GEORGE MASON AMERICAN INN OF COURT

DIVERSITY IN THE LEGAL PROFESSION AND BEYOND

January 23, 2018

Team Members:

- **Chidi I. James, Esq. Moderator**
- **Carole H. Capsalis, Esq.**
- **Derry Dean Sparlin, Jr., Esq.**
- **Mary Ann Kelly, Esq.**
- **Casey Chapman, Student Member**
- **Kelly Diebler, Student Member**
- **Rebecca Maietta, Student Member**

AGENDA

- Introduction of Panel and Overview of Presentation: 7:30 – 7:40
- The Diversity Conference: 7:40 – 8:00
- Diversity in the Legal System: 8:00 – 8:15
- Diversity in the Context of Employment Discrimination: 8:15-8:30
- Adjourn: 8:30

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DIVERSITY IN THE LEGAL PROFESSION AND BEYOND

I. Opening Statements – Chidi James (Blankingship & Keith), introduction of speakers.

A. **Carole Capsalis**
B. **Dean Sparlin**
C. **Mary Ann Kelly**

II. Why is Diversity Important?

In a 2016 ABA journal article, attorney Edward Kang, noted that "on a theoretical level, diversity is about social harmony"; however, in a legal context it is also about living up to our countries founding principles of freedom and equality. If we allow the quality of justice that one receives to be influenced by one's gender or ethnicity then we have failed to live up to our nations creed that

> " **all men are created equal**, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness."
>
> US Declaration of Independence, July 4, 1776

The 14th Amendment to the US Constitution was adopted in 1868 and it gave legal teeth to the principles espoused in the declaration of Independence. In pertinent part the 14th Amendment provided that

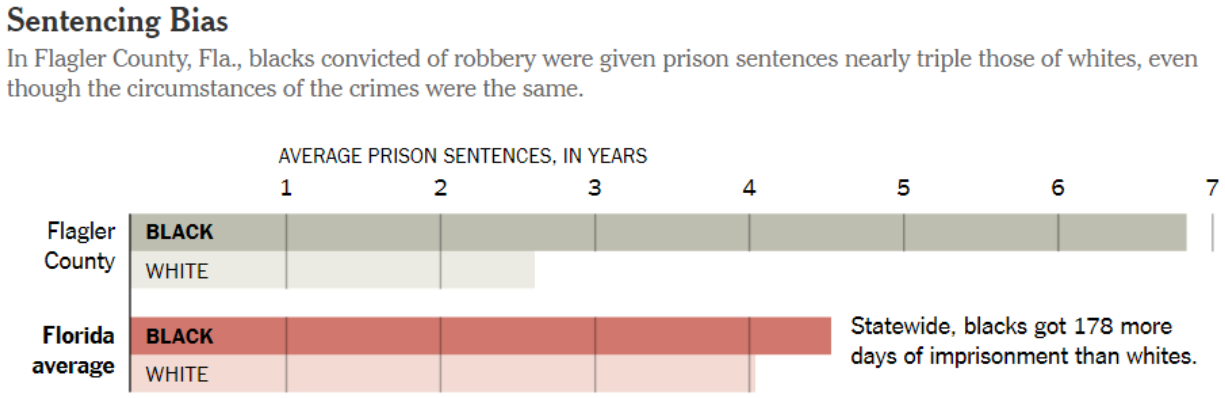
> **No state shall** make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor **deny to any person within its jurisdiction the equal protection of the laws.**
>
> US Constitution, Amendment XIV, July 8, 1868

If we live in a society where people of different gender and different ethnicities are receive differing levels of justice as a result of those differences, then we have not lived up to our constitutional principles and we have a moral obligation to take steps to do so.

III. Is there bias in the judicial system?

The racial bias of the American justice system has been documented by numerous studies. On December 17, 2016 the New York Times published an editorial entitled "Unequal Sentences for Blacks and Whites." The article notes that "*Decades of research have shown that the criminal courts sentence black defendants more harshly than whites."*

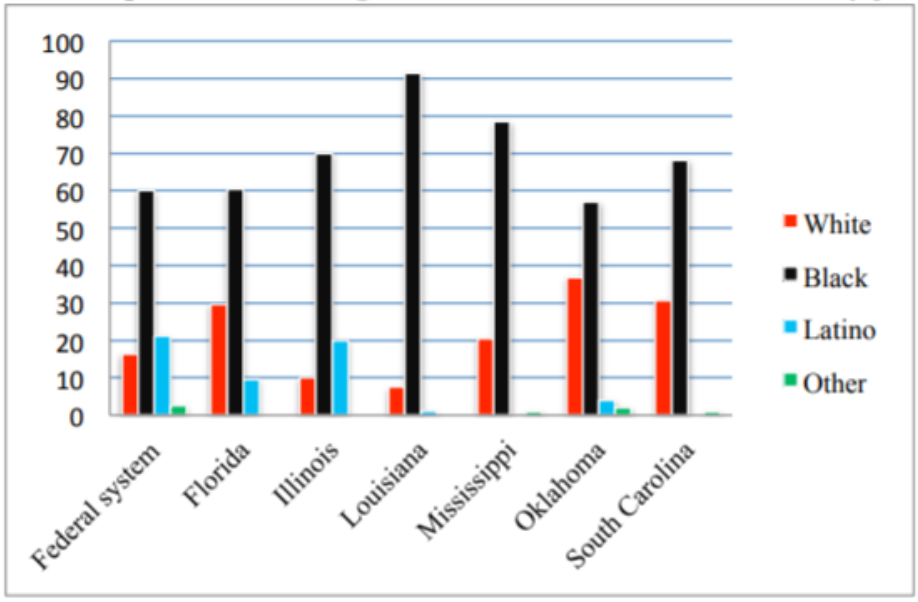
A study of criminal sentences handed down by Florida courts, particularly in Flagler County Florida showed that black defendants received longer imprisonment than white defendants for the same crime.



According to research sponsored by the American Civil Liberties Union greater racial disparities exist in sentencing for nonviolent crimes, especially property crimes and drug offenses. In particular, there are staggering racial disparities in life-without-parole sentencing for nonviolent offenses. Based on data provided to the ACLU by the U.S.

Sentencing Commission and state Departments of Corrections, the ACLU estimates that nationwide, 65.4 percent of prisoners serving LWOP for nonviolent offenses are Black, 17.8 percent are white, and 15.7 percent are Latino. According to data collected and analyzed by the ACLU, Black prisoners comprise 91.4 percent of the nonviolent LWOP prison population in Louisiana (the state with the largest number of prisoners serving LWOP for a nonviolent offense), 78.5 percent in Mississippi, 70 percent in Illinois, 68.2 percent in South Carolina, 60.4 percent in Florida, 57.1 percent in Oklahoma, and 60 percent in the federal system.

Figure 1: Race of prisoners serving LWOP for nonviolent offenses, by jurisdiction[21]



In addition to the statistical data, many people quickly point to perceived well publicized failures of the judicial system as a basis for their distrust in the judicial system. Notable examples of these perceived failures include:

Beating of Rodney King:

In 1991 in Los Angeles, a bystander videotaped police officers beating Rodney King, a black man, after a car chase. People in the African-American community had long complained of cases of police brutality. At long last, they had clear evidence — a videotape. But at the trial in state court, the jury acquitted the four officers of using excessive force. A major riot erupted in Los Angeles following the verdict.

Death of Trayvon Martin:

On the night of February 26, 2012, in Sanford, Florida, United States, George Zimmerman fatally shot Trayvon Martin, a 17-year-old African American high school student. Zimmerman, a 28-year-old mixed race Hispanic man, was the neighborhood watch coordinator for his gated community where Martin was visiting his relatives at the time of the shooting. Zimmerman shot Martin, who was unarmed, during an altercation between the two.

Zimmerman was charged with Martin's murder but acquitted at trial on self-defense grounds. The incident was reviewed by the Department of Justice for potential civil rights violations, but no additional charges were filed, citing insufficient evidence.

Death of Freddie Gray:

On April 12, 2015, **Freddie Carlos Gray, Jr.**, a 25-year-old Black American man, was arrested by the Baltimore Police Department for possessing what the police alleged was an illegal switchblade under Baltimore law. While being transported in a police van, Gray fell into a coma and was taken to a trauma center. Gray died on April 19, 2015; his death was ascribed to injuries to his spinal cord.

The medical investigation found that Gray had sustained the injuries while in transport. The medical examiner's office concluded that Gray's death could not be ruled an accident, and was instead a homicide, because officers failed to follow safety procedures "through acts of omission."

The prosecutors stated that they had probable cause to file criminal charges against the six police officers who were believed to be involved in his death. The officer driving the van was charged with second-degree "depraved-heart" murder for his indifference to the considerable risk that Gray might be killed, and others were charged with crimes ranging from manslaughter to illegal arrest.

In September 2015, it was decided that there would be separate trials for the accused. The trial against Officer William Porter ended in mistrial. Officers Nero, Goodson, and Rice were found not guilty at trial. The remaining charges against the officers were dropped on July 27, 2016.

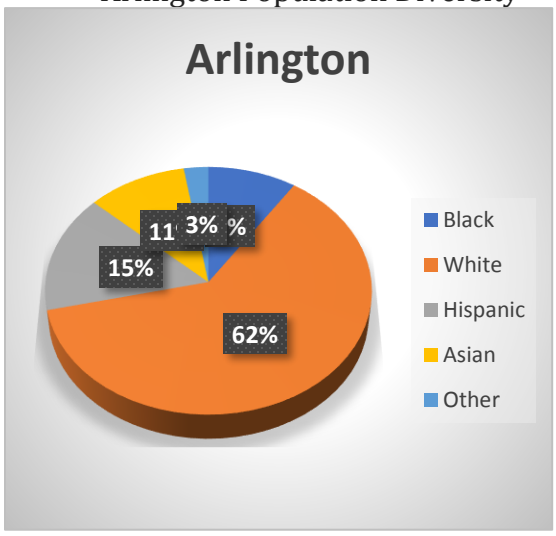
With these cases as a backdrop, it is understandable why many minorities have a distrust of the judicial system and a concern that all men may not equal in the eyes of the American justice system. Faith in the system is also undermined by a lack of minority representation in judicial system.

IV. Diversity In Virginia's Judicial System

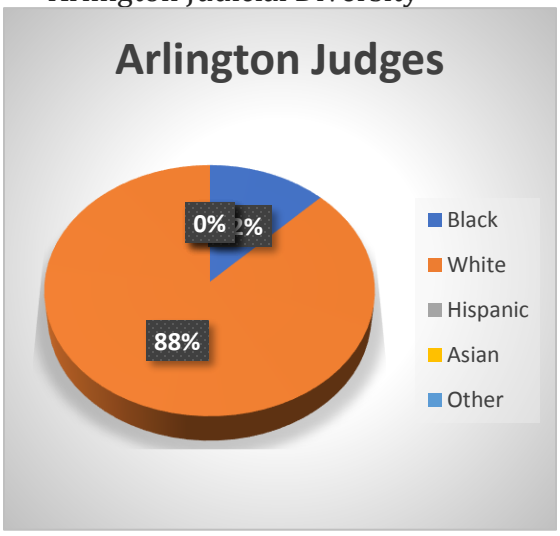
Jurisdiction	% Minority Population	% Minority Judges
Alexandria	48.4%	29%
Arlington	38%	13%
Fairfax	49%	9%
Prince William	56%	7%
Loudoun	43%	0%

Percentage of Minority Judges v. Minority Population

Arlington Population Diversity

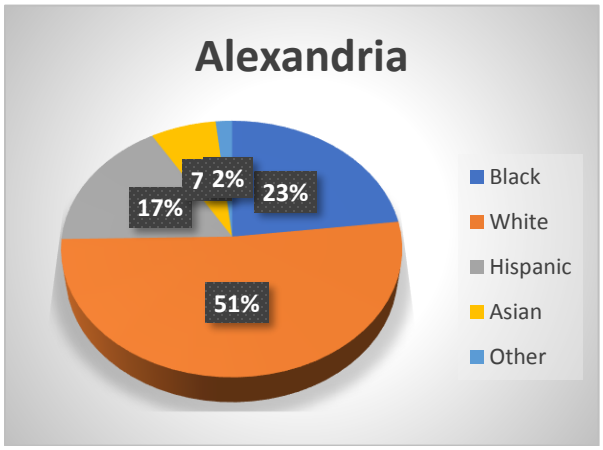


Arlington Judicial Diversity

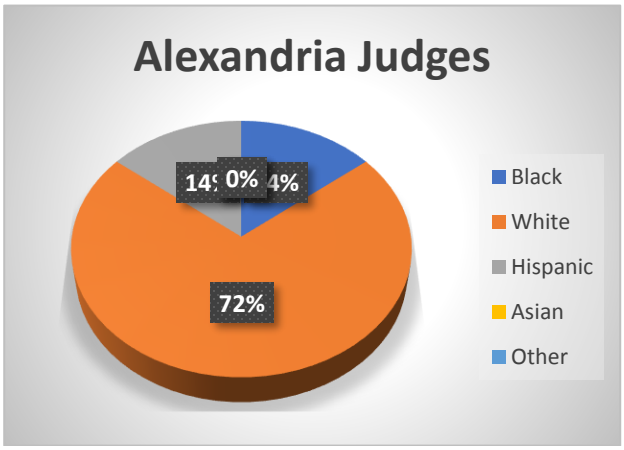


1 of the 8 judges in Arlington are ethnic minorities (1 Black Judge).

Alexandria Population Diversity

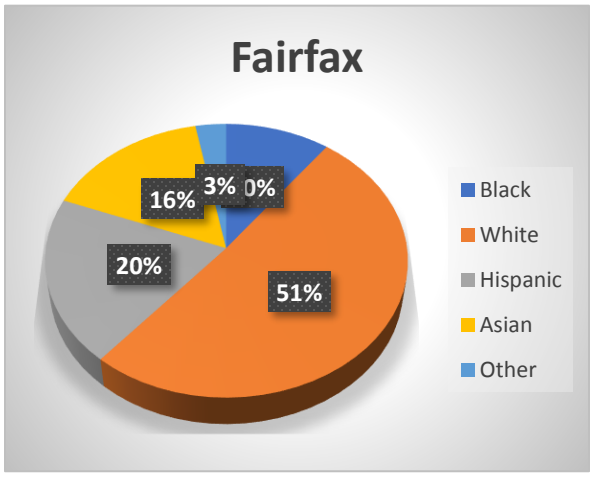


Alexandria Judicial Diversity

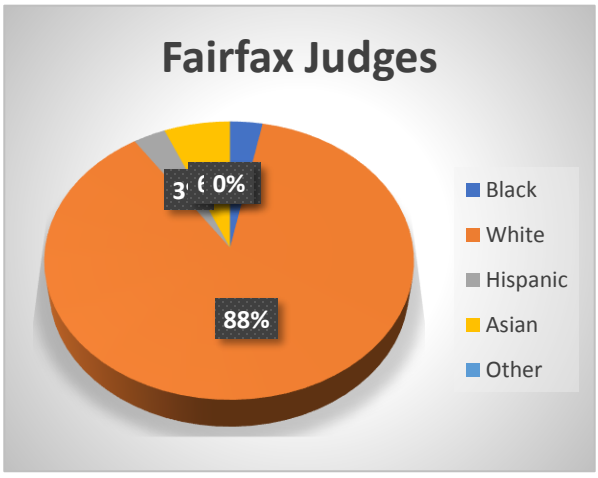


2 of the 7 judges in Alexandria are ethnic minorities. (1 Black Judge, 1 Hispanic Judge)

Fairfax Population Diversity

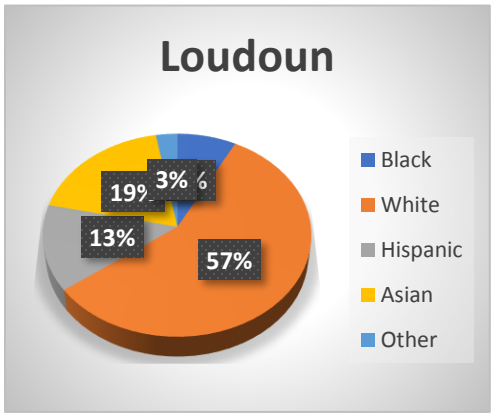


Fairfax Judicial Diversity

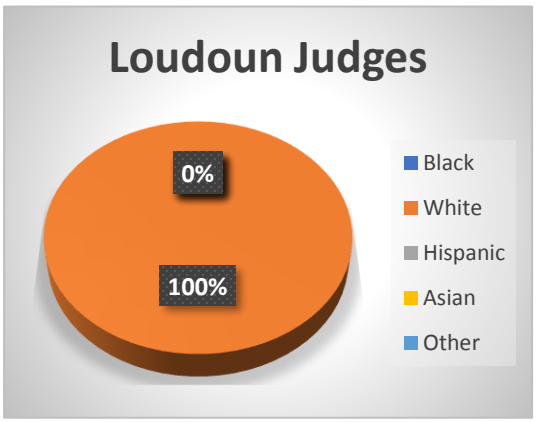


4 of the 32 judges in Fairfax are minorities. (1 Black, 1 Hispanic, 2 Asian)

Loudoun Population Diversity

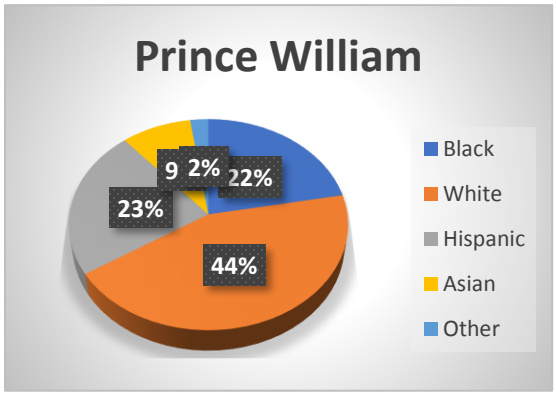


Loudoun Judicial Diversity

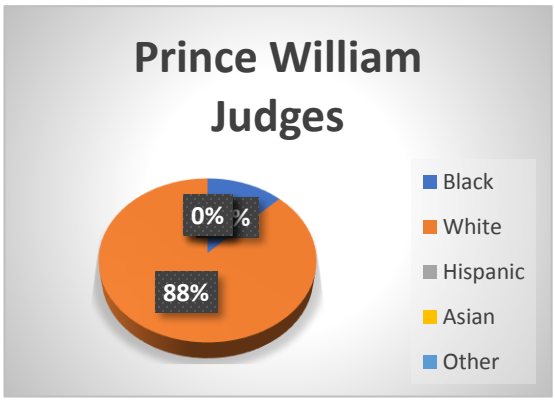


None of the 10 judges in Loudoun County are ethnic minorities.

Prince William Population Diversity



Prince William Judicial Diversity



2 out of 16 Judges in Prince William are ethnic minorities.
(No Hispanic or Asian judges).

V. The Diversity Conference of the Virginia State Bar was established in 2010 to promote diversity and inclusion in the legal profession and to help ensure that Virginia meets the legal needs of an increasingly diverse population.

- The Diversity Conference's stated mission is to
  - Foster and encourage diversity and inclusion in admission to the bar, in advancement in the profession, and in the judiciary.
  - Facilitate diversity and inclusion in professional leadership opportunities.
  - Ensure that Virginians' changing legal needs are met.
- The Diversity Conference became a funded Conference of the Virginia State Bar in 2016.
  - In an official advisory opinion dated October 2, 2015, Attorney General Mark R. Herring laid out the public policy reasons supporting action to increase diversity in the legal profession and the legal justification for State Bar funding to support the Diversity Conference's activities. *See* Appendix 1
- The Diversity Conference's efforts in support of its mission include mentor/mentee programs, underwriting of the Oliver Hill/Samuel Tucker Pre-Law Institute to introduce disadvantaged high school students to the legal profession, and other activities designed to publicize and promote the cause of diversity in the legal profession. *See* Annual Report of the Diversity Conference for the 2016-2017 Fiscal Year (available at http://www.vsb.org/site/conferences/diversity/annual_reports).
- The August 2017 report from the National Task Force on Lawyer Well-Being, *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change* ("the Report") recognizes the critical importance of diversity and inclusion in lawyer well-being. See Appendix 2. By resolution, the Conference of Chief Justices, including Chief Justice Donald W. Lemons (who is also a member of the Task Force), recommended that each state consider the Report and its recommendations on improving lawyer well-being. The recommendations of the Report, particularly Recommendation 6 (Foster Collegiality and Respectful Engagement Throughout the Profession), recognize the importance of organizational diversity and inclusion in promoting lawyer well-being. *See id.* at 12-21. The ideals set forth in Recommendation 6.1 (Promote Diversity and Inclusivity) and Recommendation 6.2 (Create Meaningful Mentoring and Sponsorship Programs) are shared by the Diversity Conference in its mission statement and goals. Through its programming and coalition building, the Diversity Conference has advanced and supported many of the initiatives suggested by the Task Force in Recommendations 6.1 and 6.2, and it will continue to do so. At the request of Chief Justice Lemons, the Virginia State Bar and Bar leadership are actively promoting the recommendations of the Report.

The following presentation provides an overview of the need for diversity, both in the legal profession and more generally. It discusses the current state of diversity and affirmative action to promote equal opportunity for everyone regardless of race, gender, or other protected characteristics. It also describes applicable legal requirements, including recently enacted or proposed laws and regulations designed to further the cause of diversity.

VI. The Quest To Achieve A Post-Racial Society

The quest to achieve a "post-racial" society, in which all races are fully integrated and enjoy the complete benefits of equal access to education, employment, and other opportunities, remains ongoing.

A. Historical Background

The following timeline identifies key developments in the fields of civil rights, diversity, and affirmative action.

1863 President Lincoln issues the Emancipation Proclamation.

1868 The Fourteenth Amendment is ratified.

1896 In *Plessy v. Ferguson*, 163 U.S. 537 (1896), the United States Supreme Court upholds "Jim Crow" laws enforcing racial segregation under the "separate but equal" doctrine.

1948 President Truman orders desegregation of the United States military. Executive Order 9981 (July 26, 1948).

1954 In *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), the U.S. Supreme Court reverses *Plessy* and mandates the integration of public schools.

1956 Virginia declares a policy of "massive resistance" to school integration. *See* Statement of Sen. Harry S. Byrd, Feb. 25, 1956 ("If we can organize the Southern states for massive resistance to this order, I think that in time the rest of the country will realize that racial integration is not going to be accepted in the South.").

1964 The Civil Rights Act of 1964 is enacted into law. Pub. L. 88-352, 78 Stat. 241 (codified at 42 U.S.C. §§ 2000d *et seq.*).

1965 President Johnson issues an Executive Order requiring companies holding federal contracts to engage in affirmative action. Executive Order 11246 (Sep. 24, 1965).

1978 The U.S. Supreme Court issues a divided opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), which acknowledges that "the interest of diversity is compelling in the context of a university's admissions program," *id.* at 314, but nonetheless rejects the use of admission quotas or set-asides to achieve that interest. *See* Appendix 3.

2003 In *Grutter v. Bollinger*, 539 U.S. 306 (2003), the U.S. Supreme Court permits limited consideration of race in law school admissions, finding that it satisfies strict scrutiny based on the compelling interest in obtaining "the educational benefits that flow from a diverse student body." *Id.* at 328. *See* Appendix 4.

2016 In *Fisher v. University of Texas*, 136 S. Ct. 2198 (2016), the U.S. Supreme Court upholds the University's "holistic" consideration of race in undergraduate admissions. *See* Appendix 5.

B. The Ongoing Debate

In *Grutter*, Justice O'Connor envisioned a time in the near future where affirmative action will not be needed:

> "We take the Law School at its word that it would 'like nothing better than to find a race-neutral admissions formula' and will terminate its race-conscious admissions program as soon as practicable. . . . We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."

539 U.S. at 343. Justices Ginsberg and Breyer, in concurrence, offered a different view:

> "The Court further observes that '[i]t has been 25 years since Justice Powell [in Bakke] first approved the use of race to further an interest in student body diversity in the context of public higher education. . . . For at least part of that time, however, the law could not fairly be described as 'settled,' and in some regions of the Nation, overtly race-conscious admissions policies have been proscribed. . . . It is well documented that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals."

Id. at 345 (Ginsberg, J., concurring).

C. Are We There Yet?

The numbers suggest that we are not.

1. K-12 Education

- Between the 2000-01 and 2013-14 academic years, the percentage of "high poverty" schools (those in which at least 75% of students qualified for free or reduced-price lunches) that were predominately African-American or Hispanic climbed from 9% to 16%. U.S. General Accountability Office, *K-12 Education: Better Use of Information Could Help Agencies Identify Disparities and Address Racial Discrimination*, at p. 11 (April 2016) (available at https://www.gao.gov/assets/680/676745.pdf).

- Over the same period, the percentage of predominately African-American or Hispanic "low poverty" schools (less the 25% of students qualifying for school lunch assistance) dropped from 31% to 16%. *Id*.

- As of 2014, 85% of African-American adults and 65% of Hispanic adults (ages 25 and over) had a high school diploma or equivalent, compared to 92% of White adults. National Center for Education Statistics, *Status and Trends in the Education of Racial and Ethnic Groups*, at 129 (2017) (available at https://nces.ed.gov/pubs2017/2017051.pdf).

2. College Education

- From the high school class of 2015, 63% of African-Americans and 67% of Hispanics enrolled in 2-year or 4-year colleges immediately after graduation, compared to 70% of Whites. *Id.* at 93.

- As of 2014, 20% of African-American adults and 14% of Hispanic adults held at least a Bachelor's degree, compared to 34% of Whites. *Id.* at 129.

3. Employment

- As of the third quarter of 2017, the current unemployment rate was 7.5% for African-Americans, 5.1% for Hispanics, and 3.8% for Whites. U.S. Department of Labor, Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey*, Table E-16 (updated Oct. 6, 2017) (available at https://www.bls.gov/web/empsit/cpsee_e16.htm).

- Although the total employed workforce is 11.9% African-American and 16.7% Hispanic, *id.*, Table 11 (updated Feb. 8, 2017), these races are not proportionately represented in higher-paying occupations:

  - In management occupations, 9.1% of employees are African-American and 9.3% are Hispanic. *Id*.

  - In professional and related occupations, 9.8% of employees are African-American and 9.0% are Hispanic. *Id*.

- Minorities are even more underrepresented in legal professions than in other professional occupations.

  - According to the latest data from the Bureau of Labor Statistics, 4.4% are African-American and 5.6% are Hispanic. *Id*.

  - Within law firms, 4.4% of associates are African-American and 4.9% of associates are Hispanic, while only 2.0% of partners are African-American and only 2.6% of partners are Hispanic. T. Jan, "The Legal Profession Is Diversifying, but Not at the Top," Washington Post, Nov. 27, 2017. *See* Appendix 6.

D. How Do We Measure Progress?

In federally-mandated affirmative action plans, the cornerstone measurement compares "utilization" to "availability."

- "Utilization," also called "incumbency," is the percentage of a given racial group in a particular employment classification. 41 C.F.R. § 60-2.15(a).

- "Availability" is the estimated percentage of qualified candidates for jobs in that employment classification who are within the given racial group. 41 C.F.R. § 60-2.14(a).

Availability can be measured in different ways.

- "External availability" is an estimate of the percentage of a given racial group among qualified outside candidates for recruitment in the relevant labor market. 41 C.F.R. § 60-2.14(c)(1). It is usually estimated using occupational census data. *See* United States Census Bureau, Equal Employment Opportunity Tabulation (available at https://www.census.gov/topics/employment/equal-employment-opportunity-tabulation.html).

- "Internal availability" is an estimate of the percentage of a given racial group among qualified candidates for promotion within the employer's workforce. 41 C.F.R. § 60-2.14(c)(2). It is usually estimated the employer's own workforce data.

- "Weighted availability" is a proportional combination of these two data sources. 41 C.F.R. § 60-2.14(g).

In an affirmative action plan, utilization is compared to availability to determine whether "the percentage of minorities or women employed in a particular job group is less than would reasonably be expected given their availability percentage in that particular job group." 41 C.F.R. § 60-2.15(b).

- Whether utilization is "less than reasonably expected" is usually determined by whether the utilization and availability percentages are within two standard deviations based on standard statistical tests. *See Hazelwood School District v. United States*, 433 U.S. 299, 308 n.14 (1977).

- If utilization is significantly below availability, a "goal" is declared. *Id*.

- "In-depth analyses" of employment processes (e.g. hiring and promotion decisions) are conducted to identify "problem areas." 41 C.F.R. § 60-2.17(b).

- "Action-oriented programs" are developed to address any problem areas that are found. 41 C.F.R. § 60-2.17(c).

- "Placement goals may not be rigid and inflexible quotas, which must be met, nor are they to be considered as either a ceiling or a floor for the employment of particular groups. Quotas are expressly forbidden." 41 C.F.R. § 60-2.16(e)(1).

E. "Dos" and "Don'ts"

Do engage in outreach efforts designed to identify and attract qualified candidates from disadvantaged groups.

- Job announcements with affinity/advocacy groups.
- Job fairs.
- Training opportunities to support career advancement.

Don't make employment decisions based on race or other protected characteristics.

- Hiring or promoting someone to meet a numerical goal.
- Creating job openings or other opportunities reserved for specific protected groups.

Do identify and correct aspects of the employment process that are hindering the selection or career advancement of disadvantaged groups.

- If a selection test is having adverse impact on minority candidates, find a different test that is equally effective but has less impact. 29 C.F.R. § 1607.6A (Equal Opportunity Employment Commission, Uniform Guidelines on Employment Selection Procedures).

Don't apply established selection criteria in an inequitable or race-conscious manner.

- Administering a promotion test and then disregarding the results because the test did not produce the desired proportion of minority candidates. *Ricci v. DeStefano*, 557 U.S. 557 (2009).

Do engage in efforts to expand the pool of qualified candidates from disadvantaged groups.

- "STEM" (science/technology/engineering/mathematics) training programs aimed at encouraging minorities and women to pursue technical careers.
- Virginia's Hill-Tucker Pre-Law Institute, which is designed to introduce disadvantaged students to the legal profession.

Don't stray from choosing the most qualified candidate in every situation, regardless of race or other protected characteristic.

- Setting a "goal" that exceeds the availability of qualified candidates from a particular group.

VII. The Gender Pay Gap

One of the most prominent discrimination issues over the years has been the continuing gap between the pay received by female and male employees in the workforce.

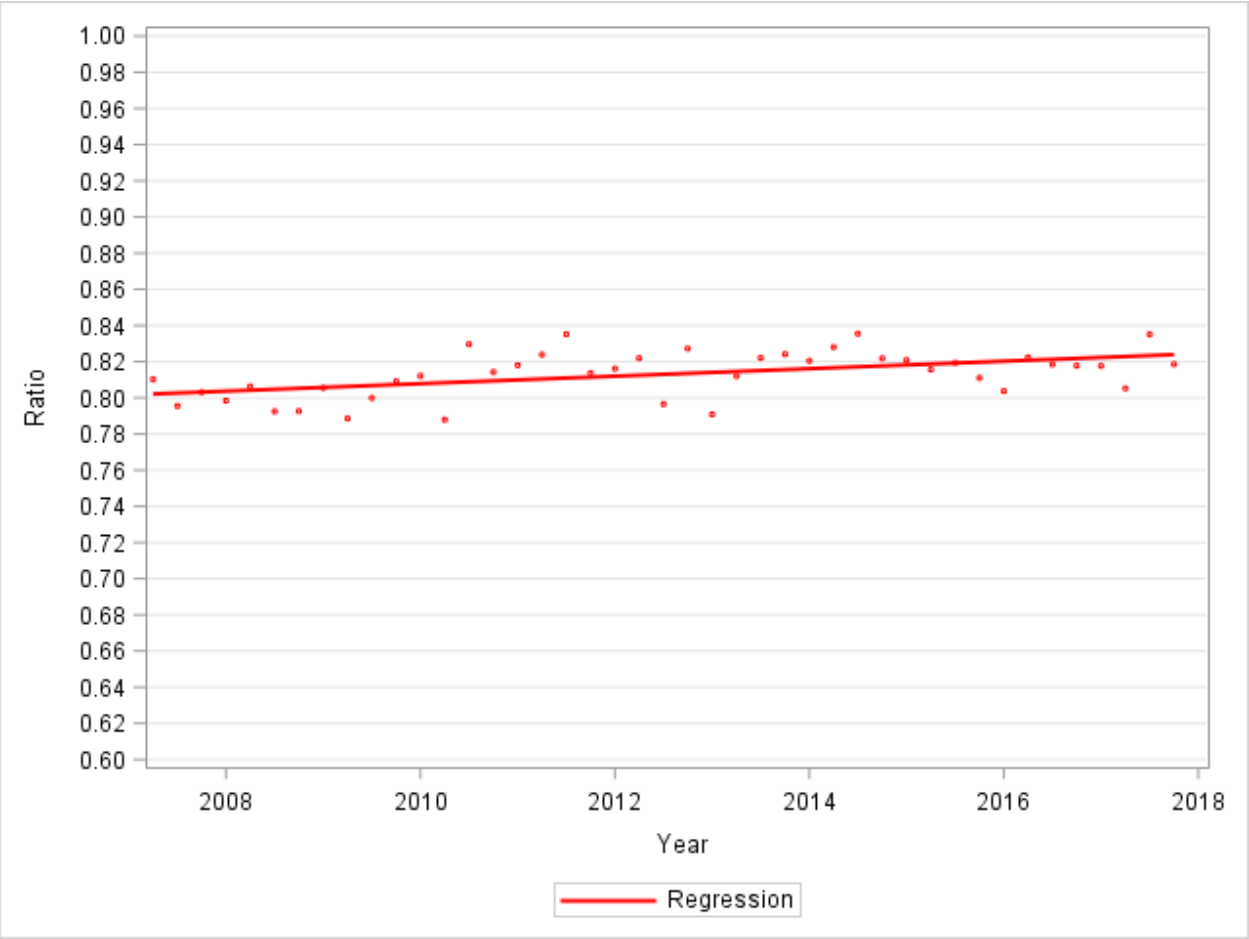
A. The Issue

The average wage for full-time female employees is variously estimated, depending on the statistical sources that are used, to be approximately 77% to 83% of the average wage for full-time male employees:

- In 2014, President Obama declared that "working women . . . earn only 77 cents for every dollar that a man earns." Presidential Memorandum, "Advancing Pay Equality Through Compensation Data Collection," April 8, 2014 (available at https://obamawhitehouse.archives.gov/the-press-office/2014/04/08/presidential-memorandum-advancing-pay-equality-through-compensation-data).

- Since 2007, statistics released by the U.S. Department of Labor estimate that the "pay gap" has ranged from a low of 78.8% (2010, first quarter) to a high of 83.5% (2017, second quarter). U.S. Department of Labor, Bureau of Labor Statistics, Current Population Survey, Median Weekly Earnings Estimates for Men and for Women (retrieved from https://data.bls.gov/cgi-bin/surveymost?le).

Over time, the gender pay gap has been narrowing, but only gradually. If the trend estimated from 2007-2017 Bureau of Labor Statistics data continued indefinitely, the pay gap would not close completely until the end of 2103 – approximately 86 years from now.



- The graph shown on the following page shows the result of a regression model developed from the above-cited 2007-2017 Bureau of Labor Statistics weekly earnings estimates for men and women.**B. Causes**

The causes of the gender pay gap are the subject of heated debate.

- At least some of the statistical difference appears to be attributable to career choices, particularly occupation.

    - Many high-paying occupations are dominated by men.

Occupation	***Median Weekly Earnings***	***% Female***
Chief Executives	$2,303	27.7%
Architectural and Engineering Managers	$2,258	6.3%

Computer Hardware Engineers	$1,843	20.7%
Software Developers, Applications and Systems	$1,776	19.7%

Statistics compiled from U.S. Department of Labor, Bureau of Labor Statistics, Current Population Survey, Median Weekly Earnings of Full-Time Wage and Salary Workers by Detailed Occupation and Sex (updated Feb. 8, 2017) (retrieved from https://www.bls.gov/cps/cpsaat39.htm).

- Many low-paying occupations are dominated by women.

Occupation	***Median Weekly Earnings***	***% Female***
Cashiers	$414	70.6%
Maids and Housekeeping Cleaners	$441	84.6%
Childcare Workers	$452	94.1%
Waiters and Waitresses	$470	64.0%

Statistics compiled from U.S. Department of Labor, Bureau of Labor Statistics, Current Population Survey, Median Weekly Earnings of Full-Time Wage and Salary Workers by Detailed Occupation and Sex (updated Feb. 8, 2017) (retrieved from https://www.bls.gov/cps/cpsaat39.htm).

- Overall, women comprise 44.3% of the full-time workforce. But:
  - Among the 27 highest-paying occupations (those paying a median wage of more than $1,500 per week), women comprise 27.5% of the full-time workforce.
  - Among the 23 lowest-paying occupations (those paying a median wage of less than $500 per week), women comprise 61.5% of the full-time workforce.

Id.

- Occupational differences, however, do not explain the full gap. Within the same occupation, women are often paid less than men. For example:
  - Female Chief Executives make 77.6% as much as their male counterparts.

- Female Software Developers (Applications and Systems Software) make 83.4% as much as their male counterparts.

- Female Cashiers make 84.8% as much as their male counterparts.

- Female Childcare Workers make 87.5% as much as their male counterparts.

Id.

C. Legal Remedies

Two major federal statutes, both of which have parallels in Virginia law, prohibit pay discrimination:

- The Equal Pay Act of 1963 ("the EPA"), passed as an amendment to the Fair Labor Standards Act of 1938 ("FLSA") addresses only pay disparities based on sex, and provides:

> "No employer having employees subject to any provisions of this section shall discriminate . . . between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . . ."

29 U.S.C. § 206(d).

The Code of Virginia incorporates virtually identical provisions through the Virginia Equal Pay Act. Va. Code § 40.1-28.6. The Virginia statute, however, is expressly limited to employees who are not covered by the federal FLSA. *Id*. FLSA coverage is extremely broad, extending to everyone engaged in some form of interstate commerce. *See* 29 C.F.R. § 776.1-776.21 (U.S. Department of Labor interpretive bulletin addressing FLSA jurisdiction). EPA claims may be brought in Virginia state court, which should apply federal substantive law but Virginia's rules of procedure, so long as the procedural rules do not affect the substantive federal rights. *See New Dimensions, Inc. v. Tarquini*, 286 Va. 28, 35, 743 S.E.2d 267, 270-271 (2013) (looking to Virginia's procedural law concerning pleading in holding that the four enumerated statutory exceptions in the EPA – wage differentials driven by a seniority system, a merit system, or a system measuring earnings by "quantity or quality of production," or any other "differential based on any other factor other than sex" – are affirmative defenses under federal law but were not waived by defendant under Virginia law by a failure to plead them).

- Title VII of the Civil Rights Act of 1964 covers pay disparities based on five protected characteristics, and provides:

> "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual based on his compensation . . . because of such individual's race, color, religion, sex, or national origin."

42 U.S.C. § 2000e-2(a).

The Virginia Human Rights Act incorporates these protections into the Code of Virginia. Va. Code § 2.2-3901 ("Conduct that violates any Virginia or federal statute or regulation governing discrimination on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability shall be an 'unlawful discriminatory practice' for the purposes of this chapter."). The Virginia Division of Human Rights ("DHR") has authority to investigate and make findings regarding Virginia Human Rights Act complaints under state law. Va. Code § 2.2-520.

Additionally, the DHR and certain local agencies, including the Alexandria Human Rights Office, the Arlington County Human Rights Commission, the Fairfax County Human Rights Commission, and the Prince William County Human Rights commission, have been designated by the federal Equal Employment Opportunity Commission ("EEOC") as Fair Employment Practice ("FEP") agencies, and are authorized to investigate discrimination claims asserted under federal law pursuant to work sharing agreements with the EEOC. 29 C.F.R. § 1601.74. Title VII discrimination complaints thus may be filed either with the EEOC, with the DHR or local FEP, or with both. A complainant must cross-file a charge of discrimination under Title VII with both federal and state offices to benefit from a 300-day statute of limitations, rather than the 180 days. A Title VII claim, unlike a claim under the EPA, must be filed with the EEOC or state agency before a complaint can be asserted in court.

Several local Virginia jurisdictions also have local ordinances that address pay and other forms discrimination. *See*, *e.g.*, Fairfax County Code § 11-1-5(a)(3) ("It shall be unlawful for any employer on the basis of age, race, color, religion, sex, national origin, marital status, or disability . . . [t]o deny an employee any opportunity with respect to . . . compensation . . .") (enforced by the Fairfax County Human Rights Commission).

Although the federal protections of Title VII apply only to employers with at least 15 employees, 42 U.S.C. § 2000e(b), the Virginia Human Rights Act extends a cause of action for alleged discriminatory discharge from employment to employers with more than five but less than 15 employees. Va. Code § 2.2-3903(B). The Virginia Code allows much less relief than Title VII, however, being limited to 12 months of back pay with interest and attorneys' fees of up to 25% of the back pay awarded. Va. Code § 2.2-3903(C). Reinstatement as well as compensatory and punitive damages are not available. *Id*.

Some local ordinances further broaden discrimination prohibitions to small employers, not just for discharge claims but also other forms of discrimination, including pay inequities. *See* Fairfax County Code § 11-1-2 (defining "employer," for purposes of the broad prohibition of employment discrimination, to include anyone who "employs four (4) or more persons who are not family members to the employer (if an individual) or to any partner or majority shareholder of the employer (if a partnership or a corporation) and who are not employed in domestic service in the employer's personal residence."). Both limited relief and difficulty in enforcement, however, render resort to local ordinances a last resort for plaintiffs.

There are important differences in the burden of proof, measure of damages, and scope of coverage between the EPA and Title VII:

- The Equal Pay Act (as well as its Virginia counterpart), prohibits unequal pay based on sex for employees performing "equal work." Under the EPA this means equal pay "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974). The "equal work standard does not require compared jobs to be identical, only that they be substantially equal" as measured by the relevant factors. *Brinkley-Obu v. Hughes Training,* 36 F. 3d 336, 343 (4th Cir. 1994), *citing* 29 C.F.R. § 1620.13(a). *Compare Sims-Fingers v. City of Indianapolis*, 493 F.3d 768, 771-72 (7th Cir. 2007) (opinion of Judge Posner rejecting a theory of "comparable worth" that would require wages to be "proportional to the differences between the jobs in the difficulty, required skill level, amenities and so forth" as unsupported by the statute).

  Under the EPA, "[o]nce a plaintiff has made the required *prima facie* case, the burden of production *and* persuasion shift to the defendant-employer to show that the wage differential was justified by one of four affirmative defenses listed in the statute." *EEOC v. Maryland Insurance Administration*, 2018 U.S. App, LEXIS 298, *11 (4th Cir. Jan. 5, 2018) (emphasis in original), citing *Brinkley-Obu* at 344. This contrasts with Title VII where the burden of persuasion remains always on the plaintiff who, when relying upon circumstantial evidence, must then discredit the defendant's proffered reason as "pretextual" and demonstrate that illegal discrimination motivated the action at issue. *See infra*.

  In *Maryland Insurance Administration*, the Fourth Circuit agreed with the EEOC and reversed summary judgment for the employer in an EPA case involving three plaintiffs because "a differential based on any factor other than sex . . . *could* explain the wage disparity. . . [but] a viable affirmative defense under the EPA requires more than a showing that a factor other than sex *could* explain or *may* explain the salary disparity. Instead, the EPA requires that a factor other than sex *in fact* explains the wage disparity." *Id.* at **17-18 (emphasis in original). Moreover, the EPA provides for a "mandatory" award of liquidated damages to the plaintiff in the same amount of back pay, unless the employer satisfies his "plain and substantial burden of persuading the court by proof that his failure to obey the statute was both in good

faith and predicated upon such reasonable grounds that it would be unfair" to award them. *Brinkley-Obu* at 344.

- Title VII and related state law claims provide wider coverage and can encompass a broad array of jobs. Plaintiffs, however, do not benefit from the favorable burden shifting as under the EPA and, unlike under the EPA, a plaintiff must show discriminatory intent. *Brinkley-Obu, supra*, is instructive. In that case, the court upheld a jury verdict for pay disparity based on sex under both the EPA and Title VII. The court explained that "[i]n Title VII cases, by contrast [to the EPA], the plaintiff's *prima facie* case serves to shift only the burden of production to the defendant. Once the defendant offers a non-discriminatory justification for the wage differential, the burden of persuasion remains on the plaintiff to demonstrate that the proffered explanation is pretextual and that the defendant was actually motivated by discriminatory intent." *Id*. at 344, *see also* n. 17. As in any other Title VII case, a plaintiff may use direct or circumstantial evidence to satisfy her burden. *Id*. Evidence of discriminatory acts and/or comments outside the limitations period may be used to infer discriminatory motive. *Id*. at 354. Ms. Brinkley-Obu satisfied her EPA burden with evidence "that she performed substantially similar work to the comparators," and then satisfied her Title VII burden with evidence of "sexist attitudes and conduct" on the part of her supervisor and the defendant. *Id.* at 354-355.

- Class action cases present special challenges, as they typically rely on statistical evidence of disparities between protected and unprotected employees who are otherwise similarly situated. "To be legally sufficient, the plaintiffs' statistical evidence must show a disparity of treatment, eliminate the most common nondiscriminatory explanations of the disparity, and thus permit the inference that, absent other explanation, the disparity more likely than not resulted from illegal discrimination." *Morgan v. United Parcel Service*, 380 F.3d 459, 463-64 (8th Cir. 2004). In class actions, multiple regression techniques are generally needed to control for the differences at issue. It can be very difficult to properly account for all potential explanatory variables. *See id.* at 472 (summary judgment granted to UPS on plaintiffs' nation-wide class action race claims due to flaws and omissions in the plaintiffs' regression analysis).

  Additionally, variability in individual circumstances can stand in the way of obtaining class action certification. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) (class certification not available in a nationwide case with 1.5 million employees because plaintiffs failed to show sufficient commonality under Fed. R. Civ. P. 23(a)).

C. Current Initiatives

Efforts are ongoing to address barriers to equal pay in several ways.

1. Federal Initiatives

Paycheck Fairness Act, S. 819, 115th Cong., 1st Sess. (2017); H.R. 1869, 115th Cong., 1st Sess. (2017).

- The Paycheck Fairness Act would amend the federal EPA "to provide more effective remedies to victims of discrimination in the payment of wages on the basis of sex." S. 819, 115th Cong., 1st Sess. (www.congress.gov/bill/115th-congress/senate-bill/819/text). For instance, the legislation would narrow affirmative defenses, increase penalties, and expand what constitutes a protected activity for purposes of a retaliation claim.

- Versions of this legislation have been introduced in each Congress over the last 20 years, but the furthest it has progressed was approval in the House of Representatives in 2009, during the first year of the Obama Administration. Given the current Administration and Congress, it is highly unlikely to move forward in the near future.

Form EEO-1 Compensation Data Collection by Equal Employment Opportunity Commission, 81 Fed. Reg. 45479 (July 14, 2016).

- This proposal would have required employers to file annual reports submitting compensation data by broad occupational category, broken down by race and gender. *Id*.

- The Paperwork Reduction Act, 44 U.S.C. 3501, *et. seq.*, requires review and approval of agency information collection activities by the Office of Management and Budget ("OMB"). The OMB approved the proposed EEO-1 reporting requirements in September 2017, while the Obama Administration was still in power. Initial filings were due in March 2018. After the Trump Administration took over, however, the OMB indefinitely stayed implementation of the expanded EEO-1 report to review compliance with Paperwork Reduction Act requirements. Memorandum from Neomi Rao, Administrator, OMB Office of Information and Regulatory Affairs, Aug. 29, 2017 (available at https://www.reginfo.gov/public/jsp/Utilities/Review_and_Stay_Memo_for_EEOC.pdf).

2. State Laws

Having failed to pass the Paycheck Fairness Act or push through other major initiatives on the federal level, pay equity advocates have turned their attention to the states. They have succeeded in gaining passage of several significant laws:

- California Fair Pay Act, Cal. Labor Code § 1197.5 (enacted Oct. 6, 2015) – State law requires equal pay for "substantially similar work," delineates and narrows "bona fide factors other than sex" that can be used to explain differences in pay, and places the burden on employers to advance legitimate factors that reasonably account for the pay entire pay difference between employees performing similar work.

- New York Achieve Pay Equity Law, N.Y. Consol. Laws, Art. 6, § 194 (enacted Oct. 21, 2015) – State law requires equal pay for "equal work on a job the performance of which requires equal skill, effort and responsibility, and which is performed under similar working conditions," subject to exceptions including "a bona fide factor other than sex, such as education, training, or experience."

- Maryland Equal Pay for Equal Work Law, Md. Code Ann., Labor & Employment § 3-301 *et seq.* (enacted May 19, 2016) – State law forbids unequal pay rates for employees of different sex or gender identity who "work in the same establishment and perform work of comparable character or work on the same operation, in the same business, or of the same type."

- Massachusetts Pay Equity Act, Mass. Gen. Laws ch. 149, § 105A (enacted Aug. 1, 2016) – State law requires equal pay for "comparable work," defined as "work that is substantially similar in that it requires substantially similar skill, effort and responsibility and is performed under similar working conditions."

Many of these laws prohibit employers from asking about a job applicant's prior pay history. The intent is to prevent the gender pay gap from being perpetuated when hiring employers pay in accordance with prior salary as opposed to the bona fide value of the employee to the new organization. *See*, *e.g.*, Mass. Gen. Laws ch. 149, § 105A(c)(2). A proposal banning such pay history inquiries was introduced last year in the Virginia House of Delegates, but it failed to clear committee. H.B. 2190 (introduced Jan. 11, 2017) (tabled in Committee on Commerce and Labor by voice vote).

Chidi I. James

Attorney Chidi I. James is a trial lawyer and a partner with the law firm of Blankingship & Keith, P.C. in Fairfax Virginia. His practice consists mostly of serious personal injury cases including wrongful death, products liability, and inadequate security cases. Mr. James joined Blankingship & Keith as an associate in 2003, after serving as a Judicial Law Clerk to the judges of the Arlington County Circuit Court and completing the Judge Advocate General School Course at Maxwell Air Force Base in Montgomery, Alabama. He also currently serves in the armed forces as the Air Staff Judge Advocate for the District of Columbia Air National Guard Joint Force Headquarters in Washington, DC.

Mr. James holds a Bachelor's of Science Degree from Texas A&M (1997) in Sociology and a Juris Doctorate from the George Mason University School of Law (2001). As a law student, Mr. James was the founding member of the George Mason University Trial Advocacy Association, where he continued to serve as Trial Team coach for many years.

He is licensed to practice law in the Commonwealth of Virginia and the District of Columbia. He is the former President of the Northern Virginia Black Attorneys Association, a board member of the Virginia Trial Lawyers Association, former Vice-Chair of the Virginia State Bar's Standing Committee on Lawyer Discipline, and a current elected member of the Virginia State Bar Council representing the 19th Judicial Circuit. Mr. James also serves on the Boards of Legal Services of Northern Virginia, The Fairfax Law Foundation and the Virginia State Bar Diversity Conference. He is a former faculty member of the Virginia State Bar Henry L. Carrico Professionalism Course and a former adjunct faculty member at the George Washington School of Law in Washington, D.C.

Mr. James has been recognized in several periodicals for his achievements and contributions to the legal community, including a *Martindale-Hubbell* AV rating 2013-present; *Best Lawyers in America* 2012-2017; Legal Eagles – Most Respected Attorneys in the Commonwealth – 2012 - *Virginia Living Magazine;* Washington's Best Legal Minds – 2011 – *Washingtonian Magazine;* Outstanding Young Lawyers – Rising Star 2009 – *Richmond Magazine;* Top Young Attorneys in Virginia – Rising Star 2008 – *Richmond Magazine* Top Virginia Lawyers – Rising Star 2007 – *Richmond Magazine.*

In his private life, Mr. James is a member of the Mt. Pleasant Baptist Church and Omega Psi Phi Fraternity, Inc. He also serves on the Board of the Gainesville Basketball Association, the Mount Pleasant Baptist Community Development Corporation, and has volunteered as coach for multiple youth sports teams. Mr. James is married to local psychologist, Dr. Faith Jackson James, and has three children, ages 20, 16, and 15.

Carole H. Capsalis

Carole H. Capsalis is the chair of the Diversity Conference of the Virginia State Bar and a member of the Executive Committee and Bar Council of the Virginia State Bar. Carole is a sole practitioner in Leesburg, Virginia, with a primary focus on corporate transactions, small business representation, employment and HR law, elder law and trusts and estates. Before she hung her own shingle, Carole was most recently senior associate general counsel at First Guaranty Mortgage Corporation in Tysons Corner. She practiced general civil litigation, family law, business transactions and estate planning with the Arlington law firms of Cohen, Gettings, Alper and Dunham, and Capsalis, Bruce, Reaser and Caulkins, before moving her law practice to Leesburg with her husband, Manny and law partner Kate Fitzgerald at Capsalis Fitzgerald, PLC from 2011-2014. Carole graduated from University of Illinois at Urbana-Champaign (B.A.) and George Mason University (Antonin Scalia) School of Law (J.D.).

Derry Dean Sparlin, Jr.

Dean Sparlin is attorney and founding member of Sparlin Law Office, PLLC, based in Fairfax, Virginia. He represents and advises management on employment issues, specializing in affirmative action plans, OFCCP audit defense, expert analysis, and other applications of sophisticated statistical techniques to the field of employment law. In doing so, he draws upon both his legal education and practice experience as well as post-graduate training in statistical science. Mr. Sparlin earned his J.D. in 1986 from the Marshall-Wythe School of Law at the College of William and Mary. While at William and Mary, he served as Managing Editor of the William and Mary Law Review and became a member of the Order of the Coif. Immediately after his graduation, Mr. Sparlin became associated with the Washington, D.C. office of Gibson, Dunn & Crutcher LLP, where he practiced law for 17 years. In 2003, Mr. Sparlin left to establish his current independent practice. This move also facilitated an opportunity to formalize and expand his qualifications through graduate study in statistics at George Mason University. Mr. Sparlin completed his M.S. in Statistical Science at George Mason in 2006.

Mr. Sparlin has spoken before numerous groups on labor-related issues, including the American Bar Association, the American Association for Access, Equity and Diversity, the National Industry Liaison Group, the Industrial Relations Research Association, the National Association of Manufacturers, and the Aerospace Industries Association. He appeared on the syndicated television series, *It's Your Business*, as an expert on the application of federal employment laws to the United States Congress. His writings have appeared in several publications including the Wall Street Journal and the National Law Journal.

Mr. Sparlin has volunteered his services to numerous public interest organizations, including those that promote the goals of diversity and inclusion. He currently serves as national Treasurer of the American Association for Access, Equity, and Diversity, and he is an active member of the Board of Governors of the Diversity Conference of the Virginia State Bar.

Mary Ann Kelly

Mary Ann Kelly has a solo practice in Fairfax, Virginia focused primarily in the areas of Employment Law and Civil Litigation in state and federal courts. Before starting her own practice, she was an associate with Webster & Fredrickson in the District of Columbia, Fite, O'Brien & Byrum in McLean, and worked as a Contract Lawyer for Hazel & Thomas in Falls Church.

In the area of Employment Law, Ms. Kelly has been an advocate of workers' rights for decades. She has successfully represented employees from all walks of life in a wide variety of claims, including Overtime Violations, Sexual Harassment, Retaliation, Breach of Contract, Wrongful Termination, and Discrimination. She negotiates Employment Agreements, including Severance Agreements, and handles issues related to Restrictive Covenants. Ms. Kelly represents select small businesses and has litigated commercial cases involving Negligence, Fraud, and other torts, as well as prosecuted unit owner claims under the Virginia Condominium Act.

Ms. Kelly earned a BA from Georgetown University in Comparative Government and French, and her JD from Georgetown University Law Center. She is admitted to practice in Virginia and the District of Columbia, and an active member of the Federal Bar Association, the Metropolitan Employment Lawyers Association, the Fairfax Bar Association and its Pro Bono Committee, the Virginia Trial Lawyers Association, the Virginia Women Attorneys' Association, and the George Mason Inn of Court.