with the law"<sup>351</sup> rather than as a ploy to avoid attorney's fees and costs. Although ignorance of the law is usually not considered a valid defense, Walgreens convinced the court that its conduct was unknowing and unintentional because it simply did not bother to look at obvious violations (until it was sued). Further, the court concluded that Walgreens would be vigilant to make sure that violations did not occur in the future even as these modifications might deteriorate and need updating.<sup>352</sup> One of the modifications

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<sup>343</sup> *See id.* at 1177.

<sup>344</sup> *See, e.g., Nat'l All. for Accessibility*, 2011 WL 5975809, at \*1 (denying plaintiffs' request for attorney's fees when defendant corporation fixed ADA violations after suit was filed).

<sup>345</sup> *See id.*

<sup>346</sup> *Id.*

<sup>347</sup> *See id.*

<sup>348</sup> *See id.* at \*3.

<sup>349</sup> *See id.* at \*2 (citing *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1183 (11th Cir. 2007)) (noting three factors used to determine if wrongful behavior could reasonably be expected to recur).

<sup>350</sup> *Id.* at \*3.

<sup>351</sup> *Id.*

<sup>352</sup> *See id.*

was “fixing cracks in a curb ramp.”<sup>353</sup> Anyone who has walked around outside knows how common it is for curb ramps to be in disrepair and how important safe curb ramps are for someone who uses a wheelchair or a cane. While prior precedent purportedly put the burden of proof on the defendant to demonstrate that it is unlikely to be out of compliance in the future,<sup>354</sup> the court bent over backwards to accept the defendant’s *mea culpa* explanations and determine the case was moot (and therefore not eligible for attorney’s fees). This case reflected unwarranted sympathy for the corporation and little appreciation of the importance of having a court enter an injunction to prevent repeat violations as well as allow lawyers to be paid for their work. This kind of sympathy is likely the result of repeated public insults against those who seek to use litigation to attain a more accessible society.

## 2. Specific Pleading Requirements

ADA defendants also couple litigation by insult with narrow pleading requirements for filing lawsuits. This strategy is particularly effective because of the “rush to repair” problem described above.

For example, in *Oliver v. Ralphs Grocery Co.*,<sup>355</sup> A.J. Oliver sued Ralphs Grocery Company and Cypress Creek Company alleging that a Food 4 Less grocery store was not ADA compliant.<sup>356</sup> In his complaint, Oliver indicated that he uses a motorized wheelchair and found eighteen separate architectural barriers to using the facility.<sup>357</sup> Seeking to avoid paying attorney’s fees as a result of this successful litigation, Ralphs began eliminating many of these architectural barriers.<sup>358</sup> Four months after the deadline had passed to file an amended complaint, Oliver filed an expert report identifying approximately twenty architectural barriers at the Food 4 Less store.<sup>359</sup> Plaintiff’s lawyer openly explained that:

his delays in identifying the barriers at the facility were part of his legal strategy: he purposely “forces the defense to wait until expert disclosures (or discovery) before revealing a complete list of barriers,” because

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<sup>353</sup> *Id.* (“Walgreens made a number of repairs to its facility, including fixing cracks in a curb ramp, installing electric door openers on the restrooms, placing insulating wrap around the pipes in the restrooms, and installing ADA-compliant hardware on the doors of the stalls.”).

<sup>354</sup> See *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000) (“As just noted, a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.” (citing *United States v. Concentrated Phosphate Exp. Ass’n*, 393 U.S. 199, 203 (1968))).

<sup>355</sup> 654 F.3d 903 (9th Cir. 2011).

<sup>356</sup> See *id.* at 905.

<sup>357</sup> See *id.*

<sup>358</sup> See *id.* at 906.

<sup>359</sup> See *id.*

otherwise a defendant could remove all the barriers prior to trial and moot the entire case.<sup>360</sup>

Given that defendant had notice since 1990 of the need to create an accessible structure, plaintiff's lawyer did not want to risk mooted the case by listing every accessibility problem with specificity well before trial.

Plaintiff's strategy failed. The district court refused to consider the new barriers listed in the expert's report and mooted the barriers that were already remedied.<sup>361</sup> The court of appeals affirmed the lower court's ruling.<sup>362</sup>

Defense counsel used litigation by insult to persuade the court to grant its motion for summary judgment. Defense counsel accused plaintiff's lawyer of using a "common ploy" of attempting "to thwart defendants from fixing all alleged barriers and mooted his ADA claims."<sup>363</sup> Further, defense counsel criticized plaintiff's counsel for filing "over a thousand ADA cases in the Southern District of California alone, and [being] frequently reprimanded for not sufficiently identifying alleged barriers, misleading the court regarding applicable case law, lying about his client's disability, and coaching his clients to lie."<sup>364</sup> In support of the argument that plaintiff's counsel is "frequently reprimanded," the defense's motion cited one example of a court awarding a different defendant attorney's fees in a case involving the same plaintiff.<sup>365</sup> There was no suggestion in this case that the newly alleged defects were erroneous; the expert report was allegedly not timely.<sup>366</sup> The passage of ADA Title III in 1990 did not provide defendants sufficient notice of compliance requirements, including the need to conduct their own accessibility audit.<sup>367</sup> Instead, plaintiff's case was dismissed for waiting four *months* to conduct an accessibility audit of defendant's business after filing suit.<sup>368</sup>

These arguments were possible (and successful) because of the limited relief available under ADA Title III due to pleading problems stemming from rigid pleading rules,<sup>369</sup> attorney's fees problems due to *Buckhannon*,<sup>370</sup> and the

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<sup>360</sup> *Id.* at 906 n.7.

<sup>361</sup> *See id.* at 906.

<sup>362</sup> *See id.* at 911.

<sup>363</sup> *See* Appellee Ralphs Grocery Co.'s Answering Brief at 6, *Oliver*, 654 F.3d 903 (No. 09-56447), 2010 WL 4316229, at \*6.

<sup>364</sup> *Id.*

<sup>365</sup> *See id.* (citing *Peters v. Winco Foods, Inc.*, 320 F. Supp. 2d 1035 (E.D. Cal. 2004)).

<sup>366</sup> *Id.* at \*14 (noting that plaintiff should "have proceeded by filing a *timely* motion to amend the complaint" (citing *Pickern v. Pier 1 Imps., Inc.*, 457 F.3d 963, 969 (9th Cir. 2006))).

<sup>367</sup> *See* Appellant's Reply Brief at 15, *Oliver*, 654 F.3d 903 (No. 09-56447), 2010 WL 4316229, at \*15.

<sup>368</sup> *See* *Oliver v. Ralphs Grocery Co.*, 07-cv-02301, 2009 WL 10680616, at \*6 (S.D. Cal. Aug. 26, 2009), *aff'd sub nom.*, *Oliver v. Ralphs Grocery Co.*, 654 F.3d 903 (9th Cir. 2011).

<sup>369</sup> *See* *Miller*, *supra* note 262, at 1-17 (criticizing how recent decisions have made it exceedingly difficult for plaintiffs to have a meaningful day in court).

<sup>370</sup> *See* *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 598 (2001) ("The 'catalyst theory' is not a permissible basis for the award of attorney's fees under the FHAA and ADA.").



limited availability of only injunctive relief under federal law. It is impossible to attain injunctive relief if a problem is cured, but if the plaintiff does not detail all the barriers that need to be cured at the time of filing suit, then the plaintiff fails to meet the required pleading rules. In other words, the success of litigation by insult depends on the preexisting procedural rules that make accessibility cases so difficult to bring. Without narrow pleading rules and strict attorney's fee requirements, a court may be able to fend off the insults as scurrilous and irrelevant. Instead, courts have repeatedly supported the defendant's arguments.

### 3. Standing Arguments

Defendants also ridicule so-called serial litigants by suggesting that they could not possibly be interested in visiting that many businesses in their neighborhood. For example, Glen Coleman openly acknowledges that he is a plaintiff who files numerous barriers-to-access lawsuits under the ADA. In seeking to have his case dismissed, defendant-restaurant argued that it was implausible that Coleman might want to return to fourteen different establishments, including five eating establishments "and even a funeral home."<sup>371</sup> The defendant also insisted that plaintiff's status as a "serial ADA litigant" meant that he should have to allege and prove "more than an intent to return to places previously visited."<sup>372</sup>

Although this strategy did not result in a dismissal of the claim against the restaurant in this case, it has worked in many other lawsuits.<sup>373</sup> In *Rosenkrantz v. Markopoulos*,<sup>374</sup> the court insisted that the plaintiff must detail concrete plans for when he might want to return to the defendant hotel.<sup>375</sup> Unlike nondisabled

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<sup>371</sup> Motion to Dismiss, Strike Certain Claims or, in the Alternative, Stay Litigation Pending Remediation & Memorandum of Law in Support Thereof at 13, *Coleman v. Pritchett*, No. 5:06-cv-00040 (N.D. Fla. Apr. 14, 2006), 2006 WL 1409014, at \*13 (discussing plaintiff's fourteen "largely cookie-cut complaints").

<sup>372</sup> *Id.* at 6 (describing holdings in prior ADA lawsuits).

<sup>373</sup> *See, e.g., Access for Am., Inc. v. Associated Out-Door Clubs, Inc.*, 188 F. App'x 818, 818-20 (11th Cir. 2006) (per curiam) (affirming dismissal based on lack of standing for not demonstrating "any reasonable chance of his revisiting the Track, other than 'someday'"); *id.* at 819 (Barkett, J., dissenting) (criticizing majority for requiring too specific an intention to return, especially in light of plaintiff's assertion that he "traveled to the Track six or eight times per year for the last three years"); Defendant's Motion to Dismiss & Memorandum of Law in Support Thereof at 2, *Associated Out-Door Clubs, Inc.*, 188 F. App'x 818 (No. 8:04-cv-00650), 2004 WL 2742009, at \*2 (arguing that this "case is yet another example of the 'cottage industry' into which ADA-related litigation has evolved" and describing plaintiff as "serial plaintiff"); Defendant's Memorandum of Law in Support of Its Motion to Dismiss Plaintiffs' Complaint for Lack of Subject Matter Jurisdiction at 2, *Access for Am., Inc. v. Busch Junction Enters.*, No. 8:04-cv-00653 (M.D. Fla. 2004), 2004 WL 2742208, at \*2 (representing successful motion to dismiss in which defendant argued that plaintiff had no plan to return to defendant's hotel because he had filed numerous lawsuits, lived about 100 miles away from this property, and had limited income selling "pencils in front of grocery stores and post offices").

<sup>374</sup> 254 F. Supp. 2d 1250 (M.D. Fla. 2003).

<sup>375</sup> *See id.* at 1252.

individuals, the district court was not willing to entertain the likelihood that he might travel “hundreds of miles” to visit defendant’s hotel.<sup>376</sup> Because the court saw the purpose of the litigation as making it possible for only the listed plaintiff to visit the hotel (rather than the disability community generally), it was not willing to let plaintiff’s case withstand a motion to dismiss. Similarly, the court dismissed Steven Brother’s lawsuit against a hotel chain because he lived several hundred miles away from the hotel chain and could only allege a general intent to return to the facility.<sup>377</sup> Inappropriately, the court noted in its statement of facts that plaintiff was unemployed and received social security checks and food stamps.<sup>378</sup>

The Florida court was so disturbed by Mr. Brother’s attempt to use the ADA to make hotels accessible that it offered these extensive remarks after dismissing his case:

If history is any guide, then William Charouhis and his clients will adjust to this ruling so that their future filings satisfy Article III’s standing requirements. When that occurs, this Court (respecting the separation of powers) will be obligated to allow such cases to proceed.

This being said, it should be emphasized that the system for adjudicating disputes under the ADA cries out for a legislative solution. Only Congress can respond to vexatious litigation tactics that otherwise comply with its statutory frameworks. Instead of promoting “conciliation and voluntary compliance[,]” the existing law encourages massive litigation. “[P]re-suit settlements[,]” after all, “do not vest plaintiffs’ counsel with an entitlement to attorney’s fees” under the ADA. Moreover, the means for enforcing the ADA (attorney’s fees) have become more important and desirable than the end (accessibility for disabled individuals). This is particularly the case in the Middle District of Florida where the same plaintiffs file hundreds of lawsuits against establishments they purportedly visit regularly. This type of shotgun litigation undermines both the spirit and purpose of the ADA.<sup>379</sup>

This example sheds light on the strength of the power elite’s interconnected strongholds that can undermine effective civil rights reform. The defense bar does not even need to engage in litigation by insult when the courts themselves fail to see the value in private attorneys trying to use disabled plaintiffs to make facilities more accessible. The district court’s diatribe against the plaintiff’s lawyer by name is symptomatic of the broader failure to understand how the ADA’s accessibility standards are enforced. There is no governmental entity making sure that hotels, for example, have adequate accessible rooms. These

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<sup>376</sup> *Id.* at 1253.

<sup>377</sup> *See* Brother v. Tiger Partner, LLC, 331 F. Supp. 2d 1368, 1373 (M.D. Fla. 2004) (“While [Mr. Brother] asserts that he plans to return to the Defendant’s establishment, the record evidence indicates otherwise . . .”).

<sup>378</sup> *See id.* at 1369 (“Since 2000, Mr. Brother has been unemployed. As a result, he currently supports himself and his family through monthly social security checks and food stamps . . .”) (footnote omitted).

<sup>379</sup> *Id.* at 1375 (alterations in original) (citations omitted) (quoting *Rodriguez v. Investco, LLC*, 305 F. Supp. 2d 1278, 1281-82 (M.D. Fla. 2004)).

problems are only discovered one plaintiff at a time. Rather than be castigated as a serial plaintiff, Steven Brother and his lawyer William Charouhis could be thanked for their willingness to investigate and determine which hotels are not accessible. But, instead, suits like theirs are often dismissed because the disabled plaintiff does not have a credible claim of an interest to revisit the facility.<sup>380</sup>

The requirement that plaintiffs visit every facility owned by a defendant can have a chilling effect on accessibility litigation. In *Campbell v. Moon Palace, Inc.*,<sup>381</sup> defendant, in its motion for summary judgment, argued that plaintiff was an improper “serial plaintiff” and requested that the entire case be dismissed on that theory.<sup>382</sup> Although defendant did not attain a dismissal, the stringent legal standard developed in that case subsequently caused the dismissal of other accessibility cases. For example, in *Access 4 All v. Starbucks Corp.*,<sup>383</sup> the plaintiff alleged ADA violations in eighteen Starbucks locations within the Southern District of Florida but also listed approximately 300 other locations within Florida as containing similar violations. Defendant contended that plaintiffs lacked standing because they had “no evidence to substantiate their contention that they personally encountered any barriers to access at any of the 304 locations identified in the complaint.”<sup>384</sup> In this case, Starbucks claimed to have a policy of requesting patrons to move from a wheelchair-accessible table when someone needed access to such a table.<sup>385</sup> Of the stores that plaintiffs visited, they also found other violations such as sloped parking, a transaction counter that was too high, lack of accessible tables, a bathroom door opening the wrong way, and a too-narrow bathroom corridor.<sup>386</sup> The court refused to find that the plaintiffs had standing at any location they did not personally visit, even

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<sup>380</sup> See, e.g., *Access 4 All, Inc. v. Wintergreen Commercial P’ship, Ltd.*, No. 3:05-cv-01307, 2005 WL 2989307, at \*1 (N.D. Tex. Nov. 7, 2005) (dismissing on standing grounds); *Molski v. Mandarin Touch Rest.*, 385 F. Supp. 2d 1042, 1044 (C.D. Cal. 2005) (same); *Brother v. Rossmore Tampa Ltd. P’ship*, No. 8:03-cv-01253, 2004 WL 3609350, at \*4 (M.D. Fla. Aug. 19, 2004) (“Plaintiff’s professed intent to return to Defendant-hotel lacks credibility.”); *Brother v. CPL Invs., Inc.*, 317 F. Supp. 2d 1358, 1373 (S.D. Fla. 2004) (dismissing suit in favor of hotel owner).

<sup>381</sup> No. 1:11-cv-60274, 2011 WL 4389894 (S.D. Fla. Sept. 21, 2011) (reopened for consideration but without a clear reported resolution in *Campbell v. Moon Palace, Inc.*, 1:11-cv-60274, 2011 WL 6951846 (S.D. Fla. Dec. 15, 2011)).

<sup>382</sup> *Id.* at \*2 n.2.

<sup>383</sup> No. 1:11-cv-61010, 2012 WL 602603 (S.D. Fla. Feb. 23, 2012).

<sup>384</sup> *Id.* at \*2.

<sup>385</sup> See *id.* at \*3 (“Defendant has put forth evidence that it in fact has in place a corporate policy to provide wheelchair disabled customers with access to an accessible table when that table is in use by an able bodied person, by having employees ask and help to move non-disabled persons away from such tables.”).

<sup>386</sup> See *id.* at \*4 (“He testified that there were barrier issues with the front door weight (too heavy to open), the countertop heights, disabled table access, and bathroom doors not having sufficient opening space.”).

if their experts had visited those stores and reported violations.<sup>387</sup> By requiring the impossible, the court was able to shut down what it considered to be improper serial litigation. Such requirements reflect the limitation of a private mode of enforcement: only a government entity can pursue that kind of systemic theory.

One ironic problem that occurs in this context due to the ability of the power elite to use public insults so effectively is that private attorneys are afraid to litigate against major corporations because they know they will be drowned in defense pleadings. Instead, they may agree to take cases against small businesses that may be less likely to respond aggressively in litigation. This, in turn, feeds the media account of “drive-by litigation” against a helpless, sympathetic defendant.<sup>388</sup> If public enforcement of accessibility problems existed, then government entities might prioritize enforcement against major corporations who have the largest effect on people with disabilities. The private mode of enforcement may therefore cause plaintiffs to only sue the weakest defendants. This makes sense, of course, when one understands that the power elite may have agreed to precisely this mode of enforcement, knowing they would have the strength to push back against solo practitioners who sought to sue them. It should be no surprise that plaintiffs’ lawyers would seek to sue the defendants who are least likely to have the resources to aggressively fight back, just as the defense bar is most likely to use its resources to fight large-scale structural reform. Both sides are merely working under the neoliberal, one-plaintiff-at-a-time framework that Congress created. Yet it is the plaintiffs’ lawyers who are criticized as taking advantage of the very system that Congress created to avoid broad public, structural enforcement of these rights.

#### E. *Exhaustion and Delay*

While one can find instances where the litigation-by-insult strategy does not succeed, this strategy still serves to exhaust and delay the attainment of justice. Lengthy lawsuits or appeals are needed to remedy simple accessibility violations, sending the message to plaintiffs’ lawyers that this kind of litigation is rarely worth the effort.

Where defendants have allegedly remedied the defects raised in the plaintiff’s lawsuit before trial, plaintiffs may find themselves needing to survive years of litigation merely to overcome the mootness argument. For example, in *Pereira*

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<sup>387</sup> See *id.* at \*4 (“Because the Court has determined that Plaintiff has standing regarding 31 locations that one of the Plaintiffs actually visited, and does not have standing as to the other locations, the expert reports did not, in this action, create standing for Plaintiffs.”).

<sup>388</sup> When I deliver this paper at workshops and conferences, I am always asked to acknowledge sympathy with the notion that there is vexatious Title III litigation. My answer is that Rule 11 is designed to deal with frivolous litigation. The so-called vexatious litigation is virtually never frivolous. The ADA violations do exist, which is why the plaintiffs are often able to obtain settlements. Further, there is benefit to defendants genuinely having to worry about being sued for ADA violations because such concerns might increase voluntary compliance. In the absence of the availability of monetary relief, corporations need some financial reason to engage in compliance. Fear of litigation can act as such encouragement.

*v. Ralph's Grocery Co.*,<sup>389</sup> plaintiff sued twenty-three grocery stores in Southern California on January 17, 2007, alleging that they did not provide sufficient access to persons who use wheelchairs or scooters for mobility.<sup>390</sup> The parties agreed that defendant corrected all of the accessibility issues raised in plaintiff's complaint, yet plaintiff argued the case was not moot because the challenged conduct could be expected to recur. Plaintiff argued that "over time parking lots will need to be restriped and handicapped accessible signage will need to be repaired and/or replaced."<sup>391</sup> Defendant argued that the case should be mooted, because the court could readily believe that defendant intended to fully comply with the ADA in the future.<sup>392</sup> The district court accepted the mootness argument, finding:

Plaintiffs allege ADA violations that are of a physical nature, not due to an ineffective policy. For example, Plaintiffs alleged that the placement of toilets and the disabled parking signage are violative of the ADA, not that Defendant failed to enforce a policy to keep an accessible grocery store check-out line staffed.<sup>393</sup>

The argument that the facility *may* fall out of compliance was not considered sufficient to overcome the mootness problem. Thus, the court concluded, the plaintiff could not establish that the inaccessibility would be reasonably expected to recur, even though the Supreme Court had said in *Friends of the Earth v. Laidlaw Environmental Services, Inc.*<sup>394</sup> that the burden was on the *defendant*, not the plaintiff, to show that they were unlikely to fall out of compliance in the future.<sup>395</sup>

In an unpublished, 2-to-1 decision, the Ninth Circuit reversed the district court's decision.<sup>396</sup> Writing for the majority, Judge Kozinski found that the "defendant's 'voluntary cessation of allegedly illegal conduct' did not moot this case," and that the plaintiff had standing to challenge all the disability-related barriers.<sup>397</sup>

Although the court of appeals reversed the district court in *Pereira*, many other courts have ruled for defendants in similar ADA cases, thereby precluding plaintiffs' lawyers from obtaining any attorney's fees for their work in bringing accessibility violations to the attention of various defendants.<sup>398</sup>

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<sup>389</sup> No. 8:07-cv-00841, 2007 WL 7543254 (C.D. Cal. Oct. 25, 2007), *rev'd*, 329 F. App'x 134 (9th Cir. 2009).

<sup>390</sup> *See id.* at \*1.

<sup>391</sup> *Id.* at \*5.

<sup>392</sup> *See id.*

<sup>393</sup> *Id.* at \*4.

<sup>394</sup> *See* 528 U.S. 167 (2000).

<sup>395</sup> *Id.* at 190 ("As just noted, a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.").

<sup>396</sup> *Pereira v. Ralphs Grocery Co.*, 329 F. App'x 134 (9th Cir. 2009) (citing *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1047 (9th Cir. 2008)).

<sup>397</sup> *Id.* (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)).

<sup>398</sup> *See, e.g.*, cases cited *supra* note 341.

Defendants also use litigation by insult to seek to impose a backdoor notice requirement. A good example is *Rudder v. Costco Wholesale Corp.*,<sup>399</sup> in which the defendant was partially successful in having issues dismissed that were resolved after the case was filed.<sup>400</sup> The law firm Barbosa, Metz & Harrison, LLP, represented plaintiff Christie Rudder in this case.<sup>401</sup> Rudder is an individual with a disability who sustained various injuries in an automobile accident.<sup>402</sup> She is not able to stand independently and uses a wheelchair for mobility.<sup>403</sup> She appears to have been involved in at least five other lawsuits involving lack of accessibility at a supermarket,<sup>404</sup> a local restaurant,<sup>405</sup> a hotel,<sup>406</sup> an office building,<sup>407</sup> and a nearby transportation entity.<sup>408</sup>

The *Costco* case was a suit against many businesses at a local parking center, with Costco being the anchor store and primary defendant.<sup>409</sup> Rudder made two allegations that related to the site itself: lack of accessible parking and lack of accessible path of travel.<sup>410</sup> The other allegations were specific to Costco.<sup>411</sup> Because the parking and path-of-travel problems were common to all the stores at the facility, she had to name them all as defendants in the lawsuit.<sup>412</sup>

Rather than acknowledge that the shopping center was out of compliance with basic rules about parking and site accessibility, Costco attacked the right of the plaintiff to name so many defendants in a lawsuit about access to a shopping center, accusing plaintiff's counsel of "extort[ing] separate nuisance settlements from each of the multiple defendants."<sup>413</sup> Further, the defendant argued that the case against Costco should be dismissed "for failure to adequately provide notice

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<sup>399</sup> No. 8:12-cv-00128, 2013 WL 5509129 (C.D. Cal. Sept. 20, 2013).

<sup>400</sup> *Id.* at \*6.

<sup>401</sup> Complaint for Injunctive Relief & Damages at 1, *Costco Wholesale Corp.*, No. 8:12-cv-00128 (C.D. Cal. filed Jan. 26, 2012) [hereinafter *Costco* Complaint].

<sup>402</sup> *Id.* at \*1.

<sup>403</sup> *Id.*

<sup>404</sup> Complaint for Injunctive Relief & Damages at 2-3, *Rudder v. Fresh & Easy Neighborhood Market, Inc.*, No. 8:11-cv-01884 (C.D. Cal. filed Nov. 4, 2011), 2011 WL 9372542.

<sup>405</sup> Christie Rudder's First Amended Complaint for Injunctive Relief & Damages, *Rudder v. Marmalade Café*, No. 2:10-cv-08498 (C.D. Cal. filed Dec. 16, 2010), 2010 WL 8266721.

<sup>406</sup> First Amended Complaint for Injunctive Relief & Damages at 1, *Rudder v. Pansuria*, No. 30-2015-00793966-CU-MC-CJC (Cal. Super. Ct. filed Sept. 23, 2015), 2015 WL 13653215.

<sup>407</sup> Complaint for Injunctive Relief & Damages at 2, *Rudder v. Chase Partners, Ltd.*, No. 8:11-cv-00182 (C.D. Cal. filed Feb. 1, 2011), 2011 WL 465993.

<sup>408</sup> Complaint for Injunctive Relief & Damages at 2, *Rudder v. L.A. Cty. Metro. Transp. Auth.*, 2:12-cv-00840 (C.D. Cal. filed Jan. 31, 2012), 2012 WL 4843248.

<sup>409</sup> See *Costco* Complaint, *supra* note 401, at 4.

<sup>410</sup> *Id.* at 6-7.

<sup>411</sup> *Id.* at 7-10.

<sup>412</sup> *Id.* at 4, 6-7.

<sup>413</sup> Defendants' Memorandum of Points & Authorities in Support of Motion to Sever and Dismiss Based on Misjoinder at 3, *Rudder v. Costco Wholesale Corp.*, No. 8:12-cv-00128 (C.D. Cal. filed Feb. 25, 2013).

to Costco” and for pulling a “‘bait and switch’ by filing a complaint and then go[ing] fishing for additional violations with her expert in tow.”<sup>414</sup>

Despite Costco’s arguments about lack of notice, the original complaint alleged many of the violations that were still found to exist when the court resolved the defendant’s summary judgment motion on September 20, 2013, more than a year after she filed the original lawsuit.<sup>415</sup> Although Costco did not succeed in having the entire case dismissed, their strategy was partially successful.

The notice strategy is tied to a mootness strategy. Defendants seek to insist that plaintiffs name every ADA violation at the time they file the lawsuit so that they can rush to cure each of those violations before trial and then argue mootness. Even when a plaintiff cannot get into a facility because of an accessibility violation, the defendant seeks to argue that plaintiff needed to name all potential defects in the initial lawsuit. As the Ninth Circuit has said, “[I]t would be ironic if not perverse to charge that the natural consequence of this deterrence, the inability to personally discover additional facts about the defendant’s violations, would defeat that plaintiff’s standing to challenge other violations at the same location that subsequently come to light.”<sup>416</sup> Nonetheless, not all circuits accept this rule; as the previous Section indicated, plaintiffs are often found not to have standing when they cannot allege repeated exposure to defendant’s inaccessible facilities.

After vigorously attacking plaintiffs’ standing and ability to represent a class, defendants then challenge plaintiffs’ claims for attorney’s fees. The size of the attorney’s fee bill, of course, is related to the number of objections thrown at them by opposing counsel. Again, litigation by insult is used to lower the attorney’s-fee petition.<sup>417</sup>

A case in which a plaintiff successfully deflected this strategy is *Charlebois v. Angels Baseball, LP*.<sup>418</sup> Paul Charlebois filed a complaint against Angels Baseball after he sought to attend a baseball game and have a good line of sight in the Club level, where there is also portable food service.<sup>419</sup> Plaintiff sought to certify a class of wheelchair users who have sought or would seek in the future

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<sup>414</sup> See Defendant Costco Wholesale Corporation’s Memorandum in Opposition to Plaintiff’s Summary Judgment Motion at 3, *Costco Wholesale Corp.*, No. 8:12-cv-00128 (C.D. Cal. filed June 3, 2013) (objecting to plaintiff’s raising of additional violations and issues not included in complaint).

<sup>415</sup> See *Costco Wholesale Corp.*, 2013 WL 5509129, at \*5 (“[T]he undisputed facts show Costco does not currently comply with the ADA . . .”).

<sup>416</sup> *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1042 (9th Cir. 2008).

<sup>417</sup> See discussion *supra* Section II.D.3 (discussing success of various arguments defendants make to attack plaintiffs’ standing).

<sup>418</sup> 993 F. Supp. 2d 1109, 1126 (C.D. Cal. 2012).

<sup>419</sup> See Order Granting Plaintiff’s Motion for Class Certification at 2, *Charlebois*, 993 F. Supp. 2d 1109 (C.D. Cal. 2011) (No. 10-cv-00853), 2011 WL 2610122, at \*1 (noting that, because there were no accessible seats in Club level, defendant allegedly offered to carry Charlebois to Club-level seat, which Charlebois considered “humiliating and insensitive”).

to attend a game at the stadium.<sup>420</sup> Defendants apparently did not dispute that they had an insufficient number of wheelchair-accessible seats or, in particular, that they had very few such seats in the Club section of the stadium.

This should not have been a difficult claim to certify as a class.<sup>421</sup> People who use wheelchairs, like much of the general public, might enjoy viewing a professional baseball game. And like the general public, those people might want to sit in seats where vendors sell food. In fact, their need to use a wheelchair to travel, combined with the apparent inaccessibility of the newly renovated stadium, might make them more likely than the general public to seek to purchase food from a vendor who walks around the stadium. Despite the obviousness of the plaintiff's ability to meet these requirements, defendant strongly opposed class certification, and the court requested that the plaintiff engage in extensive surveys and data analysis to certify the class.<sup>422</sup>

In opposing class certification, defendant argued that plaintiff could only establish that there were thirty-one potential class members who have suffered or will suffer harm from the inaccessible stadium design despite the fact that thousands of individuals attend baseball games at the stadium.<sup>423</sup> After extensive litigation and fact-gathering by both sides, the court ruled:

This Court believes that attending a baseball game is more akin to attending a movie than it is to going to a golf course. Baseball is often referenced as America's favorite past-time, and given that Plaintiff's class includes future attendees, it is reasonable to presume that many wheelchair-using baseball fans will emerge as future class members based on the statistical evidence provided by Plaintiff through the shared survey and, to a limited extent, Plaintiff's supplemental data.<sup>424</sup>

The class certification skirmish was typical of the heated nature of this litigation. Thus, not surprisingly, the defendants then attacked plaintiff's request for attorney's fees after this case finally settled.<sup>425</sup> Defendants unsuccessfully argued that attorneys at large, prestigious firms were not an appropriate comparator,<sup>426</sup> that one lawyer's fees should be reduced because another judge in another case more than four years ago had reduced his fees,<sup>427</sup> that the fees

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<sup>420</sup> See *id.* at 3 (noting that plaintiff alleged that the stadium had inadequate accessible seating, that the ticketing system was inaccessible, and that employees were not trained to accommodate wheelchair users' requests).

<sup>421</sup> See *id.* (stating that party seeking class certification must show "(1) numerosity of plaintiffs; (2) common questions of law or fact predominate; (3) the named plaintiff's claims and defenses are typical; and (4) the named plaintiff can adequately protect the interests of the class" (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992))).

<sup>422</sup> See *id.* at 8.

<sup>423</sup> See *id.* at 10.

<sup>424</sup> *Id.* at 14.

<sup>425</sup> See *Charlebois*, 993 F. Supp. 2d at 1115-23.

<sup>426</sup> See *id.* at 1120 (rejecting argument that large firms with high hourly rates should not be used as comparator for boutique firm with twelve attorneys).

<sup>427</sup> See *id.* at 1121 (rejecting argument that fees should be reduced for one member of Class Counsel because court had reduced fees in older, factually simple case).



should be reduced because they were more than defendants paid their lawyers,<sup>428</sup> that one lawyer's fees should not be included because he was not counsel of record,<sup>429</sup> that the hours they worked on the complaint and motion for summary judgment were excessive,<sup>430</sup> and that some work was duplicative.<sup>431</sup> The court observed: "[I]f Defendants had wished to not pay Class Counsel's fees, Defendants could have settled earlier."<sup>432</sup>

Nonetheless, the attorney's-fees petition shows how difficult and time-consuming it can be to win a relatively straightforward accessibility case about stadium seating. The plaintiff's request for attorney's fees showed that the plaintiff's attorneys had devoted 1709 hours to this case even though it *settled* without litigation.<sup>433</sup> Further, as the court noted, this kind of private enforcement is essential because there is little public enforcement of disability access.<sup>434</sup> And as noted by defendants, this strategy was partially successful against one of the lawyers in another gruesome civil rights case in which his attorney's fees were somewhat reduced.<sup>435</sup>

Even when plaintiffs are successful in these kinds of cases, defendants' tactics often involve enormous delays in the attainment of an accessible facility. Attorney Amy Robertson documents the impact of these kinds of tactics in a case challenging the inaccessibility of Cracker Barrel's parking lot.<sup>436</sup> She chose this example because a recent amicus brief filed in the Third Circuit by an industry trade group described the Cracker Barrel case with the kind of public

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<sup>428</sup> *See id.* at 1123 (stating that a defendant's attorneys' rates is not the standard by which a plaintiff's attorneys' rates are measured).

<sup>429</sup> *See id.* at 1124 (rejecting defendant's argument because precedent supported opposite conclusion).

<sup>430</sup> *See id.* (rejecting defendant's argument that hours spent on unfiled motion were excessive and noting that motion was not filed because settlement was negotiated shortly before motion deadline).

<sup>431</sup> *See id.* at 1125 (rejecting defendant's argument that hours billed for reviewing another attorney's work were duplicative).

<sup>432</sup> *Id.* (noting that defendants chose to negotiate settlement only days before summary judgment motion deadline).

<sup>433</sup> *See id.* at 1117 (reporting that plaintiff's attorney's fees totaled \$745,835.37).

<sup>434</sup> *See id.* at 1114 ("[T]his lawsuit has resulted in the enforcement of an important right affecting the public interest, namely, the right of wheelchair users to have affordable access to facilities.").

<sup>435</sup> *See Benham v. S & J Sec. & Investigation, Inc.*, No. B207420, 2010 WL 761586, at \*3 (Cal. Ct. App. Mar. 8, 2010) (involving allegations of false imprisonment, negligence, assault and battery, intentional infliction of emotional distress, and violations of California's civil rights laws regarding actions of security officers during improper accusation of shoplifting).

<sup>436</sup> *See* AMY F. ROBERTSON, CIVIL RIGHTS EDUC. & ENF'T CTR., ADA DEFENSE LAWYERS PROLONG LITIGATION AND POSTPONE ACCESS: A CASE STUDY OF LITIGATION ABUSE 1 (2018), <https://creeclaw.org/wp-content/uploads/2018/02/ADA-Defense-Abuse-A-Case-Study.pdf> [<https://perma.cc/ZSY2-LRWT>] ("ADA defense counsel are already guilty of prolonging litigation, postponing access, and ultimately enriching themselves . . .").

insults that this Article has documented.<sup>437</sup> The Cracker Barrel plaintiffs were described as “clients [who] often identify a particular type of accessibility issue, and then bring the same claim over and over against different businesses,”<sup>438</sup> even though the plaintiffs eventually *prevailed* in this litigation.<sup>439</sup>

Rather than being an example of abusive litigation by *plaintiffs*, Robertson documents how it was the *defendants* that used every available stalling tactic to delay the implementation of an accessible parking lot in the Cracker Barrel litigation. Cracker Barrel’s lawyers filed twenty-one separate briefs over a two-and-a-half-year period while people with mobility impairments continued not to have access to Cracker Barrel parking lots.<sup>440</sup> The amicus brief criticized plaintiffs who bring numerous lawsuits against the same defendant for “excessive slopes or other accessibility issues in parking lots”<sup>441</sup> without considering why these claims almost always are successful due to the underlying inaccessible design of the parking lots at these stores. The implicit message of the amicus brief is that the inaccessibility of parking lots is a trivial issue that does not merit litigation.

The amici curiae brief reflects the strength of the power elite. This brief was funded by three trade associations representing various convenience stores and supermarkets.<sup>442</sup> The corporate and political elite have combined to weaken the ADA by trivializing the rights protected by this statute and castigating those who try to vindicate those rights. They acknowledge that “the class action mechanism and the prospect of recovering attorney fees under federal law provide alternative incentive to bring such litigation” and therefore argue that such mechanisms should be disfavored.<sup>443</sup> They do not hide their direct attempt to undermine the statute’s underlying enforcement mechanism. Rather, they simply do not want plaintiffs to be able to use this statute effectively, which would force them to make their facilities accessible against their corporate interests.<sup>444</sup>

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<sup>437</sup> See Brief of Amici Curiae National Ass’n of Convenience Stores et al. in Support of Appellant-Defendant & Reversal at 9, *Mielo v. Steak ’N Shake Operations, Inc.*, 879 F.3d 467 (3d Cir. 2018) (No. 17-2678), 2017 WL 5759712, at \*9 [hereinafter Amici Curiae Brief].

<sup>438</sup> *Id.*

<sup>439</sup> See *Heinzl v. Cracker Barrel Old Country Stores, Inc.*, No. 2:14-cv-01455, 2016 WL 2347367, at \*1 (W.D. Pa. Jan. 27, 2016) (certifying class action against Cracker Barrel because it lacked adequate ADA compliance policy).

<sup>440</sup> See ROBERTSON, *supra* note 436, at 4 (“Cracker Barrel’s lawyers *billed their client for the time spent drafting and filing 21 separate briefs in pursuit of this campaign of delay.*”).

<sup>441</sup> Amici Curiae Brief, *supra* note 437, at 9.

<sup>442</sup> The brief was listed as being on behalf of the “National Association of Convenience Stores, National Grocers Association, and Food Marketing Institute.” See *id.* at i.

<sup>443</sup> See *id.* at 8.

<sup>444</sup> Their effort was successful in the Third Circuit case in which the industry groups filed this amici brief. See *Mielo v. Steak ’N Shake Operations, Inc.*, 897 F.3d 467, 491 (3d Cir. 2018) (reversing district court’s class certification decision).

## IV. HOW CAN CIVIL RIGHTS ADVOCATES FIGHT BACK?

“Fear” is the title of a new book about the Trump Administration.<sup>445</sup> The title captures the effectiveness of the various strategies that have been historically used to scare civil rights plaintiffs from pursuing their rights. Litigation by insult is nothing new. It is a modern version of the old story of using intimidation and fear to prevent people from coming forward to secure their civil rights. It is a tactic to stop structural reform. It is not merely a personal tactic of humiliation. And although it is not necessarily directly connected to threats of physical harm and violence, it can be.<sup>446</sup>

By using a case study of litigation under the ADA, this Article has shown how litigation by insult can be especially effective when civil rights hang by a narrow thread. When a statute such as ADA Title III primarily permits relief by private attorney generals, only allows an injunctive relief remedy, and merely requires businesses to engage in improvements that are “readily achievable,” a strategy of litigation by insult can easily undermine the entire statutory scheme.<sup>447</sup> The power of this strategy to undermine any attempt for structural reform is that Congress’s response has been to seek to limit the structural scheme *even more*.

But it is not the case that the tactic of public insults inevitably succeeds even when civil rights may appear to hang by a weak thread. Although there is no way to know exactly why Senator John McCain saved the Affordable Care Act (“ACA”) by a single vote in the U.S. Senate, one might wonder if it was his response to the bully—Trump.<sup>448</sup> Douglas Holtz-Eakin, McCain’s chief domestic policy advisor, described McCain as a person who will “punch the bully for you.”<sup>449</sup>

The McCain episode is a revealing example of the toll paid by insults even if those insults are eventually overcome. The ACA was initially very unpopular,

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<sup>445</sup> See generally BOB WOODWARD, *FEAR: TRUMP IN THE WHITE HOUSE* (2018).

<sup>446</sup> See Seung Min Kim & Felicia Sonmez, *At Montana Rally, Trump Praises Congressman for Assaulting Reporter*, WASH. POST (Oct. 19, 2018, 12:11 PM), [https://www.washingtonpost.com/politics/at-montana-rally-trump-praises-congressman-for-assaulting-reporter/2018/10/18/1e1d0d1e-d304-11e8-8c22-fa2ef74bd6d6\\_story.html](https://www.washingtonpost.com/politics/at-montana-rally-trump-praises-congressman-for-assaulting-reporter/2018/10/18/1e1d0d1e-d304-11e8-8c22-fa2ef74bd6d6_story.html) (“‘Any guy that can do a body slam, he’s my kind of – he’s my guy,’ Trump said.”). See generally Thomas J. Scheff, *Runaway Nationalism: Alienation, Shame, and Anger*, in *THE SELF-CONSCIOUS EMOTIONS* 426 (Jessica L. Tracy, Richard W. Robins & June Price Tangney eds., 2007) (offering explanation for emergence of collective violence using dynamic theory of nationalism).

<sup>447</sup> See AMERICANS WITH DISABILITIES ACT TITLE III TECHNICAL ASSISTANCE MANUAL COVERING PUBLIC ACCOMMODATIONS AND COMMERCIAL FACILITIES § III-4.4200, <https://www.ada.gov/taman3.html> [<https://perma.cc/Y8HZ-N2A8>] (last visited Dec. 21, 2019) (“Public accommodations are required to remove barriers only when it is ‘readily achievable’ to do so.”).

<sup>448</sup> See Emmarie Huetteman, *McCain Hated Obamacare. He Also Saved It.*, NBC NEWS (Aug. 27, 2018, 1:21 PM), <https://www.nbcnews.com/health/obamacare/mccain-hated-obamacare-he-also-saved-it-n904106> [<https://perma.cc/UUV7-JWQQ>].

<sup>449</sup> *Id.*

with a barrage of ads about death panels and other parades of horrors.<sup>450</sup> The power elite's initial success in creating a negative public opinion of the ACA by using fear tactics is supported by research in the field of educational psychology. "Strong evidence of the persuasive power of fear appeals in political ads confirms theoretical expectations and echoes findings from a decades-old research tradition on fear appeals in public health campaigns."<sup>451</sup> Researchers find that negative messaging stimulates "bottom-up" reasoning, which is inductive rather than logical or deductive.<sup>452</sup> Thus, the initial barrage against the ACA may have fed bottom-up emotional responses while eight years of experience with the statute may have ultimately changed public opinion through a more logical inquiry. The ACA was actually quite popular by the 2018 midterms and may have helped Democrats in many races.<sup>453</sup>

But those eight years of patience were exacted at a high price; a different vote by McCain may have resulted in a different ending to this story. Slender threads are very fragile and do not always survive for eight years. Nonetheless, civil rights advocates sometimes have the stamina and strength to sustain them. Further interdisciplinary research might provide better understanding of when and how civil rights advocates can withstand a barrage of insults.

It is also important to remember that progressive change *can* happen without resort to public insults. Professor and civil rights advocate Michelle Alexander's best-selling, poignant, and fact-based account of mass incarceration in the United States<sup>454</sup> first brought important attention to this problem in 2010, with an initial print run of only 3000 copies from the New Press.<sup>455</sup> With enormous

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<sup>450</sup> See, e.g., Don Gonyea, *From the Start, Obama Struggled with Fallout from a Kind of Fake News*, NPR (Jan. 10, 2017, 4:08 PM), <https://www.npr.org/2017/01/10/509164679/from-the-start-obama-struggled-with-fallout-from-a-kind-of-fake-news> [https://perma.cc/HE7V-F6LW] (describing GOP's fierce opposition to ACA).

<sup>451</sup> Ted Brader, *Striking a Responsive Chord: How Political Ads Motivate and Persuade Voters by Appealing to Emotions*, 49 AM. J. POL. SCI. 388, 400-01 (2005) (citing Kim Witte & Mike Allen, *A Meta-Analysis of Fear Appeals: Implications for Effective Public Health Campaigns*, 27 HEALTH EDUC. & BEHAV. 591 (2000)).

<sup>452</sup> See *id.* at 402 ("When added to a negative message, fear-eliciting images and music stimulate 'bottom-up' reasoning on the basis of contemporary evaluations.").

<sup>453</sup> See, e.g., Jacob Weindling, *New Fox News Poll: Obamacare's Popularity Is at an All Time High*, PASTE MAG. (Oct. 18, 2018, 12:30 PM), <https://www.pastemagazine.com/articles/2018/10/new-fox-news-poll-obamacares-popularity-is-at-an-a.html> [https://perma.cc/AZZ9-2Z77].

<sup>454</sup> See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (rev. ed. 2012) (detailing legality of discriminating against convicted persons).

<sup>455</sup> MEDIA IMPACT PROJECT, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS: A CASE STUDY ON THE ROLE OF BOOKS IN LEVERAGING SOCIAL CHANGE 2* (2014), <http://mediaincimpactfunders.org/wp-content/uploads/2014/12/The-New-Press-NJC-Case-Study-Nov20141.pdf> [https://perma.cc/R7GA-3PDB] (describing book's growing demand following initial print run).

grassroots support from community organizers<sup>456</sup> and civil rights organizations,<sup>457</sup> important structural changes have occurred since 2010, like “banning the box” initiatives,<sup>458</sup> mass bailouts of inmates,<sup>459</sup> the curtailment of money bonds,<sup>460</sup> and the reinstatement of voting rights for convicted felons.<sup>461</sup> And the Black Lives Matter movement has managed to sustain its work on many of these issues despite even President Trump trying to bring them down through public insults.<sup>462</sup> While the changes that Alexander helped spur are not perfect, they show that the political left, too, can attain structural change—but those

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<sup>456</sup> The Media Impact Project describes the activism that has influenced her book as including:

activism on campuses through Students Against Mass Incarceration; standing-room-only events at churches around the country (including an 800-plus audience at Abyssinian Baptist Church in Harlem); marches organized by the Campaign to End the New Jim Crow; and sponsored events featuring Michelle Alexander in partnership with a range of nonprofit organizations, including the ACLU, the Drug Policy Alliance, Demos, the NAACP, and The Sentencing Project. These events provided an opportunity to reach individuals at the front lines of advocating for policy reform.

*Id.*

<sup>457</sup> The Media Impact Project includes the following events as being influenced by Alexander’s work:

In addition to events, *The New Jim Crow* also played an instrumental role in the Center for Constitutional Rights’ legal preparation in advance of the seminal case, *Floyd, et al. v. City of New York, et al.*—a class action lawsuit that challenged the New York Police Department’s practices of racial profiling and stop-and-frisks, with Judge Shira Scheindlin citing *The New Jim Crow* twice in her decision.

*Id.*

<sup>458</sup> See Beth Avery, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies*, NAT’L EMP. L. PROJECT (July 1, 2019), <https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/> [<https://perma.cc/4X5E-LMV7>] (stating that thirty-five states and over 150 cities and counties have adopted employment practices that ban questions about conviction histories on job applications).

<sup>459</sup> See, e.g., Jeffery C. Mays, *Human Rights Group to Bail Out 500 Women and Teenagers from Rikers*, N.Y. TIMES, Sept. 20, 2018, at A20 (describing bail effort led by the Robert F. Kennedy Human Rights group).

<sup>460</sup> See Lisa W. Foderaro, *Mercy vs. Risk as New Jersey Cuts Cash Bail*, N.Y. TIMES, Feb. 7, 2017, at A1 (stating that defendants are only required to post bail if they pose flight risk or are threat to public safety).

<sup>461</sup> See Frances Robles, *Florida Eases Voting Ban for Felons, Giving 1.4 Million a Second Chance*, N.Y. TIMES, Nov. 8, 2018, at F14 (describing restoration of voting rights for convicted felons who have served their sentences and were not convicted of murder or sexual abuse).

<sup>462</sup> See Dara Lind, *The President Pulled an “All Lives Matter” on DREAMers*, VOX (Jan. 31, 2018, 10:30 AM), <https://www.vox.com/2018/1/30/16953714/trump-state-union-immigration-dream-daca> [<https://perma.cc/G8BL-LJU9>]; see also *In Response to the State of the Union*, BLACK LIVES MATTER (Feb. 14, 2018), <https://blacklivesmatter.com/pressroom/responsestate-of-the-union/> [<https://perma.cc/45A4-XXC4>] (documenting Trump’s use of phrase “All Lives Matter” to undermine Black Lives Matter movement).

changes need to be strong in order to be sustained. As Alexander recounts, efforts to undermine those reforms will be immediate and need to be resisted.<sup>463</sup>

One must be cautious in suggesting a one-size-fits-all solution to the power of insults. Insults are contextual, so the appropriate response is likely contextual as well. Looking for a universal response, Michelle Obama said, “When they go low, we go high”; by contrast, in a riff on Obama’s famous phrase, Eric Holder said, “When they go low, we kick them!”<sup>464</sup> Neither universal response is likely to always work. Further, by the time the insults start flying, the response may be irrelevant. This Article has argued that insults can be successful because of the preexisting weakness of the underlying right that is being attacked. Thus, it is important to have a fortress *before* the fighting begins. The better analogy may be the “The Three Little Pigs.”<sup>465</sup> The civil rights community has a straw house that cannot withstand even a slight puff of air by the power elite. The civil rights community needs a brick house rather than a “fragile compromise.”<sup>466</sup> Then, the civil rights community need not hold its breath while waiting to see if a Senator McCain will display a thumbs up or a thumbs down.<sup>467</sup>

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<sup>463</sup> See Michelle Alexander, Opinion, *The Newest Jim Crow*, N.Y. TIMES, Nov. 11, 2018, at SR3 (arguing that risk assessment algorithms are based on factors that highly correlate with race and class).

<sup>464</sup> Herreria, *supra* note 41.

<sup>465</sup> JOSEPH JACOBS, *The Three Little Pigs*, in ENGLISH FAIRY TALES 69, 69-72 (1890).

<sup>466</sup> Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 BERKELEY J. EMP. & LAB. L. 377, 378 (2000) (“In return for a broad list of covered entities, civil rights advocates agreed to a limited set of remedies under ADA Title III.”).

<sup>467</sup> See Peter W. Stevenson, *The Iconic Thumbs-Down Vote that Summed Up John McCain’s Career*, WASH. POST (Aug. 27, 2017, 12:18 PM), <https://www.washingtonpost.com/politics/2018/08/27/iconic-thumbs-down-vote-that-summed-up-john-mccains-career> (describing shock of Senator McCain’s vote against GOP’s plan to repeal Obamacare).