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Advance

The Journal of the ACS Issue Groups

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Advance

A*dvance*, the Journal of the Issue Groups of the American Constitution Society for Law and Policy (ACS), is published periodically by ACS. Our mission is to promote the vitality of the U.S. Constitution and the fundamental values it expresses: individual rights and liberties, genuine equality, access to justice, democracy and the rule of law.

Each issue of *Advance* features a collection of articles that emanate from the work of ACS's Issue Groups. Most editions of *Advance* feature a selection of Issue Briefs written for ACS in the preceding several months, on topics spanning the breadth of the Issue Groups. While others consist of papers on one particular topic addressed at a conference or other event hosted by ACS. ACS Issue Briefs—those included in *Advance* as well as others available at www.acslaw.org—are intended to offer substantive analysis of a legal or policy issue in a form that is easily accessible to practitioners, policymakers and the general public. Some Issue Briefs tackle the high-profile issues of the day, while others take a longer view of the law, but all are intended to enliven and enrich debate in their respective areas. ACS encourages its members to make their voices heard, and we invite those interested in writing an Issue Brief to contact ACS.

We hope you find this issue's articles, which span a range of topics, engaging and edifying.

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ACS Issue Groups are comprised of legal practitioners and scholars working together to articulate and publicize compelling progressive ideas. The Groups are led by distinguished co-chairs who are experts in their respective fields. They are open to all ACS members, and new members and new ideas are always welcome.

Access to Justice

The Access to Justice Group addresses barriers to access to our civil justice system, including, among other issues, efforts to strip courts of jurisdiction, raise procedural hurdles, remove classes of cases from federal court, insulate wrongdoers from suit, limit remedies and deprive legal aid services of resources. It focuses attention on ways to ensure that our justice system is truly available to all.

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The Roberts Court and the Future of the Exclusionary Rule

Susan A. Bandes*

I. INTRODUCTION

Sixty years ago, the Supreme Court held that the Fourth Amendment places limits not only on the federal government, but on state and local governments as well. The decision was a significant advance toward safeguarding the right of every person to be free from unreasonable searches and seizures. However, the Court's broad expansion of Fourth Amendment protection ignited a heated debate over the proper remedy for violations of the right—a debate that continues to this day. The exclusionary rule, which prohibits the use in court of unconstitutionally acquired evidence, has always been a controversial remedy for the violation of Fourth Amendment rights. Yet over the years it has become apparent that the exclusionary rule is an essential means of ensuring that law enforcement officers respect the limits the Fourth Amendment imposes on their power.

The critics of the exclusionary rule point to its costs, although the costs they refer to are the costs imposed by the Fourth Amendment itself. The exclusionary rule excludes evidence that would never have been acquired if the police had obeyed the Fourth Amendment in the first place.¹ Thus the controversial nature of the remedy has much to do with the controversial nature of the underlying right. The Fourth Amendment imposes constraints on law enforcement officials in order to protect individual autonomy and dignity. The debate over the proper balance between the police power and individual privacy is contentious and longstanding.

Justice Cardozo famously lamented that, under the exclusionary rule, “the criminal is to go free because the constable has blundered.”² In *Mapp v. Ohio*, the Court responded “the criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.”³ The Court reasoned that the government should neither profit from its own illegal activity nor model disrespect for the law through its own actions.

The Reagan-era Justice Department, led by Attorney General Edwin Meese, spearheaded the first frontal attack on the exclusionary rule. Under the current Supreme Court, these efforts may finally come to fruition. Chief Justice John Roberts and Justice Samuel Alito, both of whom served in the Meese Justice Department,⁴ are now part of a four-member voting block (with Justices Antonin Scalia and Clarence

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¹ Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1392-93 (1983).

² *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926), *cited in* *Mapp v. Ohio*, 367 U.S. 643, 659 (1961).

³ *Mapp*, 367 U.S. at 659.

⁴ In 1983, (now) Chief Justice Roberts worked on a memorandum about what he called “the campaign to amend or abolish the exclusionary rule.” In 1985, (now) Justice Alito, in applying for a job in the Reagan Justice Department, wrote that his interest in the law had been motivated in large part by disagreement with Warren Court decisions, particularly in the areas of criminal procedure, religious freedom, and

Thomas) that, to all appearances, is busily laying the groundwork for abandoning the exclusionary rule. They lack only a reliable fifth vote.

II. THE EXCLUSIONARY RULE: THE ESSENTIAL REMEDY FOR FOURTH AMENDMENT VIOLATIONS

The objection to the exclusionary rule has never been that it is ineffective at enforcing the Fourth Amendment. The objection has been that it imposes too high a price. When evidence is excluded, criminals may go free. Studies show that very few criminals in fact go free because evidence is excluded, and that criminals accused of violent crime almost never do.⁵ Nevertheless, the rule does lead to loss of evidence and sometimes to lost convictions, and thus it is deeply unpopular, not only with law enforcement but with the general public. Despite this unpopularity, which has made it a target of heated criticism since its inception, the exclusionary rule has remained the central method of enforcing the Fourth Amendment. It has survived all these years because it has proved essential. Without it, the Fourth Amendment's guarantee against unreasonable search and seizure is "an empty promise."⁶

In 1949, the Supreme Court held that the Fourth Amendment constrains state and local officials as well as federal officials. Although the exclusionary rule then applied in federal cases, the Court was reluctant to foist it on the states. In *Wolf v. Colorado*,⁷ the Court directed the states to come up with alternative ways to enforce the Fourth Amendment. By the time it decided *Mapp* 12 years later, the Court saw no choice but to impose the exclusionary rule on the states, noting that the trend among the states had been to adopt the rule on their own, and that experience had shown other alternatives to be ineffective.

The reaction to *Mapp* by law enforcement officials is perhaps the best evidence of how urgently the exclusionary rule was needed. As Professor Yale Kamisar recounts, the New York City Police Commissioner said the decision created "tidal waves and earthquakes" in the law enforcement community. It required retraining his entire department "from the very top administrators down to each of the thousands of foot patrolmen and detectives engaged in the daily law enforcement function." As Kamisar asked, "Why did it necessitate 'retraining' from top to bottom? What was the *old* search and seizure training like? *Was there any?*" There was reason to think there had been no training at all in search and seizure before the threat of exclusion was

voting rights. Adam Liptak, *Supreme Court Edging Closer To Repeal of Evidence Ruling*, N.Y. TIMES, Jan. 31, 2009.

⁵ Exactly how many go free is a matter of controversy. One study, described by Professor Wayne LaFave as "the most careful and balanced assessment of all available empirical data," found that the vast majority of cases in which exclusion of evidence occurred during the period studied were drug cases. Very little evidence was excluded in cases involving violent crimes. Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Cost" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 AM. B. FOUND. RES. J. 611. Another study found an overall suppression rate of slightly less than five percent in warrant-related prosecutions. It also concluded that even in 70% of the cases in which evidence was suppressed, convictions were obtained. Overall, the rule prevented conviction in no more than 1.4% of the cases studied. RICHARD VAN DUIZEND ET AL., NAT'L CTR. FOR STATE COURTS, *THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, AND PRACTICES* 21 (1984), cited in JOSHUA DRESSLER & ALAN C. MICHAELS, *UNDERSTANDING CRIMINAL PROCEDURE* 381 (4th ed. 2006).

⁶ *Mapp*, 367 U.S. at 660.

⁷ 338 U.S. 25 (1949).

imposed.⁸ Police departments behaved as if the Fourth Amendment had just been adopted—and as if this was very bad news indeed.

Of course it is possible that police departments have changed so much in the nearly 50 years since *Mapp*, or that alternative enforcement mechanisms have become so much more effective, that the exclusionary rule is no longer necessary. Chief Justice Roberts has advanced these very arguments. But before turning to the evidence that the rule is still essential, it will be helpful to consider the changes in the interpretation of the exclusionary rule that have led to its current precarious position.

III. RATIONALES FOR THE EXCLUSIONARY RULE: FROM JUDICIAL INTEGRITY TO DETERRENCE

Exclusion of unlawfully seized evidence has never been viewed as a personal right of the victim of an unlawful search or seizure. It is a means of achieving broader societal objectives. Originally, the exclusionary rule was regarded as a way to preserve judicial integrity. The rationale was that the government should not profit from its own wrongdoing, and should not traffic in tainted evidence. As Justice Brandeis famously argued, “Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law.”⁹

But as early as the *Mapp* decision, the Court adopted an additional rationale: that the purpose of excluding evidence is to deter future police misconduct. Under this rationale, illegally obtained evidence is excluded to increase the likelihood that in the future, law enforcement agents will abide by constitutional rules, thus protecting all of us from unwarranted intrusions into our privacy. “Courts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty.”¹⁰

The judicial integrity rationale was soon entirely supplanted by the deterrence rationale. When determining the scope of the exclusionary rule, the Court began focusing solely on whether exclusion of evidence is likely to deter future police misconduct. The deterrence analysis became an invitation for the Court to engage in unsupported speculation about police behavior, and specifically, about whether suppressing evidence in various circumstances would provide an incentive for police to obey the law. In case after case, the Court has concluded that even if the evidence was suppressed, the police would be unlikely to change their behavior. In each case, the Court has weighed this “speculative” likelihood of deterrence against the “substantial”¹¹ costs of exclusion, and found that the exclusionary rule should not apply.

*Herring v. United States*¹² is the latest in the line of cases carving out exceptions to the exclusionary rule. In previous cases, illegal searches or seizures took place because police relied on the illegal actions of third parties, and the Court concluded that since the fault lay with the third parties, excluding the evidence was unlikely to deter the police. In *United States v. Leon*,¹³ the Court assumed that police would not be deterred by exclusion of evidence obtained under an illegal warrant. It reasoned that the

⁸ Yale Kamisar, *Mapp v. Ohio: The First Shot Fired in the Warren Court's Criminal Procedure "Revolution,"* in *CRIMINAL PROCEDURE STORIES* 76-77 (Carol S. Steiker ed. 2006).

⁹ *Olmstead v. United States*, 277 U.S. 438, 485 (1928).

¹⁰ *Brinegar v. United States*, 338 U.S. 160, 181 (1949).

¹¹ *See, e.g., United States v. Leon*, 468 U.S. 897, 907 (1984); *United States v. Calandra*, 414 U.S. 338 (1974).

¹² 129 S. Ct. 695 (2009).

¹³ 468 U.S. 897 (1984).

illegality was the fault of the magistrate who issued the warrant, and that excluding evidence found in reliance on such a warrant would have no effect on the police, who would simply continue to defer to the magistrate's judgment. (As the dissents pointed out, the Fourth Amendment is directed not just at the police, but at the government as a whole, and excluding the evidence might well create an incentive for both police and magistrates to beef up their compliance with Fourth Amendment law.) Subsequent cases declined to exclude illegal searches based on clerical errors by court employees¹⁴ and illegal searches made in reliance on unconstitutional statutes.¹⁵

IV. THE *HERRING* CASE: RAISING THE BAR FOR EXCLUSION OF ILLEGALLY OBTAINED EVIDENCE

Some commentators describe *Herring* as just another case in this line, almost identical to *Arizona v. Evans*, the case involving a clerical error by a court employee.¹⁶ But *Herring* is a far more serious assault on the exclusionary rule for two reasons. First, the case involved reliance by police officers on an error, not by a court or a legislature, but by *other police officers*. Second, the case introduced an entirely new requirement for application of the exclusionary rule: the police mistakes must be the result of "systemic error or reckless disregard of constitutional requirements,"¹⁷ rather than of mere negligence. It premised this holding on the unsupported assertion that exclusion of evidence obtained through negligent violation of the Fourth Amendment has a reduced deterrent effect.

Bennie Dean Herring was arrested in Coffee County, Alabama. Investigator Mark Anderson, who "knew Herring from prior interactions,"¹⁸ one day spotted Herring at the Sheriff's Department and looked for a way to arrest him.¹⁹ Anderson consulted the Coffee County records to see whether there were any warrants outstanding that would allow him to do so. There were not, but he had more luck when he called over to neighboring Dale County. The Dale County database did contain an open arrest warrant for Herring. Unfortunately, the warrant had been recalled five months earlier, but the Dale County database had never been updated to reflect this change. Thus Herring was arrested without probable cause or a valid warrant. He was then subjected to a search incident to arrest, which led to the discovery of contraband and a weapon on his person.²⁰ Because the arrest was illegal, the fruits of the search incident to the arrest would have been suppressed under the law as it stood prior to *Herring*.

V. FOR THE FIRST TIME, POLICE CAN USE EVIDENCE ILLEGALLY OBTAINED BY OTHER POLICE

In refusing to exclude the fruits of the illegal search, the Court rejected the notion that cases like *Evans* had been premised on police reliance on the mistakes of *other*

¹⁴ *Arizona v. Evans*, 514 U.S. 1 (1995).

¹⁵ *Illinois v. Krull*, 480 U.S. 340 (1987).

¹⁶ See, e.g., Matthew J. Franck, *Hyperventilating About the Exclusionary Rule*, NAT'L REV. ONLINE, Feb. 16, 2009, available at <http://bench.nationalreview.com/post/?q=YjNiYjNkMTQ0ZjM4Y2YzOGNlZWY5NDk4M2JmOWEyNjA=>.

¹⁷ *Herring*, 129 S. Ct. at 704.

¹⁸ *Id.* at 705 (Ginsburg, J., dissenting).

¹⁹ *Id.* at 709 (Ginsburg, J., dissenting). "Herring had told the district attorney, among others, of his suspicion that Anderson had been involved in the killing of a local teenager, and Anderson had pursued Herring to get him to drop the accusations." *Id.* at 705 (Ginsburg, J., dissenting).

²⁰ *Id.* at 705-06.

branches of government.²¹ But until *Herring*, the good faith of a police officer engaging in an illegal search was relevant only when the officer conducted an illegal search in reasonable²² good faith reliance on the mistake of an authoritative governmental source *other than* another law enforcement agent. The good faith exception to the exclusionary rule prior to *Herring* was based on two related rationales. The first was that the exclusionary rule is directed at deterring police officers, not judges, court clerks, or legislators, so it provides no grounds for suppressing the fruits of mistakes by government officials other than police officers. The second was that police officers who reasonably believe they are correctly relying on the judgments of authoritative officials are unlikely to be deterred from making the same error again.

In *Herring*, the mistake in question was made by the police themselves—precisely the group the Court claims the exclusionary rule is meant to deter. The *Herring* decision deviates from 50 years of precedent in permitting one unit of law enforcement to benefit from the illegal acts of another. A year before the decision in *Mapp v. Ohio*, the Court rejected the “silver platter” doctrine, which allowed federal officers to use evidence illegally obtained by state officers. It found that the doctrine implicitly invited federal officers to tacitly “encourage state [law enforcement] officers in the disregard of constitutionally protected freedom.”²³

Now that the Court has excused mistakes by police officers relying on other police officers, the stage is set for much broader incursions into the exclusionary rule. Professor Richard McAdams observed, “if a police officer can act in good faith on the error of a police clerk, she can likely act in good faith on the error of a fellow detective. Second, if we don’t exclude evidence when Detective A relies on a negligent but isolated error by Detective B, then . . . why [would we] exclude evidence when Detective B relies on *her own* negligent but isolated error?”²⁴

Moreover, although all the cases in this line concern searches based on invalid warrants (or, in the case of *Krull*, an invalid statute), the same reasoning seems to apply to negligent errors about other Fourth Amendment requirements. In other words, if a police officer wrongly but negligently believes she has both probable cause for a search and exigent circumstances excusing a warrant, the *Herring* reasoning seems applicable: there is no reason to exclude the evidence obtained in that illegal search.

VI. THE FRUITS OF ILLEGAL SEARCHES AND SEIZURES ARE ADMISSIBLE IF THE ILLEGAL CONDUCT WAS NEGLIGENT RATHER THAN FLAGRANT

The *Herring* majority declined to suppress the fruits of illegal searches and seizures if the police acted negligently rather than flagrantly.²⁵ The Court premised this

²¹ It claimed that the cases stood for the proposition that only evidence obtained in flagrant violation of the Constitution should be suppressed.

²² That is, the actual intent of the officer was irrelevant. The question was whether a reasonable officer would have been likely to make the same mistake.

²³ *Elkins v. United States*, 364 U.S. 206, 221-22 (1960).

²⁴ Posting of Richard McAdams, to The University of Chicago Law School Faculty Blog, <http://uchicagolaw.typepad.com/faculty/2008/10/wither-the-excl.html> (Oct. 29, 2008, 17:23 EST).

²⁵ The Court in its holding states the new rule more narrowly, as permitting the admission of evidence that is the result of isolated negligence “attenuated from” the illegal search or arrest. *Herring*, 129 S. Ct. at 698. The Court fails to explain the attenuation limitation, and commentators have expressed puzzlement over its meaning. For example, in the *Herring* case, it might refer to the fact that the invalid warrant was five months old (though the fact that an invalid warrant had been left in the database for five months

holding on the assertion that isolated instances of negligent wrongdoing are unlikely to be deterred by exclusion, an assertion unsupported by even “an iota of supporting analysis or evidence.”²⁶ As Justice Ginsburg observed in dissent, “the suggestion runs counter to a foundational premise of tort law—that liability for negligence . . . creates an incentive to act with greater care.”²⁷ Suppression of illegally obtained evidence, even where the illegality was the result of police negligence, provides police with “an incentive to err on the side of constitutional behavior.”²⁸ It also “demonstrates that our society attaches serious consequences to violations of constitutional rights.”²⁹

As Professor Wayne LaFave notes, “many more violations of the Fourth Amendment are the result of carelessness than are attributable to deliberate misconduct.”³⁰ Warrant checks like the one at issue in *Herring* are a case in point. Warrant checks are routinely run, not only on those suspected of violating criminal laws, but on drivers and passengers of cars pulled over for minor traffic infractions. Negligent errors in recordkeeping can lead to false arrests and other serious incursions on liberty and privacy. Penalizing these errors creates an effective incentive for law enforcement agencies to maintain accurate records.

Since the exclusionary rule is not meant to punish police, but to encourage them to abide by the law, the deliberateness of their conduct ought to be irrelevant to the question of exclusion, particularly in the absence of any evidence that negligent misconduct is undeterrable. And prior to the *Herring* case, with few exceptions, the applicability of the exclusionary rule did not turn on whether the police conduct was flagrant, deliberate, or intentional—only on whether it was illegal.

In short, *Herring* is poised to convert the exclusionary rule from the ordinary remedy for Fourth Amendment violations to an extraordinary remedy available only when defendants can somehow prove police conduct was intentional,³¹ flagrant,³² or recurring.³³

would seem to exacerbate rather than attenuate the wrongdoing) or to the fact that the invalid warrant was in the database of one county and the arresting officer who relied on it was in another (for discussion of this distinction see Part V above). For a lengthy analysis of the various possible meanings of the attenuation language, see Wayne R. LaFave, *The Smell of Herring: A Critique of the Supreme Court's Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY (forthcoming 2009). McAdams predicts that the attenuation requirement will soon be abandoned. McAdams, *supra* note 24.

²⁶ LaFave, *supra* note 25.

²⁷ *Herring*, 129 S. Ct. at 708 (Ginsburg, J., dissenting).

²⁸ LaFave, *supra* note 25 (citing *United States v. Johnson*, 457 U.S. 537, 561 (1982)).

²⁹ *Id.*

³⁰ *Id.*

³¹ As Justice Ginsburg notes in dissent, the Court's new focus on intentional police conduct is hard to square with its prior refusal to inquire into subjective police intentions in order to regulate pretextual arrests. *Herring*, 129 S. Ct. at 710 n.7 (Ginsburg, J., dissenting). The Court claims that it is not requiring an inquiry into the subjective mental state of the officer but it is unclear how one would show that police “knowingly made false entries [into a database] to lay the groundwork for future false arrests” without inquiring into their subjective mental states. *Id.* at 703.

³² As an example of flagrant conduct, the Court refers to the treatment of Dollre Mapp, in *Mapp v. Ohio*. The case involved not just the execution of a non-existent warrant, but police conduct that included brandishing the so-called warrant, grabbing it back from Mapp after she demanded to see it, and handcuffing Mapp to her stairway banister before searching her home from top to bottom. *Herring*, 129 S. Ct. at 702 (citing *Mapp v. Ohio*, 376 U.S. 643, 644-45 (1961)).

³³ The database at issue in *Herring* had a systemic flaw: it did not automatically update to reflect changes such as the withdrawal of arrest warrants. There is some disagreement about whether the clerk who was supposed to update the database manually had erred in other cases as well. But the Court would demand a showing of a “widespread pattern of violations” or a system that “routinely leads to false

VII. THE HUDSON CASE: SUGGESTING THE EXCLUSIONARY RULE IS OBSOLETE

Herring's new requirements are justified, according to the Court, by the high costs of the exclusionary rule. The case follows on the heels of another Roberts Court opinion, *Hudson v. Michigan*,³⁴ which also takes aim at the exclusionary rule, but from another angle. *Hudson* questions whether the rule continues to provide any benefit, and strongly suggests that it has outlived its usefulness.

The narrow question in *Hudson* was whether evidence obtained by police who illegally failed to knock and announce their entry into a suspect's home ought to be suppressed. The Court held that suppression was unnecessary, but the opinion goes much further. Justice Scalia's majority opinion rejects the notion that exclusion is the proper remedy "simply because we found that it was necessary deterrence in different contexts and long ago."³⁵ It claims two major changes since *Mapp* was decided. First, other effective remedies are available to victims of Fourth Amendment violations. Second, police forces are increasingly professional. Because of these changes, "resort to the massive remedy of suppressing evidence of guilt is unjustified."³⁶

In some ways it is easier to sue the police than it was in 1961. Prior to 1961, civil rights suits against individual police officers were nearly impossible to bring.³⁷ Prior to 1971, suits against individual federal officers were unavailable.³⁸ Prior to 1978, police departments could not be sued.³⁹ Even with these changes to the law, high barriers still exist to suit against police officers and police departments, and in many respects, they are becoming higher. *Hudson* cites a widely used police misconduct litigation manual for the proposition that currently "citizens and lawyers are much more willing to seek relief in the courts for police misconduct."⁴⁰ It does not quote what the authors said next: that in some respects, it is now "far more difficult" to challenge police misconduct.⁴¹

It has always been challenging to sue individual police officers—it is difficult to find lawyers to bring suit against police, to convince juries to render verdicts against them, and to collect damage awards against officers who are often judgment proof. In *Hudson* itself, which involved the failure of police to knock and announce before entering the suspect's home, the Court seemed unfazed by the lack of any evidence that victims of such conduct had been able to bring successful civil suits, declaring itself willing simply to assume that "as far as we know, civil liability is an effective deterrent here."⁴²

arrests." *Herring*, 129 S. Ct. at 704 (citing *Hudson v. Michigan*, 547 U.S. 586, 604 (2006) (Kennedy, J., concurring)).

³⁴ 547 U.S. at 586.

³⁵ *Id.* at 597.

³⁶ *Id.* at 599.

³⁷ See, e.g., *Monroe v. Pape*, 365 U.S. 167 (1961) (broadening the definition of "under color of state law").

³⁸ See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (permitting these suits).

³⁹ See *Monell v. N.Y. City Dep't of Soc. Servs.*, 436 U.S. 658 (1978) (permitting these suits).

⁴⁰ *Hudson*, 547 U.S. at 597-98.

⁴¹ See David Alan Sklansky, *Is the Exclusionary Rule Obsolete?*, 5 OHIO ST. J. CRIM. L. 567, 572 (2008) (citing MICHAEL AVERY ET AL., *POLICE MISCONDUCT LAW AND LITIGATION* (3d ed. 2007)). Avery et al. added a footnote to this text calling Justice Scalia's quotation "highly misleading." *Id.*

⁴² *Hudson*, 547 U.S. at 598.

Suit against individual officers is now even more difficult due to the Court's expanding immunity doctrines.⁴³ And the Court has erected increasingly high barriers to bringing suit against police departments for systemic wrongdoing, such as failure to screen, train, or discipline police officers.⁴⁴ There is no reason to believe that the civil remedies that have for so long been inadequate to replace the exclusionary rule have suddenly become adequate, and the Court offers no evidence to support this assertion. As Justice Breyer observed in dissent, the majority has "simply assumed that as far as it knows, civil liability is an effective deterrent, a support-free assumption...."⁴⁵

In many ways, police departments are more professional than they were in 1961. In support of its claim that these changes have rendered the exclusionary rule unnecessary, the Court cites the work of criminologist Samuel Walker.⁴⁶ Walker, in an opinion piece in the *Los Angeles Times* called "Thanks for Nothing, Nino," took Justice Scalia to task for misrepresenting his work. Walker regarded the positive changes in police work over the years as, in large part, *attributable* to the exclusionary rule, and not as an argument for doing away with the rule.⁴⁷

Recent scandals in the Chicago, Oakland, and Atlanta police departments, among others, are reminders that even as policing becomes more professionalized, incentives to cut constitutional corners continue to exist—and that illegal police conduct affects the innocent as well as the guilty. In Atlanta, federal prosecutors have charged the Atlanta Police Department with regularly lying to obtain search warrants and fabricating documentation of drug purchases. One such case turned tragic when police raided the home of 92-year-old Kathryn Johnston on a bad tip. Instead of building a case, police obtained a no-knock warrant based on false information and broke down Johnston's door. Frightened by the unidentified intruders, she fired a single shot, and they responded by killing her in a hail of bullets. They then planted drugs in her home and falsely claimed they had bought cocaine from her. In the ensuing investigation, federal investigators have uncovered a "culture of misconduct." United States Attorney David Nahmias had this to say about the officers indicted in the death of Johnston:

The officers charged today... are not accused of seeking payoffs or trying to rob drug dealers or trying to protect gang members. Their goal was to arrest drug dealers and seize illegal drugs, and that's what we want our police officers to do for our community. But these officers pursued that goal by corrupting the justice system, because when it was hard to do their job the way the Constitution requires, they let the ends justify the means.⁴⁸

⁴³ Police officers have qualified immunity for their investigative conduct, *Anderson v. Creighton*, 483 U.S. 635 (1987), and absolute immunity for their in-court conduct, *Briscoe v. LaHue*, 460 U.S. 325 (1983).

⁴⁴ See, e.g., *Bd. of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397 (1997) (creating high barriers to suing municipal agencies for failure to screen employees); *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (creating high barriers to establishing standing to seek injunctive relief).

⁴⁵ *Hudson*, 547 U.S. at 611 (Breyer, J., dissenting) (citing *Dickerson v. US*, 530 U.S. 428, 441-442 (2000)).

⁴⁶ *Hudson*, 547 U.S. at 599 (citing S. WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE 1950-1990* 51 (1993)).

⁴⁷ Samuel Walker, *Thanks for Nothing, Nino*, L.A. TIMES, June 25, 2006, at M5.

⁴⁸ Shaila Dewan & Brenda Goodman, *Prosecutors Say Corruption in Atlanta Police Department is Widespread*, N.Y. TIMES, Apr. 27, 2007.

VIII. CONCLUSION

Incentives to violate constitutional protections are heightened in times when safety and security seem precarious, and they lead to tactics that are too often deployed against those with little access to the civil courts. There is no question that the exclusionary rule should be supplemented by better training, better internal discipline, broader access to civil rights suits, and other remedies. But until there is hard evidence that the lessons of the past 60 years are no longer applicable, and that these alternative remedies are truly adequate to enforce the Fourth Amendment, the exclusionary rule remains essential.

The future of the exclusionary rule became precarious when Chief Justice Roberts and Justice Alito were appointed to the Court and joined Justices Thomas and Scalia in targeting the rule for evisceration. The fate of the rule should be a primary consideration when the next candidate for the Supreme Court is under consideration.

The Google Book Search Settlement: Ends, Means, and the Future of Books

James Grimmelmann*

For the past four years, Google has been systematically making digital copies of books in the collections of many major university libraries. It made the digital copies searchable through its web site—you couldn't read the books, but you could at least find out where the phrase you're looking for appears within them. This outraged copyright owners, who filed a class action lawsuit to make Google stop. Then, last fall, the parties to this already large class action announced an even larger settlement: one that would give Google a license not only to scan books, but also to sell them.

It is difficult to overstate the importance of this settlement. The ongoing shift to electronic publishing is arguably the biggest transformation in books since Gutenberg's invention of the printing press. The scale of Google's plans boggles the mind. If the settlement is approved, Google will have the closest thing to a universal library the world has ever seen. We should be enthusiastic about the prospect of creating such a library, and concerned that it may be under the exclusive control of one company. This issue brief will connect this enthusiasm and this concern to the structure of the settlement that gives rise to them both.

Part I of the Issue Brief is an analysis of the lawsuit and its settlement. It discusses Google's original scanning project and the copyright-infringement lawsuit the authors and publishers filed to stop the scanning. It then looks at the settlement Google struck with the authors and publishers to end the lawsuit; the lawsuit has enormous potential both to do good and to cause harm.

Part II then examines one especially important part of the public interest context. Book copyrights are haunted by the specter of "orphan works"—books under copyright but whose copyright owners cannot be found. The orphans are neither making money for their authors and publishers nor effectively available to the public. The settlement authorizes Google to start selling orphan works. That's good for the public to the extent it makes them available again, but potentially bad to the extent it turns Google into a dominant platform with control over a huge catalog of books that no one else has access to.

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Finally, Part III discusses process. I argue that orphan works issues should be resolved through the legislative process, as the issue substantially affects the interests of large swathes of the public. Indeed, orphan works legislation has been hotly debated in Congress. The settlement tackles the orphan works problem, but through the judicial process. Laundering orphan works legislation through a class action lawsuit is both a brilliant response to legislative inaction and a dangerous use of the judicial power. Many of the public interest safeguards that would have been present in the political arena are attenuated in a seemingly private lawsuit; the lack of such safeguards is evident in the terms of the resulting settlement. The solution is to reinsert these missing public interest protections into the settlement.

I. THE PROJECT

“Google’s mission is to organize the world’s information and make it universally accessible and useful.”¹ Building on its wildly successful web search engine, Google has expanded into searching news stories, blogs, images, videos, and other media. When it started thinking about books, Google worked with publishers through a Partner Program: the publishers supplied it with digital copies of books, and Google made the copies searchable. Type in a search term, and Google would show you what books the term appeared in, along with “snippets”—a few sentences before and after, to give you a little context for seeing how the term appeared in the book. Where the copyright owner agreed, Google also provided previews of a few pages.

In December 2004, however, Google announced that it had also struck partnerships with a number of major research libraries to start scanning their collections. Details of the scanning technology are largely a matter of secrecy and speculation, but the basic outline is well known.² The libraries supply Google with stacks of books from their stacks. Google then uses custom-built machines to hold the books in place and take high-quality photographs of each page. Individual workers stand by the books, turning the pages, and occasionally photographing their hands by mistake.³

Some of the books Google scans are in the public domain, and are thus free for anyone to reuse. Google generally makes them not just searchable but available for download as free PDFs. For books still under copyright protection and whose copyright owners are members of the Partner Program, Google follows their requests in deciding how much of the books to make available. In between, though, is a vast middle ground—perhaps 70% of all books. Google took the position that unless and until it affirmatively heard otherwise from a copyright owner, it would display snippets in search results for books. In this, Google Book Search set itself apart from other similar programs like Amazon’s “search inside the book,” which also provides snippets and previews, but which is strictly opt-in for authors, publishers, and other copyright owners.

A. THE LAWSUIT

It didn’t take long for copyright owners to raise an outcry over the scanning and the snippets. They saw Google as an intermeddling freeloader, using their books for its own benefit and without paying. They also thought of Google’s “scan first and ask

¹ Google Company Overview, <http://www.google.com/corporate/> (last visited Apr. 10, 2009).

² See Jeffrey Rosen, *Google’s Moon Shot*, NEW YORKER, Feb. 5, 2007; Kevin Kelly, *Scan This Book!*, N. Y. TIMES MAG., May 14, 2006, at 42.

³ See Duncan Riley, *Google Books Adds Hand Scans*, TECHCRUNCH, Dec. 6, 2007, <http://www.techcrunch.com/2007/12/06/google-books-adds-hand-scans/>.

questions later” attitude as a dangerous precedent. On September 20, 2005, a group of authors led by the non-profit Authors Guild filed suit against Google.⁴ A month later, a group of publishers coordinated by the Association of American Publishers (AAP) followed with their own lawsuit (which the court consolidated with the authors’ suit).⁵ The publishers’ suit was a standard lawsuit on behalf of five individually named plaintiffs, all large publishing companies. The authors’ suit, however, was styled as a class action. The class—as expanded over the course of the lawsuit—now consists of anyone who owns a United States copyright interest in a book.

The copyright basis of the lawsuits was simplicity itself. United States copyright law gives a copyright owner a number of exclusive rights, including the rights “to reproduce the copyrighted work in copies” (the reproduction right), “to distribute copies . . . of the copyrighted work to the public” (the distribution right) and “to display the copyrighted work publicly” (the display right).⁶ It seems uncontested that Google’s scans of copyrighted works constituted “copies” and were therefore *prima facie* infringements of the reproduction right. Similarly, Google’s use of snippets in search results could implicate one or more of the reproduction, distribution, or display rights.

The heart of Google’s defense was a fair use argument. All claims of copyright infringement in the United States are subject to the fair use defense, a common-law defense now codified in the Copyright Act.⁷ It requires courts to consider whether a particular defendant’s uses ought to be excused—even though they would otherwise be infringing—because their social value outweighs any harm to the copyright owner. The copyright owners had, under long-standing print-based fair use principles, a strong argument that Google’s uses were not fair. Google was making an unambiguously commercial use, one that required making complete copies of highly expressive books, but that didn’t add much original expression of its own.

Google’s reply arguments were rooted in a more modern line of decisions that have found fair use in digital cases involving verbatim copies. The common thread connecting these cases was that the copies weren’t being passed along to the public; instead they were “intermediate” copies, used as part of the defendant’s internal operations. Thus, for example, the Ninth Circuit found fair use where one video game maker reverse engineered a competitor’s games to understand how they worked.⁸ Search engine indexing fits this mold; the point is to make a usable overall index, something very different than the indexed works themselves—but which can’t be made without copying them along the way.⁹ Looming large in any discussion of fair use would also have been Google’s argument that trying to license scanning rights for many millions of books would have been so utterly impractical as to make the use impossible.

Many scholars were rooting for Google. They saw the fair use argument as compelling, given the public benefit of the index. As long as Google was merely indexing books, rather than trying to sell their contents, giving copyright owners a right to veto its creation would have run against copyright’s purpose of promoting the progress of the useful arts and sciences. What’s more, had Google won the fair use claim, it would have created a strong precedent for similar efforts by others to take underused works

⁴ Authors Guild, Inc. v. Google, Inc., No. 1:2005cv08136 (S.D.N.Y. filed Sept. 20, 2005).

⁵ McGraw-Hill Cos. v. Google, Inc., No. 1:2005cv08881 (S.D.N.Y. filed Oct. 19, 2005).

⁶ 17 U.S.C. § 106(1), (3), (5) (2000).

⁷ 17 U.S.C. § 107 (2000).

⁸ See *Sega Enters. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992).

⁹ See 4 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 10:27.50 (2009).

and to help others figure out what's in them—in effect, helping copyright owners bring them back into a larger, more successful market.

B. THE SETTLEMENT

This picture changed radically on October 28, 2008, when the parties filed a proposed settlement with the court.¹⁰ According to the settlement's terms, Google will be released from liability, on a class-wide basis, for its past and future scanning and searching.¹¹ In return, Google will pay roughly \$125 million in attorneys' fees and as a one-time compromise payment. It will continue to allow copyright owners to choose whether any content from their books will be shown, and if so, how much.¹² If they allow Google to show excerpts from their books, Google will pay the owners roughly two-thirds of the resulting ad revenue.¹³ A new non-profit Book Rights Registry will collect the payments, hold them for copyright owners, and serve as the interface between copyright owners and Google.¹⁴ Thus, this part of the settlement breaks no new ground; it largely tracks the deal Google already offers to book copyright owners through its Partner Program.

The settlement, however, goes far beyond just scanning and searching. It also authorizes Google to start *selling books*.¹⁵ True, they'll be electronic books (e-books), to be read online through Google's servers. But still, Google is about to have access to a truly gigantic backlist: roughly 10 million titles. That will make it the largest bookstore in the world as measured by catalog size, and could well turn it into the largest bookstore in the world as measured by sales. Copyright owners can set their own prices, or delegate the pricing decisions to Google's all-knowing computers.¹⁶ Again, the Registry will act as the go-between, passing pricing decisions to Google and payments to copyright owners.

In addition to offering à la carte e-book purchases, Google will also offer an all-you-can-eat subscription service to libraries, companies, colleges, schools, and other institutions.¹⁷ Subscribers will have full online access to most books in Google's scanned collection, and be able to print up to 20 pages at a time. The pricing is very much to-be-determined: Google and the Registry will negotiate a set of prices with the stated twin goals of making money and enabling access.¹⁸ Although it's hard to imagine the full subscription service coming cheap—how much would *you* charge for every book ever?—Google is also allowed to offer a limited, free version of the subscription to colleges and public libraries. Online access will be free at one terminal in

¹⁰ Settlement Agreement, Authors Guild v. Google, Inc., No. 1:2005cv08136 (S.D.N.Y. Oct. 28, 2008) available at <http://www.googlebooksettlement.com/intl/en/Settlement-Agreement.pdf> [hereinafter Settlement Agreement].

¹¹ *Id.* at § 10.2.

¹² *Id.* at § 3.5(b).

¹³ *Id.* at §§ 4.5(a)(ii) ("Google shall pay . . . seventy (70%) of Net Advertising Revenues"), 1.86 ("less ten percent (10%) for Google's operating costs").

¹⁴ The Registry's governing board will be made up half of author representatives and half of publisher representatives. *Id.* At § 6.2(b). Thus, no other groups will have voting representation at the Registry: not libraries, not readers, not anyone. The parties to the settlement either have not decided or are not yet willing to say who the initial members of the board will be.

¹⁵ *Id.* at § 4.2.

¹⁶ *Id.* at § 4.2(b).

¹⁷ *Id.* at § 4.1.

¹⁸ *Id.* at § 4.1(a)(i)

each public library building and for every 10,000 students at four-year colleges (every 4,000 at two-year colleges).¹⁹

Even that's not all. The settlement allows the creation of a large research database of every book in the collection, allowing researchers to conduct automated studies that involve computer-based analysis of large numbers of books at once.²⁰ Imagine literary research tracking the occurrence of culturally-loaded terms in novels across the decades, or linguistic studies of pronoun reference in written English, and you have the idea. And we're still not done. The settlement also contemplates that the services Google offers will expand over time. It authorizes the Registry to negotiate the terms of various new business models with Google, including print-on-demand, PDF download, and coursepacks.²¹

C. PUBLIC INTEREST CONCERNS

The settlement, therefore, initially sounds like a perfect solution all around. The reading public gets access to the enormous all-time backlist of American arts and letters. Authors and publishers open up a substantial new revenue stream, rewarding them for their past creativity and investments—and giving them every incentive to continue producing new literary treasures. Google has the potential to open up yet another gold mine; libraries get a comprehensive new information resource, sometimes for free. What's not to like?

For one thing, there are competition concerns. The ninth circle of antitrust hell is reserved for price-fixers. Section 1 of the Sherman Act declares illegal “[e]very contract . . . in restraint of trade.”²² Legal agreements that cartelize an entire industry for the purpose of coordinating prices are one of the few remaining forms of conduct that antitrust law regards as *per se* illegal. Surely the sophisticated companies with expert lawyers who drafted this settlement agreement wouldn't use it to set up a system of naked price-fixing, right? That's what I thought, too, but consider this: The e-book purchase program²³ creates a system of fixed prices—twelve possible pricing buckets ranging from \$1.99 to \$29.99—and gives every copyright owner the option to let Google pick which price each book will sell for.²⁴ Put another way, the copyright owners may collectively delegate their pricing decisions to a single centralized actor that can examine the market and pick a revenue-maximizing set of prices.

The Registry is also a potentially dangerous monopoly. The Registry's authority to negotiate new business models with Google puts it in a classically dangerous position. The Registry will speak on behalf of an entire industry, more or less. With that concentrated authority, it will have great practical ability to structure these new business models in anticompetitive ways in dealing with Google—or to structure them in ways such that it and Google present a coordinated face to the reading public.

¹⁹ *Id.* at § 4.8(a).

²⁰ *Id.* at § 7.2(d).

²¹ *Id.* at § 4.7.

²² 15 U.S.C. § 1 (2000).

²³ The subscription service seems less intrinsically problematic. All-you-can-eat licenses can have pro-competitive effects. *See Broadcast Music, Inc. v. Columbia Broadcast Sys., Inc.*, 441 U.S. 1 (1979) (holding that blanket licenses are not *per se* anticompetitive).

²⁴ Settlement Agreement § 4.2(b)–(c).

Other concerns relate to intellectual freedom: people's ability to think and to learn, free from outside coercion.²⁵ Obviously, the broad access to books promoted by the settlement promotes intellectual freedom, but other terms potentially threaten it. Take privacy, for example. *The Theory and Practice of Oligarchical Collectivism*, the Index Librorum Prohibitorum, and *The Easy Way to Quit Drinking* remind us that intellectual freedom is closely bound up with reader privacy.²⁶ Google's book access programs, however, being online services, will be capable of tracking millions of users, book by book, page by page. That's a horrifying prospect for librarians who fought the Patriot Act's patron-records provisions. The settlement, however, is largely silent on privacy issues.²⁷

Libraries also fear that Google's power might actually reduce access to books. Libraries are likely to face intense pressure to subscribe to Google's services. Patrons accustomed to ready electronic access through the free public access service will demand that their libraries subscribe to the paid version once the lines at the free terminal start to grow. Outside funders—city councils and university administrators—will ask why the library needs all those expensive books and shelves when everything is available online anyway. Once they are in the system, though, these libraries will be at Google's mercy, no matter how high the prices or restrictive the terms. Once a library has gone digital, going back is almost impossible.²⁸ That is especially worrisome since Google's scans are, in library terminology, "access digitization" rather than "preservation digitization."²⁹ They are meant to be readable today, not to capture every detail that future scholars might care about; moreover, many of Google's digitizations are so marred by misaligned pages, bad metadata, or other scanning mistakes as to be unreadable.³⁰

Consumer-protection issues with the settlement's terms are also a concern.³¹ We might worry about the settlement's effects on consumers' rights under copyright law: an e-book cannot be resold or loaned the way a physical book can. We might also worry about the potential impermanence of e-books: when Google shut down its Google Video purchase program, it turned off the servers that made the videos viewable.

The common theme in these concerns is that they all relate to, or are magnified by, centralized power. Price-fixing among two copyright owners is harmless; price-fixing among two million copyright owners is a serious concern. Multiple e-book vendors give libraries and consumers the power to walk away from bad deals; a single monopolist leaves them helpless. Numerous and varied channels of cultural and intellectual exchange lead to a robust public sphere; a single point of control can threaten democracy. Personal information on a hundred readers is a privacy worry; personal

²⁵ See, e.g., AM. LIBRARY ASS'N, LIBRARY BILL OF RIGHTS (adopted 1948, as amended 1980), <http://www.ala.org/ala/aboutala/offices/oif/statementspols/statementsif/librarybillrights.cfm>.

²⁶ See generally Julie Cohen, *A Right to Read Anonymously*, 28 CONN. L. REV. 981 (1996).

²⁷ In one respect, it's worse than silent. The libraries that gave Google books to be scanned received back digital copies. The settlement actually requires that these libraries report all scholarly and classroom uses of their digital copies. Settlement Agreement § 7.2(b)(vii).

²⁸ See generally NICHOLSON BAKER, DOUBLE FOLD: LIBRARIES AND THE ASSAULT ON PAPER (2001) (arguing passionately against deaccessioning decisions).

²⁹ See Kalev Leetaru, *Mass Book Digitization: The Deeper Story of Google Books and the Open Content Alliance*, FIRST MONDAY, Oct. 2008, <http://www.uic.edu/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/2101/2037>.

³⁰ See Paul Duguid, *Inheritance and Loss? A Brief Survey of Google Books*, FIRST MONDAY, Aug. 2007, <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/1972/1847>.

³¹ See, e.g., James Grimmelman, *How to Fix the Google Book Search Settlement*, J. INTERNET L., April 2009, at 1.

information on a hundred million readers is a privacy dystopia. And so on and so forth. The central inescapable issue posed by the settlement is that it will leave Google in an immensely powerful position; it will control access to the single most comprehensive collection of books since the Library of Alexandria. It is that dominant position that makes an otherwise sound settlement worrisome. In the next part, I will examine more closely the source of that concentrated power.

II. CONTEXT: THE ORPHAN WORKS PROBLEM

Copyright is designed to increase the supply of creative works available to the public. To do that, it gives creators incentive to create new works by giving them a revenue source; willing buyers pay for copies of the work. Under ordinary circumstances, a user is more than happy to pay a price the owner is more than happy to accept.

An “orphan” work, however, has (or might have) an owner who cannot be found, who may not even know that she is a copyright owner. For instance, think of an author who dies without a will. Her next of kin may have no idea that they are now copyright owners. Or think of a publishing house that gets into financial distress and has to sell itself to a liquidator; the buyer may be thinking of the presses and the office chairs, not the copyrights. Especially with older works that are not currently generating revenue, it becomes all too easy to lose track of ownership records.

The result is a lose-lose situation. On one hand, orphan works owners never see a dime from their copyrights. On the other, it is impossible for a potential user to feel entirely safe when trying to put an orphan work to use, no matter how good her search for the owner. Perhaps it is true that nine out of ten orphan owners will never turn up; the tenth could still file a painful infringement lawsuit. The rational user plays it safe and foregoes the use. For instance, some photo labs will not reproduce old family photographs because of the copyright risk.

Orphan works thus occupy an unfortunate middle ground between works that are actively being distributed and works in the public domain. If a book is in print and available for purchase at bookstores, the copyright owner is making money off of it; if a book is clearly in the public domain, the rest of the world is able to enjoy it, build on it, and put it to new uses. But orphan works are the worst of both worlds: no one is benefiting from them, financially, creatively or intellectually. This rough tripartite division—actively managed, orphan, and public domain—is critical for understanding the orphan works problem and the structure of the settlement.

FIGURE 1:
ORPHAN WORKS BENEFIT NEITHER COPYRIGHT OWNERS NOR THE PUBLIC

		COPYRIGHT OWNER MAKING MONEY?	
		Yes	No
FREE FOR PUBLIC REUSE?	Yes	—	Public domain
	No	Actively managed	Orphan

Copyright’s increasingly long term compounds the problem. Copyright endures for the life of the author plus 70 years.³² That is an immensely long time, and it is an immensely long time to keep careful track of ownership. Under the 1909 Copyright Act (which was in force until 1978), copyright lasted 56 years—but had to be renewed

³² 17 U.S.C. § 302 (2000).

halfway through by filing a form with the Copyright Office. Over 85% of works were not renewed, putting them unambiguously in the public domain; the ones that were renewed had updated ownership records, aiding in the process of finding the owner. For books, orphan-dom is a serious problem. The low renewal rates under the 1909 Copyright Act and the small fraction of books kept in print today suggest that the vast majority of books ever published are not being put to productive use.³³ The precise split between orphan works and ones whose owners are rationally allowing them to lie fallow is impossible to ascertain, but no one thinks that the number of orphans is small. Half of all books would be a conservative, lowball estimate.

For this reason, then, the prevalence of orphaned books would have played a major role in Google's fair use defense. Orphan works take the transaction costs argument for fair use—the costs of negotiating a deal would exceed the social benefits³⁴—and ratchet it up to a new level. Orphan owners cannot be found, not at any price. The transaction costs of negotiating with them are effectively infinite. Similarly, truly orphan owners—who cannot be found to be paid—are inherently unable to profit from selling licenses to scan and search their books. Putting these points together yields the powerful argument that rejecting a fair use defense for scanning orphaned books would necessarily mean shutting down a project of great social utility, but without one iota of offsetting benefit to anyone.

A. ORPHANS AND THE SETTLEMENT

If the orphans thus loomed large over the lawsuit, they also cast long shadows across the settlement. Under its terms, by default, Google will be free to make all uses of out-of-print books: scanning, searching, advertising, sale, subscription, and so on. It will set their prices algorithmically, and forward on to the Registry all the money it makes from them. When the copyright owners turn up, they can claim their money and start taking active control of how the books are priced and displayed.

Of course, some owners will *never* turn up. These are the orphan owners. No one knows exactly how many are out there, although to all indications, there are a great many of them. (A quick back-of-the-envelope calculation based on the dollar figures the settlement sets out for one-time payments to copyright owners and the size of the pool set up to pay them suggests that only about 10% of copyright owners are expected to register with the Registry.³⁵) Thus, by the logic of the settlement, the orphan works will be scanned, searchable, and available for sale. The money piling up in their names will sit there, until after five years the Registry will be allowed to apply it to other operating expenses. If any is left over, it will go to charities and to the copyright owners who did turn up.

³³ See Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 497, 519–21 (2004) (collecting sources on renewal rates and in-print status).

³⁴ See Wendy Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600 (1982).

³⁵ The settlement sets aside \$45 million to pay “inclusion fees” to copyright owners whose works were scanned. The minimum inclusion fee is \$60, so the settlement would seem to expect about 750,000 book copyright owners to show up. Compare that figure with the roughly 7 million books Google has scanned, of which about 6 million are in copyright. Jule Sigall, Senior Policy Counsel for Microsoft (and principal drafter of the Copyright Office's study of orphan works) made this calculation in a presentation at a Columbia Law School symposium on the settlement on March 27, 2009. A video recording of his comments, along with a rebuttal from one of the settlement's drafters, is available at <http://kernochancenter.org/Googlebookssettlementrecording.htm>.

It's important to recognize the critical role that the settlement's treatment of orphan works plays in its ambitious scope. Because Google is allowed to presume consent of absent copyright owners—precisely the presumption that the plaintiffs objected to when they filed the lawsuit—it sets a default that most of the books in existence in the United States will be part of Google's collection. Every orphaned book is a book whose owner will never reverse the default, will never opt out. Google's book services will be comprehensive on a previously unimaginable scale; the settlement ensures that copyright claims by orphan works owners will not threaten that comprehensiveness.

Indeed, just as Google would have argued the intractability of the orphan works problem in making a fair use case for scanning, that self-same intractability provides the best justification for the comprehensive book-sales programs that the settlement establishes. The orphans are books that are not being made available to the buying public and are not benefitting their copyright owners. The class action gives Google the green light to start making them available again, while collecting money on behalf of copyright owners. That is not an arrangement that would be possible through any kind of voluntary dealing. With orphan works legislation stalled out, the class action settlement may well be the only way of accomplishing this goal.

This basic deal has a lot to recommend it. Society gets access to these orphaned books; Google profits from making them available; money is pushed back at the copyright owners. Some copyright owners will never show up to claim their money; we should shed no tears on their behalf, since there was nothing we could have done for them. Some will show up, at which point they are no longer orphan owners, and everyone is happy about that, too. As for the money that has been piling up in the meantime, if a 63/37 revenue split is fair to present copyright owners, it seems fair to absent ones, as well. This deal is, in its high-level structure, a model for how to do orphan works legislation properly.

The devil, however, is in the details. I have noted a number of problematic details about the settlement: competition, privacy, conflicts of interest, quality, and so on. These devilish details have at least two things in common. First, issues that might not be troubling if they involved a few copyright owners or one of many book platforms become much more worrisome when they involve all copyright owners and a dominant platform. Second, the concentration of power that amplifies all our concerns is *directly traceable* to the orphan works-affecting provisions of the settlement—that is, to its class action nature.

B. A DEAL GOOD FOR GOOGLE ONLY

Google is not the only player with an interest in scanning books and making them available. Microsoft had a book-scanning program for search purposes, but closed it down in mid-2008. Amazon has the institutional capacity to make books available digitally on a huge scale, and could quite plausibly expand into scanning. The non-profit Open Content Alliance has been busily scanning public-domain works, as well.

In a post-settlement world, however, all of these potential competitors face one insurmountable hurdle: copyright law. Anyone who tries scanning in-copyright books and selling access to them will immediately be sued into oblivion by a mob of angry copyright owners. The only way to avoid that gruesome fate is to get the appropriate licenses, in the time-honored tradition of copyright law: by negotiating advance permission from each individual copyright owner. Here's where the class action nature of the settlement becomes crucial. Precisely because the present lawsuit is a class action, Google can rely on it to force a standardized deal on all book copyright owners at

once. Some of them will opt out, to be sure, but the vast majority of them will not. Google only had to negotiate with ten copyright owners to reach this deal; the class action multiplies the effect by a factor of a million.

This really is a Google-only deal. Suppose that Yahoo! wants to get into the business. If it starts scanning and gets sued, who's to say that the plaintiffs—who could, by definition, be almost anyone—would file their suit as a class action, be inclined to settle, and be inclined to settle on terms comparable to those offered by Google? Keep in mind that the plaintiff-side attorneys fees payable under the proposed settlement exceed \$45 million. Now that Google is in this line of business, what sensible copyright owner would want to spend tens of millions creating competition—and driving down the price of books? Without a group of “representative” plaintiffs willing to cooperate with the way that the Authors Guild cooperated with Google, Yahoo! would be in the extremely difficult position of trying to file and settle a declaratory judgment action against a gigantic defendant class. Note also that because Google's victory comes from a settlement, rather than a court ruling, it establishes no fair use principles for competitors to draw on in framing their own legal arguments.

Thus, the settlement, by its very class action nature, creates a remarkably effective barrier to entry. No potential competitor could come close to matching the depth of Google's backlist. As though to make doubly sure, the settlement contains a powerful most-favored-nation clause in Google's favor; the Registry promises to Google “economic and other terms . . . that, when taken as a whole, do not disfavor or disadvantage Google as compared to any other substantially similar authorizations granted to third parties by the Registry.”³⁶

Thus, Google's extraordinary market power under the settlement will come from its unique lock on orphan works. These are precisely the works that no one else has legal permission to use, and precisely the works that no one else dares sell *en masse* for fear of the not-actually-orphan copyright owner who turns up with a grudge and a summons. The class action settlement gives Google a green light to make the orphans available; that same light is red for everyone else.

III. ENDS AND MEANS

Copyright law is broken, and the orphan works problem illustrates everything wrong with it. Well-intentioned users who can't honestly acquire the copyright clearances they need? Check. Far-reaching rights that aren't actually doing much good for creators? Check. Painfully ambiguous fair use standards? Check. Powerful remedies that bear no rational relation to the harms involved? Check. Orphan works are broken for everyone.

A. LEGISLATIVE AND JUDICIAL SOLUTIONS

The orphan works problem, in other words, is a textbook example of a *legislative* problem. Something's wrong with existing law and it affects a lot of people. If we decide to start tampering with the rules, we would like to make sure that the gains are broadly distributed, rather than just accruing to a lucky few. What's more, the problem affects different constituencies in different, subtly interacting ways. It may be that someone's ox will need to be gored in order to make progress, but ox-goring is never a decision that should be made lightly. These are the kinds of comprehensive rulemaking and interest-group balancing for which legislation is ideally suited.

³⁶ Settlement Agreement § 3.8(a).

Indeed, legislative fixes for the orphan works problem have drawn no shortage of interest. Responding to congressional requests, the Copyright Office conducted its own detailed study of the orphan works problem in 2005 and 2006.³⁷ The resulting study proposed limiting damages to “reasonable compensation” and putting sharp limits on the use of injunctions where “prior to the commencement of the infringement, performed a good faith, reasonably diligent search to locate the owner of the infringed copyright and the infringer did not locate that owner.”³⁸

Legislation implementing the Copyright Office’s proposal was introduced in the 110th Congress.³⁹ It passed the Senate but expired in committee in the House. Although the proposal had a number of high-profile supporters in the nonprofit and commercial worlds, it also drew sharp opposition. Some copyright owners, particularly visual artists, thought it went way too far;⁴⁰ Lawrence Lessig thought it “simply wouldn’t do much good.”⁴¹ Copyright legislation in the United States tends to follow a consensus model; Congress will not act unless it perceives that most major commercial stakeholders in the copyright system are on board.⁴² At the moment, at least, the political process appears to be logjammed on the orphan works problem; no one has found a way to resolve it that does not make some powerful group scream loudly.

The Google Book Search settlement, then, is a judicial solution to a legislative problem. That makes it appealing. If we care about making orphan works available again, then we ought to be happy that Google, the Authors Guild, and the AAP were able to figure out a way to fit an orphan works solution into a class action settlement. But we should also be concerned that legislative problems demand legislative solutions; in the process of folding and squishing orphan works legislation to make it look like a settlement order, some important pieces have been mutilated.

Think about how the issues I have raised with this settlement would have been dealt with had it been considered as legislation. The competition concerns with designating Google as the unique source for orphan books would have been obvious, and Congress would almost certainly have had to create a generic process that others could use to make those books available. The Registry’s dangerous power would also have been evident and it would have been straightforward to set hard limits on its power to prevent abuses. Consumer and library advocates could have shown up and presented their concerns; Congress would have written privacy guarantees and library freedoms into the legislation.

None of this has happened in the settlement deliberations, at least so far. Google and the plaintiffs have resolutely described it as a private settlement, between private parties, in which the concerns of non-parties simply ought not to register. By judicializing their orphan works solution, the parties to this lawsuit have done an end run around the usual safeguards of the democratic process. The ends may be noble, but the means are not—and the result of choosing the wrong branch of government is that the resulting product is tainted. Freed from the usual checks attendant upon legislation, Google and the plaintiffs have structured the deal to exclude competitors, take money

³⁷ See U.S. COPYRIGHT OFFICE, *supra* note 33.

³⁸ *Id.*

³⁹ Orphan Works Act of 2008, H.R. 5889 110th Cong. (2008); Shawn Bentley Orphan Works Act of 2008, S. 2913 110th Cong. (2008).

⁴⁰ See ILLUSTRATORS’ P’SHP, GROUPS OPPOSING THE HOUSE & SENATE ORPHAN WORKS BILLS AS WRITTEN (2009), http://www.illustratorpartnership.org/01_topics/article.php?searchterm=00273.

⁴¹ Lawrence Lessig, *Little Orphan Artworks*, N.Y. TIMES, May 20, 2008, at A23.

⁴² See generally JESSICA LITMAN, DIGITAL COPYRIGHT (2001).

from orphan copyright owners, and potentially oppress the reading public. One should be troubled by this prospect. The public has a right to demand that the concerns that would have been aired in the legislative forum be aired in the judicial one.

The costs of standing idly by go beyond this particular lawsuit. If the settlement is allowed to stand without question, it will set a terrible precedent for the future. We're committed to a democratic political process, and if we think the process is broken, the solution is to fix it, not to avoid it entirely. Every time we launder a legislative problem through the judicial system with an arguably abusive class action, we erode the rule of law a little more.

B. SUBSTANTIVE REFORMS

I have written elsewhere about specific substantive ways the settlement could be improved.⁴³ The list is long, but three fairly straightforward changes would suffice to eliminate most of the serious reasons to worry about the settlement. They all relate to issues that would have been on the table if this deal had been hammered out in Congressional hearing rooms, rather than lawyers' offices.

First, the arrangement needs to be genuinely non-exclusive. Right now, the deal is formally non-exclusive in that it does not actively prohibit copyright owners from authorizing Google's competitors to make their books available. But the most-favored nation clause and the class action default will make Google's deal exclusive in practice. That is structurally easy to fix. Anyone else willing to assume the same obligations that Google assumes under the settlement should also be entitled to the same benefits.

If Google isn't the only game in town for the entire back catalog, a remarkable number of other concerns become much less serious. Google cannot hook libraries using drug-dealer pricing (the first time is free) if it has serious competition. Botched scans are not the end of the story if there is another source for the pages. Terms and conditions will be fairer if negotiated in a competitive market. And so on and so forth. Fixing the exclusive licensing regime in the settlement is an absolutely necessary condition for competition to be feasible.

Second, we need to recognize the Registry for what it is: a new collecting society, that is, an institution that issues licenses on behalf of an entire class of copyright owners and divides the money up among them. The best-known collecting societies in the United States are the performing rights organizations— The American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC. They hand out licenses to radio stations, concert halls, large stores and restaurants, and anyone else who wants to perform music publicly without having to negotiate with every individual composer.

Collecting societies have great power, and with it comes great responsibility. Their role—aggregating rights to smooth out licensing transactions—tends to require that we tolerate their accumulation of market power and explicit coordination of pricing. In exchange, however, our copyright and competition authorities must watch them carefully. ASCAP and BMI are subject to antitrust consent decrees, and for very good reason. They have agreed to forego a whole range of dangerous practices, and to live with continuing court supervision to make sure they do not invent new ones.

The basic obligation we need to impose on the Registry is to deal fairly and evenhandedly with all comers. The settlement is already fairly good about this on the

⁴³ Grimmelmann, *supra* note 31, at 1.

copyright owner side; the Registry is prohibited from representing subsets of the settlement class, and thus cannot turn copyright owners against each other.⁴⁴ On the Google side, however, the Registry's powers and duties are too vague for comfort. It has vast power to negotiate new business models, but no obligations to be pro-competitive or evenhanded when doing so; its powers to negotiate with Google's competitors are limited and slightly obscure.

Somewhat paradoxically, the best way to make the Registry work well is to universalize it. The settlement, for jurisdictional reasons, limits the class of copyright owners whose works will be controlled by the Registry.⁴⁵ That is another unfortunate artifact of the judicial process; if Congress were to charter the registry, it would not and should not be so limited. The Registry should explicitly be authorized, indeed required, to represent *all* copyright owners with an interest in books: past, present, and future. Thus, it would be able to hand out blanket licenses that have no unfortunate jurisdictional holes (which create licensing transaction-cost problems and create conflicts among copyright owners). If we think the settlement is fair for the settlement class, we have every reason to think that it's fair for *all* book copyright owners.

Third, we need to take the issue of terms and conditions seriously from the very start. The sheer scope of the settlement—especially if it is extended by making it non-exclusive and covering more copyright owners—means that it will profoundly reshape copyright law as it affects books. The fair use, library use, and first sale provisions of the Copyright Act need to be appropriately translated into the digital book access envisioned by the settlement. The settlement currently does a passable job, but there are reasons to be concerned that it may undermine library rights to preserve books and reader rights to share them. Neither of these groups was properly heard from in the negotiations that produced this settlement; their voices would have been a larger part of congressional or agency deliberations.

C. HOW TO GET THERE

What now? The settlement is still subject to the court's approval. Nominally, the court is considering both whether to certify the plaintiff class and to approve the settlement binding that class. Thus, the court has set a May 5 deadline for class members to file opt-outs and a June 11 fairness hearing. These deadlines follow one of the largest legal-notice programs in history.⁴⁶ During the five-month notice period, Google has spent \$7 million on print ads in 70 languages, in publications as obscure as the *Nauru Bulletin* (circulation 700).

This procedural posture complicates the process of raising public interest concerns. In approving or rejecting a class action settlement, a court's typical concern is

⁴⁴ Settlement Agreement at § 6.2(b).

⁴⁵ See *id.* at § 1.16 (defining "Book"). Specifically, if a book is a United States work, it is covered by the settlement only if the copyright has been registered with the United States Copyright Office; if the book is a foreign work, it is covered as long as has been made available in the United States. These categories track the jurisdictional categories of copyright law. See generally 17 U.S.C. § 101 (2000) (defining "United States work"); 17 U.S.C. § 411 (2000) (requiring registration prior to suit for United States works). The Second Circuit—in a decision currently under review by the Supreme Court—had held that a federal court lacked jurisdiction to approve a class action settlement whose class was drawn more broadly. *In re Literary Works in Elec. Databases Copyright. Litig.*, 509 F.3d 136 (2d Cir. 2007), *cert. granted sub nom.* Reed Elsevier, Inc. v. Muchnick, 77 U.S.L.W. 3487 (U.S. Mar. 2, 2009 No. 08-103).

⁴⁶ See Noam Cohen, *A Google Search of a Distinctly Retro Kind*, N.Y. TIMES, Mar. 3, 2009, at C1, available at <http://www.nytimes.com/2009/03/04/books/04google.html>.

whether the settlement is “fair, reasonable, and adequate” to class members.⁴⁷ For copyright owners who show up and register with the Registry, the settlement seems excellent. In particular, they can decide at any time to stop allowing their books to be sold and can even opt out of snippet display in search results. Google’s new book sales programs offer a new revenue stream, but do not force unwilling authors or publishers to drink from it.

For absent copyright owners—we might call them members of an orphan works owner subclass—the settlement is more questionable. The most directly objectionable terms are the provisions reallocating their revenues after five years. Whether the reallocated revenues are given to copyright owners who have registered or are used to defray Registry expenses that registered copyright owners would otherwise need to pay for themselves, the effect is the same. Money generated from Google’s use of orphan works is given not to the orphan work owners, but to other copyright owners. This reallocation illustrates a clear conflict of interest between the non-orphan copyright owners (including, by definition, all of the named plaintiffs) and the orphan members of the plaintiff class. As such, it speaks directly to the adequacy of the representation provided by the class counsel, and should lead the court to scrutinize the settlement closely.

Other public interest concerns, however, cannot be so easily fit into the class action framework. There is no easy way to come in and say that libraries, for example, will be adversely affected by the settlement; that does not really sound like a question of fairness to absent class members. The narrowness of the focus on absent class members, in a case with such profound effects on the public interest in copyright, ought to be a signal that something is seriously wrong with using a class action settlement to bring orphan works legislation into being.

This is not to say that the court is prohibited from considering these urgent larger issues. Settlements may not themselves violate the law,⁴⁸ a rule that comes into play with some of the antitrust issues. Courts also have a duty to ensure that class action settlements are “consistent with the public interest.”⁴⁹ Objecting copyright owners, intervenors, and *amici curiae* are thus free to call such issues to the court’s attention, and some are planning to do so. (My own institute at New York Law School, for example, will be filing an amicus brief.)

Fortunately, there also will be opportunities outside the present lawsuit to raise some of these issues. Google’s competitors could file antitrust lawsuits at any time, as could federal and state regulators. Google will have to negotiate the actual terms of its subscription service with libraries and other institutions, which may be able to require fair terms and conditions as part of the negotiations. If consumers themselves do not have the bargaining power to insist on good privacy protections when Google launches its actual book sales programs, it is certainly possible that the Federal Trade Commission and the courts could do it for them.

We should also think about going back to Congress. Last session’s orphan works bills stalled, but that does not mean that all orphan works legislation is doomed. The settlement itself could provide a workable model for a book-specific orphan works bill. Just take every mention of “Google” and replace it with a general authorization for anyone to scan and sell books provided they honor the terms of Google’s deal with the Registry. Orphan works legislation on this model would be fair to copyright

⁴⁷ FED. R. CIV. PROC. 23(e)(2).

⁴⁸ See, e.g., *Dillard v. City of Foley*, 926 F. Supp. 1053, 1063 (M.D. Ala. 1995)

⁴⁹ *Bailey v. Great Lakes Canning, Inc.*, 908 F.2d 38, 42 (6th Cir. 1990).

owners; they would get the same deal they do under the settlement. It would be fair to Google, which would remain serenely confident in its ability to take on any competitor so long as the playing field is level. It would solve most of the competition concerns with the settlement to the benefit of libraries, readers, and other book-scanners. That would bring to the table basically every interest group affected by book-specific legislation, making it quite feasible to craft a consensus proposal.

IV. CONCLUSION

The Google Book Search settlement serves respectable ends through questionable means. The copyright interests in books have been scattered to the four winds over the years, harming both the reading public and copyright owners themselves. True, a class action is a device for gathering together lots of widely scattered interests, but in this case, it's the wrong device. Because this deal was struck through private negotiation among a few parties, it neglects the broader public interest in some critically important ways.

The need for change is real, but at the same time, it's reassuring how eminently *solvable* the problems with the settlement are. The settlement may have emerged from a questionable bargaining process, but the end product bears at least a familial resemblance to an agreement of which we could all feel proud. This settlement does not need to be problematic, and we should not let it be. The court is being asked to place its imprimatur—our imprimatur—on this reshaping of our copyright law and our publishing system. We the people have the right to insist that our interest, the public interest, be reflected in the outcome.

Addressing the Epidemic of Domestic Violence in Indian Country by Restoring Tribal Sovereignty

Matthew L.M. Fletcher*

“Every hour of every day an American Indian woman within the authority of a tribal court is the victim of sexual and physical abuse.”¹

American Indian women residing on Indian reservations suffer domestic violence and physical assault at rates far exceeding women of other ethnicities and locations.² American Indian women experience physical assaults at a rate 50% higher than the next most victimized demographic, African-American males.³ About one-quarter of all cases of family violence (violence involving spouses) against American Indians involve a non-Indian perpetrator, a rate of inter-racial violence five times the rate of inter-racial violence involving other racial groups.⁴ In all, 39% of American Indian women report being victims of domestic violence.⁵

Compounding this problem, and likely contributing to it, is the current state of federal Indian law. Non-Indians who commit acts of domestic violence that are misdemeanors on Indian reservations are virtually immune from prosecution in most areas of the country. This is because the Supreme Court has held that tribal governments may not prosecute non-Indians,⁶ and while either the United States or a state

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¹ Brief for National Network to End Domestic Violence et al. as Amici Curiae Supporting Respondents at 2, *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 128 S. Ct. 2709 (2008) (No. 07-411).

² See *id.* at 3-4 (citing Lawrence A. Greenfield & Steven K. Smith, U.S. Dep’t of Justice, *American Indians and Crime* (1999); Steven W. Perry, U.S. Dep’t of Justice, *American Indians and Crime 1992–2002* (2004); Calli Rennison, U.S. Dep’t of Justice, *Violent Victimization and Race, 1993–1998* (2001); Patricia Tjaden & Nancy Thoenne, U.S. Dep’t of Justice, *Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women: Findings From the National Violence Against Women Survey 22 ex. 7* (2000)). The rates of sexual violence, including rape, are at least as startling, but this paper will focus on domestic violence.

³ See GREENFIELD & SMITH, *supra* note 2, at vi; Rebecca A. Hart & M. Alexander Lowther, *Honoring Sovereignty: Aiding Tribal Efforts to Protect Native American Women from Domestic Violence*, 96 CAL. L. REV. 185, 188 (2008).

⁴ See GREENFIELD & SMITH, *supra* note 2, at 8.

⁵ See Hart & Lowther, *supra* note 3, at 188 (citing M.C. Black & M.J. Breiding, *Adverse Health Conditions and Health Risk Behaviors Associated with Intimate Partner Violence—United States, 2005*, MORBIDITY AND MORTALITY WKLY. REP., Feb. 8, 2008).

⁶ See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

may exercise jurisdiction over such crimes, they rarely prosecute these kinds of cases due to lack of resources and other factors. Congress has the authority to fix this gap in the law, but has not done so.

In short, unprosecuted domestic violence committed by non-Indians in Indian Country is a serious problem, without an effective federal or state solution absent an Act of Congress. The Supreme Court has created—and Congress has not done enough to solve—a terrible irony. The law enforcement jurisdiction closest to the crime and with the greatest capacity and motivation for responding quickly, efficiently, and fairly, has been stripped of the authority to react, leaving Indian women to suffer, and crimes of domestic violence to remain unresolved and unprosecuted.

This Issue Brief recommends a legislative solution to alleviate this jurisdictional gap by recognizing tribal jurisdiction over non-Indians for domestic violence misdemeanors. The proposal would place the onus on Indian tribes to demonstrate their capacity to prosecute non-Indians in a manner consistent with federal and state courts and require tribes to provide comparable criminal procedure protections to these defendants before they may assert jurisdiction.⁷ This limited proposal offers a reasonable means for tribes to accept this authority and build a track record of success. Ideally, after more and more tribes begin to prove their capacity to prosecute non-Indians for domestic violence, either the Court or Congress will again recognize full tribal authority to provide for law and order on Indian reservations.

Part I of this Issue Brief describes the legal and historical landscape of Indian tribal authority to prosecute Indian Country crimes. Part II sets out the legal rule, created by the Supreme Court without Congressional sanction, denying Indian tribes the authority to prosecute non-Indian criminal perpetrators. Part III offers an incremental solution, in which Congress would reaffirm tribal criminal jurisdiction over non-Indians in certain circumstances. Part IV offers responses to the possible constitutional and criminal procedure issues that may arise under this legislative proposal.

I. TRIBAL JURISDICTION AND AUTHORITY

Felix Cohen's classic restatement of the metes and bounds of tribal sovereignty in his 1942 *Handbook of Federal Indian Law* found that tribal sovereignty—that is, the power and authority of Indian tribes—is inherent and undiminished, unless one of two conditions occurs.⁸ First, the tribe may voluntarily divest itself of some aspect of its sovereignty, such as the power to declare war, in a treaty or in a nation-to-nation agreement.⁹ Second, Congress may take action to affirmatively divest an Indian tribe of some aspect of its sovereignty. One example of such an action was the decision by Congress in 1968 to limit the criminal penalties that may be imposed by tribal courts to no more than six months and \$500 in fines, later raised to one year and \$5000.¹⁰

⁷ Indians may be prosecuted by tribes under federal Indian law *without* the full panoply of criminal procedure rights afforded them under U.S. law. See e.g., 25 U.S.C. § 1302(6) (2008) (providing for a right to counsel, but not for appointment of counsel).

⁸ See Felix Cohen, *Handbook of Federal Indian Law* 122 (1942).

⁹ E.g., Treaty of Hopewell with the Cherokees, U.S.-Cherokees, art. III, Nov. 28, 1785, 7 Stat. 18 (“The said Indians for themselves, and their respective tribes and towns, do acknowledge all the Cherokees to be under the protection of the United States of America, and of no other sovereign whosoever.”).

¹⁰ See 25 U.S.C. § 1302(7) (2000) (“No Indian tribe in exercising powers of self-government shall . . . impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of \$5,000, or both”).

In other words, unless there is a divestment of tribal authority, Indian tribes may exercise all the sovereign power of government that they would retain if they were nations within the international sphere. Indian tribes retain the power to determine their form of government, the power to determine their citizenship criteria, the power to tax, the power to exclude, the power to prosecute and punish, sovereign immunity from suit in federal and state courts, and so on. To be sure, much of tribal sovereignty has been divested by virtue of the tribes' status as "domestic dependent nations,"¹¹ but robust inherent sovereignty remains. And there are many gray areas where Indian tribes exercise *de facto* sovereignty, often over non-Indians, in areas such as land use, environmental protection, and employment.

Among the powers retained by Indian tribes is the power to establish tribal courts and to prosecute criminal offenders for acts committed within Indian Country.¹² Indian tribal courts have existed in one form or another since at least as early as the 18th century, when the Cherokee Nation of Georgia created Cherokee tribal courts.¹³ Tribal courts received a huge boost when the Supreme Court held in 1959 that state courts do not have jurisdiction over civil disputes arising on Indian reservations.¹⁴ There are now more than 300 tribal courts in the United States, with more and more tribes developing their court systems each year. The presence of tribal courts in Indian Country has coincided with the resurgence of tribal self-determination beginning in the 1960s and 1970s, when Congress shifted federal Indian policy toward allowing Indian tribes to control federal services formerly delivered by the Bureau of Indian Affairs and Indian Health Service. Congress has been a strong supporter of the development of tribal courts in the last few decades as part of its general support for the development of tribal governments.¹⁵ In 1994, Congress recognized tribal court civil jurisdiction to issue protection orders in cases of domestic violence, dating violence, sexual assault, and stalking.¹⁶

Tribal courts are courts of general jurisdiction and tend to mirror federal and state courts in many ways, although with some important differences. One key difference is that tribal court caseloads are far smaller than those of federal and state courts, which means that the amount of time a tribal prosecution takes—through investigation, indictment, trial or plea bargain, and even counting the jail time—is considerably shorter than the time for prosecutions in federal and state courts. The case of Billy Jo Lara, a nonmember Indian (a person who is a member of a federally recognized tribe different from the tribe asserting jurisdiction), is one typical example. In this case, which reached the Supreme Court, *United States v. Lara*,¹⁷ Lara, a member of the Turtle Mountain Band of Chippewa Indians, was convicted of a crime of violence towards a

¹¹ Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

¹² "Indian Country" is a term of art that includes Indian reservation lands, trust lands, and some other limited tribal lands. See 18 U.S.C. § 1151 (2000).

¹³ See Rennard Strickland, *Fire and the Spirits: Cherokee Law from Clan to Courts* 20-33 (1975).

¹⁴ See *Williams v. Lee*, 358 U.S. 217 (1959). A later decision, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), foreclosed federal court jurisdiction over Indian Civil Rights Act claims (except habeas claims), further boosting the need for tribal court development.

¹⁵ See Indian Tribal Justice Act, Pub. L. No. 103-176, 107 Stat. 2004 (1993) (codified at 25 U.S.C. §§ 3601-3631 (2000)); Indian Tribal Justice Technical and Legal Assistance Act, Pub. L. No. 106-559, 114 Stat. 2778 (2000) (codified at 25 U.S.C. §§ 3651-3681 (2000)).

¹⁶ See 18 U.S.C. § 2265 (2000). However, one federal court recently rejected the attempt by a tribal court to issue and enforce a personal protection order against a non-Indian. See *Martinez v. Martinez*, No. 08-5503 (W.D. Wash. filed Dec. 18, 2008), available at <http://turtletalk.files.wordpress.com/2008/12/dct-order-rejecting-tribal-court-jurisdiction.pdf>.

¹⁷ 541 U.S. 193 (2004).

policeman in the Spirit Lake Sioux tribal court and completed a significant jail term *before* the United States Attorney's Office in Fargo was able to muster resources to secure a grand jury indictment for assaulting a federal officer.

Indian tribes famously exercised a traditional and customary form of tribal law and order, such as in the case of the on-reservation murder of the Lower Brule Lakota leader Spotted Tail by his rival Crow Dog. There, the Lakota community chose not to execute or banish the murderer, which would have robbed the community of two of its best leaders in one fell swoop. Instead, the community chose to require Crow Dog to repay the Spotted Tail family with money, tobacco, blankets, and other sacred materials.¹⁸

But in 1883, in response to what local Indian Agents (federal officials charged with supervising Indian tribes and implementing treaty provisions) and politicians believed was insufficient tribal justice in the *Crow Dog* case, Congress extended federal criminal jurisdiction to cover most felonies in Indian Country. As a result, Congress preempted tribal customary and traditional law.¹⁹ Although the congressional statute, called the Major Crimes Act, was intended to respond to the *Crow Dog* case, it has had far-reaching negative effects throughout Indian Country. In part because of the federal law enforcement presence in Indian Country, tribal justice systems collapsed, encouraging Congress to experiment further with extending state criminal jurisdiction into parts of Indian Country in 1953.²⁰ Meanwhile, the Department of Interior created many early tribal courts and tribal law and order codes as a means of coercing compliance with American religious and cultural preferences. Only in the last few decades have tribal governments been able to resume control over most, if not all, of these courts through the federal self-determination contracting process.²¹

The systematic destruction of tribal justice systems in favor of American-style criminal justice has been nothing short of devastating to tribal communities. Dealing with deviant and criminal behavior is a central aspect of every culture, but for a century or longer Indian tribes have not been able to choose how to define or to deal with criminal behavior within their respective territories. Instead, non-Indians in Congress and in state legislatures, as well as non-Indian federal and state judges, prosecutors, investigators, and juries, decide what happens to criminal perpetrators in Indian Country. Sadly, tribal justice systems, which would be able to respond to Indian Country crime in a culturally appropriate and efficient manner, have been stripped of both authority and effectiveness by federal Indian law and policy.

II. "IMPLICIT DIVESTITURE" AND THE RESULTING LAW AND ORDER LOOPHOLE

As described above, under foundational principles of federal Indian law, Indian tribes, whose sovereignty predates the United States Constitution, exercise all the powers of a sovereign nation except those that have been divested by treaty, agreement, or

¹⁸ See *Ex parte Crow Dog*, 109 U.S. 556 (1883); B. J. Jones, *Tribal Courts: Protectors of the Native Paradigm of Justice*, 10 ST. THOMAS L. REV. 87, 90-91 (1997).

¹⁹ See *United States v. Kagame*, 118 U.S. 375 (1886); 18 U.S.C. §§ 1152-1153 (2000).

²⁰ See 18 U.S.C. § 1162(a) (2000); Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535, 541 (1975).

²¹ See JUSTIN B. RICHLAND & SARAH DEER, INTRODUCTION TO TRIBAL LEGAL SYSTEMS 75-99 (2004); 25 U.S.C. § 450a (allowing tribes to take control over various on-reservation federal services, such as tribal courts).

Act of Congress.²² This remaining authority is significant, with tribes retaining the plenary and exclusive authority, for example, to decide their form of government, adopt citizenship rules, provide for property and descent rules, and establish judicial systems.

However, in 1978 the Supreme Court unilaterally altered the playing field by adding an additional means by which Indian tribes may be divested of their sovereignty—by Supreme Court decree, or what the Court calls “implicit divestiture.” In *Oliphant v. Suquamish Indian Tribe*,²³ followed by *Duro v. Reina*,²⁴ the Court held that Indian tribes do not have the authority to criminally prosecute any non-tribal citizens despite the fact that Congress has not taken action to divest Indian tribes of this power, and few, if any, Indian tribes had consented in a treaty or other agreement to the divestment of this power.²⁵ The Court held that the federal judiciary has the authority to divest aspects of Indian tribes’ sovereign authority (such as, for example, the power to prosecute non-Indians) if the court concludes that that aspect of sovereignty is “inconsistent with their status” as domestic dependent nations.²⁶

The Supreme Court created a gaping loophole in law enforcement when it implicitly divested Indian tribes of the power to prosecute non-Indians who commit crimes in Indian Country. Large numbers of people who are not tribal citizens reside or conduct business in Indian Country, or have Indian spouses and intimate partners who reside there. Congress closed a portion of this loophole in 1991 when it reaffirmed tribal authority to prosecute Indians who are members of other tribes.²⁷ But Congress has not acted to fix the loophole preventing Indian tribes from prosecuting non-Indians, largely due to opposition from the Department of Justice and from various state governments who generally oppose tribal government activities.

The Supreme Court’s decisions left two sovereigns in charge of tribal law enforcement in relation to non-Indians: the federal and state governments. In general, the federal government has exclusive jurisdiction over Indian Country crimes, except in several states where Congress instructed state governments to assert criminal jurisdiction over Indian Country.²⁸

As a result, the prosecution of domestic violence and sexual assaults of Indian women falls in large part to federal authorities. But federal law enforcement and prosecution of these crimes against Indian women generally are ineffective for a variety of reasons.²⁹ *First*, federal law enforcement resources are limited, and are “stretched too thin to provide the level of support needed in tribal communities to adequately

²² See *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978).

²³ 435 U.S. 191 (1978).

²⁴ 495 U.S. 676 (1990).

²⁵ Criticism of *Oliphant* as racist and wrongheaded has been as intense as that of any case in the Supreme Court’s history, including perhaps *Dred Scott v. Sanford* and *Plessy v. Ferguson*. E.g., ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA 97-113 (2005); Ezekiel J.N. Fletcher, *Trapped in the Spring of 1978: The Continuing Impact of the Supreme Court’s Decision in Oliphant, Wheeler, and Martinez*, 55 FED. LAW., March-April 2008, at 36, 37-40.

²⁶ *Oliphant*, 435 U.S. at 208.

²⁷ This is the so-called “Duro fix,” named after the *Duro v. Reina* decision. See *United States v. Lara*, 541 U.S. 193, 199-200 (2004) (construing 25 U.S.C. § 1301(2) (2000)).

²⁸ See 18 U.S.C. § 1162 (2000) (requiring California, Minnesota, Alaska, Nebraska, Wisconsin, and Oregon to assert criminal jurisdiction in Indian Country); 25 U.S.C. § 232 (2000) (New York); Act of June 8, 1940, ch. 276, 54 Stat. 249 (Kansas).

²⁹ This is not to blame federal prosecutors, who perform outstanding work when they are able. See, e.g., Matthew L.M. Fletcher, *The U.S. Attorney Mess and Indian Country*, INDIAN COUNTRY TODAY, Mar.

confront this problem.”³⁰ Federal prosecutors filed only 606 criminal cases in all of Indian Country in 2006 (about one prosecution per tribe), in total.³¹ The National Congress of American Indians estimates that federal prosecutors decline to prosecute approximately 85% of felony cases referred by tribal prosecutors.³² One tribal observer calls the rate of declinations “appallingly high.”³³

Second, federal prosecutors are hamstrung by federal statutory definitions of federal crimes and by concerns over territorial limitations.³⁴ Because federal prosecutors have to prove (or disprove) several factors, including whether the crime occurred within Indian Country, whether the suspect is Indian or non-Indian, and whether the victim is Indian or non-Indian, in addition to definitional requirements, many crimes are not prosecuted due to lack of sufficient evidence.³⁵

Third, federal prosecutions in Indian Country are often hampered by delay due to lack of resources, the distance of the crime from the local United States Attorney’s Office, and difficulty in securing witness cooperation.³⁶ For federal investigations and trials, unlike with tribal court proceedings, reservation residents must travel long distances at great expense and difficulty, a distance that may be impossible to traverse for many Indian people.³⁷

Similar problems arise with respect to *state* criminal prosecutions. Public Law 280, a 1953 Act of Congress intended to turn over federal criminal jurisdiction in some states to the state governments there, eliminated federal criminal jurisdiction in those states, but did not provide resources to allow or even encourage those states to prosecute Indian Country crimes.³⁸ As such, Public Law 280 states and counties rarely establish an on-reservation police presence, resulting in very long response times after calls for service.³⁹ State courts and services are “often hundreds of miles from the

30, 2007 (recognizing the efforts of Hon. Margaret Chiara, the former United States Attorney for the Western District of Michigan).

³⁰ Letter from James S. Richardson, Sr., President, Federal Bar Association, to Senate Indian Affairs Committee 2 (July 2, 2008), *available at* http://www.fedbar.org/GR_indian-affairs_070208.pdf; *see also* Leslie A. Hagen, *Prosecuting Non-Indian Perpetrators of Domestic Violence*, BEDOHGEIMO: A NEWSL. FROM THE U.S. ATT’Y’S OFF., W. DISTRICT OF MICH., Winter 2004, at 5.

³¹ *See* N. Bruce Duthu, *Broken Justice in Indian Country*, N.Y. TIMES, Aug. 11, 2008; *see also* AMNESTY INT’L, MAZE OF INJUSTICE: THE FAILURE TO PROTECTED INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA, at 9 (1991) (noting that when federal or state governments have jurisdiction over sexual assault cases in Indian Country, “in a considerable number of instances the authorities decided not to prosecute”).

³² *Law Enforcement in Indian Country*, Hearing before the Indian Affairs Committee of the United States Senate, 110th Cong. 46 (June 21, 2007) (prepared statement of Joe Garcia, President, National Congress of American Indians).

³³ *Examining Federal Declinations to Prosecute Crimes in Indian Country*, Hearing before the Indian Affairs Committee of the United States Senate, 110th Cong. 42 (Sept. 18, 2008) (prepared testimony of M. Brent Leonhard, Deputy Att’y Gen., Confederated Tribes of the Umatilla Indian Reservation).

³⁴ *See id.* at 9, 11 (prepared testimony of Drew H. Wrigley, United States Attorney for the District of North Dakota).

³⁵ *Id.* at 37-39 (prepared testimony of Thomas B. Heffelfinger, former United States Attorney for the District of Minnesota).

³⁶ *See id.*

³⁷ *See* Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 711-12 (2006).

³⁸ Pub. L. 83-280, *codified at* 18 U.S.C. § 1162, 28 U.S.C. § 1360 (2000). *See* TRIBAL LAW AND POLICY INSTITUTE, FINAL REPORT: FOCUS GROUP ON PUBLIC LAW 280 AND THE SEXUAL ASSAULT OF NATIVE WOMEN 7 (2007), *available at* <http://www.tribal-institute.org/download/Final%20280%20FG%20Report.pdf>.

³⁹ *See* Tribal Law and Policy Institute, *supra* note 39 at 7-8.

victims' homes and communities."⁴⁰ "[S]ince tribal members are often a small percentage of county populations, local police and prosecutors have an incentive to give priority to other parts of their territory."⁴¹ A recent study concludes that on-reservation residents, Indian and non-Indian alike, are deeply dissatisfied with the law enforcement efforts of Public Law 280 states.⁴²

The mishmash of federal, state, and tribal law enforcement authority and jurisdiction over Indian Country has created understandable confusion and conflict, sometimes termed a "jurisdictional maze," a phrase coined by Professor and tribal judge Robert N. Clinton.⁴³ However complex this "maze" may be, Indian tribes and their closest neighbors, local county and municipal governments, sometimes with the participation of state governments, began negotiating and crafting cross-deputization agreements and mutual aid and assistance agreements to overcome the jurisdictional lines and to avoid conflicts.⁴⁴ In most instances, these intergovernmental agreements have been very successful and have led to other forms of intergovernmental cooperation.

In addition, some tribal courts have asserted civil authority to make up for the lack of criminal jurisdiction over non-Indians. Some tribal courts have exercised their civil contempt powers, their powers to exclude (or banish) individuals from the reservation, and other civil remedies.⁴⁵ These civil remedies alone are far from perfect, however, and are no substitute for criminal prosecution. Moreover, Supreme Court dicta suggests that one day Indian tribes may be found to be "implicitly divested" of *civil* jurisdiction over non-Indians, just as they were divested of criminal authority in *Oliphant*.⁴⁶ The Court's majority opinion in *Nevada v. Hicks*, written by Justice Scalia, specifically identifies tribal civil jurisdiction over nonmembers as an open, unsettled, question.⁴⁷ If the Court takes this dramatic next step against tribal jurisdiction, tribal courts would no longer possess any authority whatsoever over non-Indians.

Unfortunately, the Supreme Court has thus far been unmoved by the practical consequences of its federal Indian law jurisprudence. Acting as *amici* in *Oliphant* and later in *Duro v. Reina*, Indian tribes and tribal organizations attempted to explain to the Court what might be the practical import of its limitation on tribal authority. The Court acknowledged those arguments, but left the problem to Congress to resolve. Congress has yet to do so.

⁴⁰ Brief for National Network to End Domestic Violence et al. as Amici Curiae Supporting Respondents at 6, *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 128 S. Ct. 2709 (2008) (No. 07-411).

⁴¹ TRIBAL LAW AND POLICY INSTITUTE, *supra* note 38, at 8.

⁴² See Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697, 711 (2006).

⁴³ See Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journal Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1976). See also AMNESTY INT'L, *supra* note 31.

⁴⁴ E.g., N.M. STAT. ANN. § 29-1-11 (West 2008) (authorizing tribal law enforcement officers to act as state officers in certain circumstances); Deputization Agreement Between the Grand Traverse Band of Ottawa and Chippewa Indians and Leelanau County, March 19, 1997, http://www.ncai.org/ncai/resource/agreements/mi_grand_traverse_deputization-3-19-1997.pdf. The National Congress of American Indians collects these kinds of agreements on its website.

⁴⁵ See *Miner Electric, Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1008 (10th Cir. 2007); *Moore v. Nelson*, 270 F.3d 789, 790-91 (9th Cir. 2001); *State v. Esquivel*, 132 P.3d 751, 754 (Wash. Ct. App. 2006).

⁴⁶ E.g., *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 128 S. Ct. 2709, 2709; *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Montana v. United States*, 450 U.S. 544 (1981).

⁴⁷ See *Nevada v. Hicks*, 533 U.S. 353, 358 n.2 (2001) ("We leave open the question of tribal-court jurisdiction over nonmember defendants in general.").

III. THE LEGISLATIVE SOLUTION: A LIMITED RECOMMENDATION

Congress should enact legislation recognizing tribal court jurisdiction over domestic violence and related misdemeanors committed by non-Indians in Indian Country.⁴⁸ This legislation would recognize the inherent authority of Indian tribes to prosecute all persons, regardless of race and citizenship, for domestic violence crimes as defined by state law, when committed in Indian Country. Congress could condition this recognition of tribal sovereignty on a requirement that tribes maintain certain minimal guarantees of fairness, such as the presence of an independent tribal judiciary, the right to appointed counsel, and the right to jury trial in all cases.⁴⁹ This statute could also require Indian tribes to guarantee other important criminal procedure rights.

These criteria would function as an “opt-in” opportunity for tribes; that is the tribes that choose to comply with the criteria would be subject to the statute’s application. This is similar to the statutes that now authorize Indian tribes to take control over government functions formerly administered by the Bureau of Indian Affairs or the Indian Health Service.⁵⁰

Under the proposed system, tribal prosecutions for domestic violence and related misdemeanors would proceed as do other tribal prosecutions. Tribal prosecutions are conducted under tribal law—tribal constitutions, statutes adopted by tribal legislatures, tribal court precedents, and the Indian Civil Rights Act (ICRA).⁵¹ Tribal law usually involves the application of federal criminal substantive and procedural law, supplemented by state law in some instances, and is not much different than state and federal law. Indian tribes provide fundamental criminal procedure protections, often requiring more stringent protections for defendants than would be required under federal or state law.⁵² Because ICRA sets a limit on tribal penalties of no more than one year in jail and a \$5000 fine, tribal criminal jurisdiction is already limited to misdemeanors. And, unlike defendants in many federal or state prosecutions, defendants in tribal prosecutions enjoy jury trials before true peers (rather than an entirely non-Indian jury composed of residents of towns and cities far from the reservation, as is the case in almost all federal prosecutions of Indian Country crime), witnesses do not need to travel to faraway cities to testify, and, since tribal court dockets are lighter than outsider courts, the amount of time needed to conclude a tribal prosecution is dramatically shorter. According to N. Bruce Duthu, a law professor and author of *American Indians and the Law*, an important overview of American Indian Law:

Even if outside prosecutors had the time and resources to handle crimes on Indian land more efficiently, it would make better sense for tribal governments to have jurisdiction over all reservation-based crimes. Given their familiarity with the community, cultural

⁴⁸ See Hearing on the Constitutionality of Legislation Restoring Tribal Criminal Jurisdiction over Non-Indians before the Senate Committee on Indian Affairs, 110th Cong. 11 (2007) [hereinafter Kanji] (prepared testimony of Riyaz A. Kanji).

⁴⁹ See D. Michael McBride III, *The FBA’s Indian Law Section: Vetting Important Issues Regarding Indian Country*, 55 FED. LAW., March-April 2008, at 4 (describing the similar Federal Bar Association’s proposal).

⁵⁰ 25 U.S.C. § 450a (2000).

⁵¹ See 25 U.S.C. § 1302 (2000) (Indian Bill of Rights).

⁵² E.g., *Navajo Nation v. Rodriguez*, 8 Navajo Rptr. 604 (Navajo 2004) (requiring the *Miranda* warnings to be given in both English and in Navajo). See generally CARRIE E. GARROW & SARAH DEER, *TRIBAL CRIMINAL LAW AND PROCEDURE* 201-341 (2004).

norms and, in many cases, understanding of distinct tribal languages, tribal governments are in the best position to create appropriate law enforcement and health care responses—and to assure crime victims, especially victims of sexual violence, that a reported crime will be taken seriously and handled expeditiously.⁵³

It is important to note the limited nature of the recommendations made here. For now at least, I do not recommend expanding tribal authority to punish offenders for more than one year; expanding tribal authority to prosecute non-Indians where the tribe does not offer a right to counsel for indigent defendants; or expansion of tribal authority in cases of more serious violent crimes in Indian Country, such as sexual assaults. There is too much at stake in this area to gamble on granting much broader authority to Indian tribes without giving those tribes a chance to develop a track record of success in the limited area of domestic violence misdemeanors before moving on to larger issues.

IV. TRIBAL JURISDICTION OVER NON-INDIANS: NO CONSTITUTIONAL IMPEDIMENT

As noted above, the Supreme Court in modern times has not approved of tribal court jurisdiction—either criminal or civil—over non-Indians absent an express Act of Congress. Then-Justice Rehnquist’s opinion in *Oliphant v. Suquamish Indian Tribe*,⁵⁴ the decision that brought implicit divestiture to the field, did not explain why tribal jurisdiction over non-Indians was a constitutional concern. The *Oliphant* opinion focused on the history of federal-tribal relations, and held that Congress must have assumed that Indian tribes never had criminal jurisdiction over non-Indians. But Justice Rehnquist’s history, which relied upon the legislative history of federal legislation that was never enacted, Interior Solicitor opinions later revoked, and one solitary federal district court case, is too sparse to justify the Court’s holding. Since that decision, the Court has focused on the question of individual rights to justify the bright-line rule in *Oliphant*.

In *Plains Commerce Bank v. Long Family Land and Cattle Co.*, the Court’s most recent judgment against tribal court authority, decided in 2008, Chief Justice Roberts’ opinion rejected tribal court civil jurisdiction over a non-Indian-owned bank that had conducted business on the Cheyenne River Sioux Tribe’s reservation. The opinion noted two possible reasons why tribal courts should *never* have jurisdiction over non-Indians.⁵⁵ Neither of these concerns is very persuasive, given the modern realities of tribal law and tribal courts.

First, the opinion cited a 19th century case, *Talton v. Mayes*, which stands for the proposition that the United States Constitution, including the Bill of Rights, does not apply to tribal governments.⁵⁶ *Talton* held that Indian tribes predate the Constitution, they were not invited to the constitutional convention, and therefore they did not consent to the Constitution’s application. The majority’s opinion signals that the Court is concerned that tribal courts might not conform to American constitutional law.

⁵³ See Duthu, *supra* note 31.

⁵⁴ 435 U.S. 191 (1978).

⁵⁵ 128 S. Ct. 2709, 2724 (2008).

⁵⁶ 163 U.S. 376, 384 (1896).

The most obvious and compelling answer to this concern is the fact that Congress, in the ICRA, extended the federal habeas writ over tribal convictions, allowing federal courts to test tribal convictions according to federal constitutional standards.⁵⁷ Federal courts *do* invoke federal constitutional standards in reviewing tribal court convictions.⁵⁸ Moreover, preliminary empirical research of over 100 published tribal court decisions interpreting and applying the substantive provisions of the ICRA, such as “due process” and “equal protection,” reveals that tribal courts appear to follow federal and state constitutional law when the underlying dispute involves a nonmember.⁵⁹

Second, the opinion asserted that Indian courts “differ from traditional American courts in a number of significant respects.”⁶⁰ Here, the majority cited to Justice Souter’s separate opinion in a 2001 decision involving the authority of tribal courts over state police officers, *Nevada v. Hicks*, in which Justice Souter raised a wide variety of practical fairness problems in allowing tribal courts to exercise civil jurisdiction over nonmembers. Justice Souter asserted that tribal law was “unusually difficult for an outsider to sort out.”⁶¹

However, the law adopted and applied by Indian tribes that might be “unusually difficult” for outsiders is inapplicable in cases involving nonmembers. Tribal customary law, rooted in the tribe’s traditions, language, and culture, applies only to subject areas such as domestic relations, tribal probate, and other internal tribal matters that, by definition, do not involve nonmembers.⁶² In the *Plains Commerce Bank* litigation, the United States Solicitor General’s Office submitted an *amicus* brief explaining that the “unusually difficult” tribal customary law is never invoked in cases involving nonmembers, and that recent empirical research demonstrates that tribal courts are not unfair to nonmembers:

Petitioner and some of its *amici* suggest that tribal common-law claims may present a trap for unwary nonmembers. . . . Tribal courts take different forms and draw from varied traditions, but . . . many of them look to federal or state law to govern disputes where no established tribal law applies. Indeed, when the Cheyenne River Sioux Tribal Court of Appeals recognized the principle of judicial review, it relied not only on Lakota tradition but also on this Court’s opinion in *Marbury v. Madison*.⁶³

⁵⁷ See 25 U.S.C. § 1303 (2000).

⁵⁸ E.g., *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897 (9th Cir. 1988); *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874 (2nd Cir. 1996); *Spears v. Red Lake Band of Chippewa Indians*, 363 F. Supp. 2d 1176 (D. Minn. 2005).

⁵⁹ See Matthew L.M. Fletcher, *Tribal Courts, the Indian Civil Rights Act, and Customary Law: Preliminary Data*, (Mich. State Univ. Coll. of Law Legal Studies Research Paper Series No. 06-05, March 6, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103474.

⁶⁰ *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 128 S. Ct. 2709, 2724 (quoting *Nevada v. Hicks*, 533 U.S. 353, 383 (2001) (Souter, J., concurring)).

⁶¹ *Hicks*, 533 U.S. at 385 (Souter, J., concurring).

⁶² See, e.g., JUSTIN B. RICHLAND, ARGUING WITH TRADITION: THE LANGUAGE OF LAW IN HOPI TRIBAL COURT (2008) (describing litigation in Hopi Tribal Court that is conducted in the Hopi language and which does not, and cannot, involve nonmembers as parties).

⁶³ Brief for the United States as Amicus Curiae Supporting Respondents at 27-28, *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 128 S. Ct. 2709 (2008) (No. 07-411) (ellipses added) (citing *Clemente v. LeCompte*, 22 Indian L. Rep. 6111 (Cheyenne River Sioux Tribe Ct. App. 1994)); Matthew L.M. Fletcher, *Toward a Theory of Intertribal and Intratribal Common Law*, 43 HOUS. L. REV. 701, 734-45, 739 (2006); Bethany R. Berger, *Justice and the Outsider: Jurisdiction Over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L. J. 1047, 1085 (2005)).

Justice Souter, along with three other Justices, voted to affirm tribal court jurisdiction over the nonmembers in that case, suggesting that their earlier fears, expressed in *Hicks*, have been sufficiently alleviated.

Finally, the opt-in aspect of the proposal here would require tribes to address other constitutional concerns, such as the fact that ICRA does not require Indian tribes to provide paid counsel to indigent defendants.⁶⁴

A separate area of constitutional concern is the question of whether Congress has authority to subject American citizens to tribal court jurisdiction. The Court's 2004 decision in *United States v. Lara* put to rest the question, as it strongly affirmed Congress's authority to alter the metes and bounds of tribal sovereignty.⁶⁵

V. CONCLUSION

Violence against women in Indian Country is an epidemic. Yet the Supreme Court has tied the hands of Indian tribes to enforce criminal laws against non-Indians, who often are the perpetrators. Moreover, in many parts of the country, federal and state prosecutors often are not able to act. While it has sufficient constitutional authority to reverse the Court's decision, Congress has not acted to solve this problem. As a result, non-Indian perpetrators are all but immune from prosecution.

Congress should recognize inherent tribal criminal jurisdiction over non-Indians who commit domestic violence and related misdemeanors against Indian victims, so long as Indian tribes meet certain minimum criteria, such as offering counsel for indigent defendants. Tribes that demonstrate success can take that success back to Congress and ask for more authority.

There is no real threat to the civil rights of non-Indians subjected to tribal jurisdiction. Congress long ago extended federal habeas jurisdiction over tribal convictions, guaranteeing that a non-Indian's tribal conviction will still have to pass federal constitutional muster. There is no significant reason not to act to recognize tribal criminal jurisdiction in this manner.

Each day, an Indian woman is victimized by a person who likely will never be prosecuted. It is time to act.

⁶⁴ See *United States v. Lara*, 541 U.S. 193, 208-10 (2004).

⁶⁵ See *Lara*, 541 U.S. at 202; Kanji, *supra* note 48.

Toward a Public Health Approach to Drug Policy

Alex Kreit*

I. INTRODUCTION

Nearly 40 years after President Richard Nixon signed the Controlled Substances Act into law and subsequently declared a “war on drugs,” it is difficult to describe our drug policy as anything other than a failure. Despite an annual federal budget of over \$13 billion—a number that does not include the costs of housing inmates who have been convicted of a drug offense—our drug control strategy appears to have had little impact on drug use rates or drug availability. Nearly half of high school seniors have used an illegal drug by the time they graduate,¹ more kids say it is easier for them to buy marijuana than alcohol,² and a 2008 World Health Organization (WHO) study of 17 countries found that the United States had the highest rates of illegal drug use.³ Indeed, the WHO study presents a particularly vexing challenge to the efficacy of the United States’ approach to drug policy. Among the report’s findings was that the percentage of people who have used marijuana in America is more than double that in the Netherlands—42.4% to 19.8%.

Meanwhile, our punitive approach to drug policy has been a leading cause of the explosion in our prison population. In the last 20 years alone, the national prison population has nearly tripled, giving the United States the world’s highest reported incarceration rate.⁴ And, of the 2.3 million Americans in prison, approximately one quarter are there because of a drug offense. To put that in perspective, the number of Americans incarcerated for drug offenses today is larger than the entire United States prison and jail population was in 1980.⁵

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¹ L.D. JOHNSON ET AL., NAT’L INST. ON DRUG ABUSE, MONITORING THE FUTURE: NATIONAL SURVEY RESULTS ON DRUG USE 1975-2007, at 102 Tbl.4-1a, *available at* http://www.monitoringthefuture.org/pubs/monographs/vol1_2007.pdf.

² NAT’L CTR. ON ADDICTION AND SUBSTANCE ABUSE, NATIONAL SURVEY OF AMERICAN ATTITUDES ON SUBSTANCE ABUSE XIII: TEENS AND PARENTS 17 Fig.3.P, *available at* <http://www.casacolumbia.org/articlefiles/380-2008%20Teen%20Survey%20Report.pdf> (showing 23% of teens say marijuana is the easiest drug for them to buy while only 15% say beer is).

³ Louisa Degenhardt et al., *Toward a Global View of Alcohol, Tobacco, Cannabis and Cocaine Use: Findings from the WHO, World Mental Health Surveys*, 5 PLOS MEDICINE 1053, 1057 Tbl.2 (2008) (hereinafter “WHO Survey”), *available at* http://medicine.plosjournals.org/archive/1549-1676/5/7/pdf/10.1371_journal.pmed.0050141-L.pdf.

⁴ THE PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 5, *available at* <http://www.pewcenteronthestates.org/uploadedFiles/One%20in%20100.pdf>.

⁵ The most recent statistics show that 504,646 Americans are incarcerated for a drug offense, while 501,886 Americans were incarcerated for all offenses in 1980. Moreover, the actual number of drug offenders incarcerated today is very likely higher than 504,646 because offense-specific data for jail inmates has not been released since 2002. Compare TRACY L. SNELL, DEP’T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1983, at 5 Tbl.1.1 (1995), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/cpop93bk.pdf> with HEATHER C. WEST & WILLIAM J. SOBEL, DEP’T OF JUSTICE, PRISONERS IN 2007, at 21-22 Tbls. 10 & 12 (2008), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/p07.pdf> and DORIS J.

In short, after four decades, it is becoming increasingly clear that our current drug control strategy has not worked. Despite spending more money and imprisoning more people in our drug control effort than most other nations, we have among the highest drug use rates in the world.

While criticism of our drug policies is nothing new, politicians have been reluctant to tackle the issue because the war on drugs was immensely popular during the 1980s and early 1990s. The perception that supporting any change in our punitive drug policies is politically risky persists today. As Senator Jim Webb, who recently called for a national commission to re-assess criminal justice policy, put it, “few candidates or elected officials these days even dare to mention the mind-boggling inconsistencies and the long-term problems that are inherent in [our criminal justice system]” because they believe that “to be viewed as ‘soft on crime’ is one of the surest career-killers in American politics.”⁶

Contrary to the conventional wisdom, however, public opinion polls and election results reveal that there has been a dramatic—though largely unnoticed—shift in support of drug policy reform among voters over the past decade. Today, a full three quarters of Americans say that they think our “war on drugs” policy is failing, according to a 2008 Zogby poll.⁷ Similarly, ballot initiatives to reform state drug policies have met with resounding success, beginning with California’s medical marijuana initiative in 1996. Since that time, a total of 13 states have adopted medical marijuana laws, the most recent being Michigan, where the measure passed with 63% of the vote. And the trend extends beyond medical marijuana. In 2000, for example, California voters passed Proposition 36, which diverts many first- and second-time drug offenders to treatment instead of incarceration. In November 2008 in Massachusetts, Bay Staters voted by 65% to decriminalize marijuana. To be sure, support for the more controversial measures advocated by some drug policy reform advocates remains low. However, a substantial and growing majority of voters today favor commonsense reforms that would have been politically untenable during the height of drug war politics in the 1980s, such as legalizing medical marijuana or expanding treatment-based drug court programs.

As we approach the 40th anniversary of the “war on drugs” and await the confirmation of Gil Kerlikowske, President Barack Obama’s pick for Director of the Office of National Drug Control Policy (ONDCP) (a position commonly referred to as the “Drug Czar”), now is an ideal time to reassess our drug policy. There is no magic bullet that can solve the problem of substance abuse. And it would take volumes to fully examine the shortcomings of our current strategy. There are, however, a number of readily identifiable reforms that can help begin to set us on the right track and build a foundation for more significant improvements in the future. This paper discusses some of the main flaws in our drug policy and examines a handful of specific policy proposals that would improve our strategy and put us on the path toward a more efficient and humane public health approach to drug abuse.

JAMES, DEP’T OF JUSTICE, PROFILE OF JAIL INMATES, 2002, at 4 (2004) *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/pji02.pdf>.

⁶ JIM WEBB, A TIME TO FIGHT 216 (2008).

⁷ ZOGBY INT’L, LIKELY VOTERS 9/23/08 THRU 9/25/08, at 43-45, *available at* <http://www.zogby.com/news/X-IAD.pdf>.

II. AFTER NEARLY 40 YEARS, IT'S TIME FOR A NEW APPROACH

The guiding tenet of the “war on drugs” strategy has been that vigorous enforcement of uncompromising criminal justice measures is the most effective method to reduce drug abuse and associated problems. This philosophy has manifested itself in an almost singular focus on supply-side initiatives, including the mass incarceration of drug offenders at all levels of offense severity in an effort to deter domestic drug manufacture and distribution, along with a militaristic approach to eradicating drug production abroad, and interdicting drugs at the border. The theory is that these policies will help to “keep drugs off our streets,” and thereby lead to a reduction in drug use and drug-related crime. Efforts aimed directly at demand reduction have largely followed the same approach by increasing the number of arrests for drug possession and addressing drug use and addiction problems primarily within the criminal justice system. Another key component of the overall strategy has been to strictly follow this criminal justice model for all drug types, and to resist tailoring the level of enforcement to each substance based on the harm it inflicts on society by, for example, shifting resources from enforcement of marijuana laws to other areas.⁸

By contrast, public health policies, such as drug treatment and prevention measures, have played a secondary role in our drug strategy. This has led, for example, to a dramatic gap in drug treatment with the Substance Abuse and Mental Health Services Administration estimating that in 2007 only 17.8% of persons who needed drug treatment received it, a number that has remained largely unchanged throughout the decade.⁹ Indeed, drug war advocates have actually opposed some state-level treatment initiatives—particularly those that offer treatment as an alternative to incarceration or remove certain classes of drug offenders from the criminal justice system—on the grounds that they would send a “soft on drugs” message. Similarly, harm reduction measures such as needle exchange—policies aimed primarily at reducing the harms caused by drug abuse rather than limiting drug supply or demand—have by and large failed to gain traction at the federal level because they are viewed as incompatible with the zero tolerance philosophy of the war on drugs.

Though the war on drugs strategy has long been subjected to criticism as ineffective, its proponents have countered by pointing to temporary reductions in use rates or supply measurements for particular drugs during specific time periods and arguing that more resources and even tougher laws would yield sustainable results. A number of recent studies and reports, however, point to an emerging consensus among policy analysts and foreign leaders that after 40 years, the war on drugs has proven to be less effective than cheaper and more humane policies adopted by other countries. In addition to the WHO's 2008 study mentioned above, the past year alone has seen prominent reports by the Brookings Institute's Partnership for the America's Commission and the Latin-American Commission on Drugs and Democracy calling for a fundamental reassessment of the United States' drug strategy.

At the heart of this trend is mounting evidence that four decades of steadily intensifying drug war policies—including increased numbers of drug arrests

⁸ For example, 79% of the 450,000 person increase in drug arrests in the United States during the 1990s was for marijuana possession offenses alone. DAVE BEWLY-TAYLOR ET AL., THE BECKLEY FOUND. DRUG POLICY PROGRAMME, INCARCERATION OF DRUG OFFENDERS: COSTS AND IMPACTS 2 (2005), *available at* http://www.beckleyfoundation.org/pdf/paper_07.pdf.

⁹ SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., RESULTS FROM THE 2007 NATIONAL SURVEY ON DRUG USE AND HEALTH: NATIONAL FINDINGS 83 (2008), *available at* <http://www.oas.samhsa.gov/nsduh/2k7nsduh/2k7Results.pdf>.

and incarcerations, drug seizures, and spraying of crops overseas—has had at most a negligible impact on illegal drug use and availability. The temporary reductions that have been cited as drug war “successes” have all proved to be unsustainable—more likely caused by normal fluctuations of cultural preferences in the way that taste in music or fashion might change than by our drug policies. With respect to drug use, the 2008 WHO study marked the first major cross-national comparison of illegal drug use rates in all regions of the world. The study found that the “United States stands out with higher levels of [drug] use... despite punitive illegal drug policies[.]”¹⁰ The number of Americans who have used cocaine is approximately four times higher (at 16.2%) than in any other country. Among those aged 15 and younger, nearly three times as many had tried marijuana in the United States (20%) than in the Netherlands (7%). And the study indicated that the number of Americans using drugs is actually rising, with 54% of those 21 and younger having used marijuana compared to only 42% total. Overall, the researchers concluded, the findings revealed “countries with more stringent policies toward illegal drug use did not have lower levels of such use than countries with more liberal policies.”¹¹

The drug war has similarly failed to reduce drug supply. A 2008 Brookings report on U.S.-Latin American Relations described the results under a blunt heading: “the Failed War on Drugs.” According to the report, “the street prices of cocaine and heroin fell steadily and dramatically” between 1980 and 2007 despite a significant increase in United States spending on overseas supply control over the same time period. Similarly, although we have recently seen record-breaking figures for drug eradication and drug seizures at the border, “cocaine production in the Andean region is currently at historic highs.”¹² The Brookings report concluded that demand reduction is the only long-term solution to the problem of drug abuse and recommended, among other things, that the United States government undertake a comprehensive reevaluation of its drug policies.

Among recent studies of United States drug policy, however, the Latin-American Commission on Drugs and Democracy’s February 2009 report is perhaps the most striking. The Commission was comprised of a blue-ribbon panel of experts from throughout Latin America and headed by three politically conservative former Latin American Presidents: Fernando Henrique Cardoso of Brazil, César Gaviria of Colombia, and Ernesto Zedillo of Mexico. It concluded that the war on drugs was a “failed war” that has led to an increase in organized crime and drug-related violence without reducing drug use or availability.¹³ The Commission called for a paradigm shift in drug policy to an approach that focuses on demand reduction and “[c]hanges the status of addicts from drug buyers in the illegal market to that of patients cared for in the public health system.”¹⁴

All told, indicators from drug availability to drug-related violence to drug use rates reveal that our current drug strategy is fundamentally flawed. Over the past 40 years,

¹⁰ WHO Survey, *supra* note 3, at 1062.

¹¹ *See id.* at 1057 tbl.2, 1059.

¹² THE BROOKINGS INST., RETHINKING U.S.-LATIN AMERICAN RELATIONS: A HEMISPHERIC PARTNERSHIP FOR A TURBULENT WORLD, REPORT OF THE PARTNERSHIP FOR THE AMERICAS COMMISSION 25-26 (2008).

¹³ THE LATIN AM. COMM’N ON DRUGS AND DEMOCRACY, DRUGS AND DEMOCRACY: TOWARD A PARADIGM SHIFT 1 (2009), *available at* http://www.drugsanddemocracy.org/files/2009/02/declaracao_ingles_site.pdf (noting that after a decades-long war “[w]e are farther than ever from the announced goal of eradicating drugs”).

¹⁴ *Id.* at 4.

we have spent billions of dollars and imprisoned millions of follow citizens without any discernible benefit to show for it. The scope of this problem suggests that only significant change to our overall strategy will be able to address the drug war's failures. Assessing the various options for a shift of that magnitude is not feasible to do here. There are, however, a number of specific reforms that are likely to produce improved results while decreasing human and economic costs, and that can be implemented without altering the overall structure of federal drug laws. At the same time, these proposals can help lay the foundation for more fundamental change in the future by beginning to re-orient our drug strategy away from a "war" posture and toward a more effective and humane public health model. I examine these proposals in two sections. First, I will discuss ideas for reallocating funds in the National Drug Control Strategy from measures that have proven costly and ineffective to more successful programs. Second, I will explore some of the excesses of the drug war—laws that are not only ineffective but counter-productive and should be repealed or dramatically reformed.

III. REALLOCATING FEDERAL SPENDING

One of the most direct ways for the new Drug Czar to address some of the shortcomings of our current strategy would be to seek spending reallocations in President Obama's National Drug Control Policy budget request that would decrease funding for ineffective strategies and put the money toward successful treatment and prevention measures. Studies have consistently shown drug treatment and prevention programs to be more cost effective than interdiction, incarceration, and eradication programs. For example, a detailed study conducted by the RAND Corporation at the request of the ONDCP compared treatment with other strategies in the context of cocaine. The study found that each cocaine-control dollar used for treatment generates societal cost savings of \$7.48, compared to savings of only 15 cents for every dollar used for source-country control, 32 cents for every dollar used for interdiction, and 52 cents for every dollar used for domestic law enforcement.¹⁵ Yet, only 35% of the National Drug Control Policy budget goes toward treatment and prevention initiatives (a figure that includes treatment and prevention-related research) while 65% is put to supply-reduction measures, including domestic law enforcement, interdiction, and international programs.¹⁶ Moreover, these numbers have been trending in the wrong direction, with spending on demand reduction falling steadily from 46% of the total budget in 2002.¹⁷

The new administration should reverse course by significantly reducing the percentage of resources allocated to supply reduction and increasing funding for demand reduction efforts. While a detailed account of all federal drug control spending is beyond the scope of this paper, a handful of key programs deserve particular attention both for their own importance and as an illustration of the type of funding reallocations the ONDCP should seek in future budget proposals.

¹⁵ C. PETER RYDELL & SUSAN S EVERINGHAM, CONTROLLING COCAINE 42 (1994).

¹⁶ THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY, FY 2009 BUDGET SUMMARY 11 (2008), available at <http://whitehousedrugpolicy.gov/publications/policy/09budget/fy09budget.pdf>.

¹⁷ *Id.* at 13. Importantly, the cost of incarceration of drug offenders is not included in the National Drug Control Policy budget and, accordingly, not factored into these allocation percentages. If these costs were included, the percentage of resources directed toward supply-reduction would, of course, be even higher.

With respect to treatment and prevention initiatives, three stand out as examples of programs that should receive significant funding increases: (1) the Substance Abuse and Mental Health Treatment (SAPT) Block Grant; (2) the Adult, Juvenile, and Family Drug Courts grant program; and (3) the Screening, Brief Intervention, and Referral prevention program. The SAPT Block Grant is the largest federal treatment funding source and the backbone of publicly supported treatment and prevention with annual funding of approximately \$1.8 billion. The program awards grants to community organizations through the states to carry out a variety of treatment and prevention measures tailored to each community's needs. Despite the central importance of the SAPT Block Grant to public drug and alcohol treatment, recent years have seen only level or near-level funding for the Block Grant.¹⁸ Perhaps the most effective step the new administration can take to quickly help address unmet drug treatment need is to significantly increase the spending on the SAPT Block Grant.

The Adult, Juvenile, and Family Drug Courts grant program, while less far-reaching than the SAPT Block Grant, is one of the key vehicles through which the new administration can increase its support for cost-effective alternatives to incarceration. Drug courts divert non-violent drug offenders with substance abuse problems into treatment and recovery programs with intense judicial supervision of each individual's progress. And, while drug courts are not without their flaws,¹⁹ studies have consistently shown that they produce better results than incarceration with substantially reduced costs. As the 2009 National Drug Control Strategy explained, a "decade of drug court research shows that [drug] courts work better than jail or prison[.]"²⁰ An analysis in California, for example, found that the drug courts studied cost only \$3,000 on average per client while generating an average savings of \$11,000 per client in reductions in recidivism and costs to victims.²¹ Despite broad agreement that drug courts are successful, however, a 2008 study by the Urban Institute determined that just 50% of those currently eligible for drug courts, and a mere 3.8% of all at-risk arrestees, are able to participate in a drug court program. The researchers estimated that if treatment were provided to all at-risk arrestees, it would produce a net benefit of approximately \$32 billion.²² Increasing funding to the grant program, particularly to courts that do not have overly restrictive eligibility requirements, would help existing courts serve all eligible offenders and encourage states to create additional programs.

Finally, the federal government should provide additional funding for innovative medical-based prevention programs like the Bush Administration's successful Screening, Brief Intervention, and Referral to Treatment (SBIRT) initiative. The federal government began funding screening programs through SBIRT in 2003 and the early results are encouraging. The programs incorporate drug and alcohol addiction

¹⁸ *Id.* at 49, 54.

¹⁹ For an interesting and persuasive argument that drug courts may actually lead to longer sentences for members of historically disadvantaged groups who can often receive harsher prison sentences after treatment failures than they would otherwise receive through a plea agreement, see Josh Bowers, *Contraindicated Drug Courts*, 55 U.C.L.A. L. REV. 783 (2008). Bowers recommends uncoupling drug courts from criminal cases as a way to address this problem.

²⁰ OFFICE OF NAT'L DRUG CONTROL POLICY, NATIONAL DRUG CONTROL STRATEGY 2009 ANNUAL REPORT 20 (2009).

²¹ OFFICE OF NAT'L DRUG CONTROL POLICY, NATIONAL DRUG CONTROL STRATEGY 2008 ANNUAL REPORT 29 (2008).

²² AVINASH SINGH BHATI ET AL., THE URBAN INSTITUTE, TO TREAT OR NOT TO TREAT: EVIDENCE ON THE PROSPECT OF EXPANDING TREATMENT TO DRUG INVOLVED OFFENDERS xii, 33 (2008), available at http://www.urban.org/UploadedPDF/411645_treatment_offenders.pdf.

screening and counseling into general medical settings, such as visits to primary care providers. This method takes advantage of the fact that many individuals who have a drug abuse problem or are at risk of developing one do not proactively seek substance abuse treatment but will nevertheless continue to visit primary care physicians for routine examinations. SBIRT provides funding to develop and implement programs that aim to make drug screening and treatment referrals part of standard medical practice. The programs represent a common sense public health approach to substance abuse and have the potential to both help prevent problem use from becoming full-blown addiction through interventions and effectively facilitate treatment for those who are addicted.

To free up funds for additional expenditures on demand reduction programs, the ONDCP should reduce or eliminate funding for some of the “drug war” programs that have proven to be particularly ineffective. Source-country crop eradication programs like Plan Colombia, federal criminal investigation and prosecution of low- and mid-level drug offenders, and student drug testing grants are examples of programs that should be targeted for cuts. Eradication programs are a particularly stark example of the failure of our supply-side-oriented war on drugs strategy. These programs aim to reduce the supply of drugs like cocaine and heroin in the United States by wiping out coca and poppy crops in source countries, primarily through aerial fumigation. The strategy is incredibly expensive but does little to reduce drug supply. Among the reasons that crop eradication programs have not succeeded is that production simply shifts from the targeted region to a new one. At the same time, the herbicides used to spray coca and poppy fields also damage the legal crops of local subsistence farmers and may have negative environmental and health effects. A 2008 Government Accountability Office report on Plan Colombia, which featured perhaps the most prominent and expansive eradication effort to date, found that coca cultivation in Colombia had actually *increased* by 15% since 2000. During the same period, the United States provided over \$6 billion in support to Plan Colombia, though some of these funds were put toward uses other than crop eradication. Expenditures on foreign aerial fumigation programs should be dramatically reduced, if not eliminated.

In terms of domestic programs, the ONDCP, in coordination with the Department of Justice and the Drug Enforcement Administration (DEA), should work to significantly reduce the number of federal drug prosecutions. Despite overwhelming evidence that mass incarceration of drug offenders has done little to reduce drug use or availability, drug offenses remain among the most frequently prosecuted offense category and comprised approximately 35% of all federal felony and Class A misdemeanor cases in 2007.²³ Although there is no current data regarding how many drug prosecutions overall are of low- and mid-level players—such as couriers, street dealers, or look-outs—a 2007 United States Sentencing Commission report on crack and powder cocaine sentencing revealed that 61.5% of crack cocaine offenders and 53.1% of power cocaine offenders fall into these categories.²⁴ Outside of a limited category of cases where, for example, federal prosecution of an underling is truly necessary to

²³ U.S. SENTENCING COMM’N, OVERVIEW OF FEDERAL CRIMINAL CASES: FISCAL-YEAR 2007, at 1 (2008).

²⁴ U.S. SENTENCING COMM’N, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 19 Fig. 2-4 (2007). Similarly, a 1994 Department of Justice report found that 36.1 percent of all federal drug offenders were “low-level” offenders under the Department’s own criteria and that these offenders received an average prison sentence of 85.1 months. The 1994 report did not include mid-level offenders. U.S. DEP’T OF JUSTICE, ANALYSIS OF NON-VIOLENT DRUG OFFENDERS WITH MINIMAL CRIMINAL HISTORIES (1994).

reach a kingpin or dismantle a large-scale criminal organization, there is no reason why most offenders in these categories should be the subject of federal law enforcement resources. However, a 2004 study of predictive factors on federal decisions about which cases to prosecute found that drug prosecutions are the least likely of all federal crimes to be declined for prosecution.²⁵ Domestic federal drug investigations and prosecutions, and the lengthy sentences they entail, should be reserved for high-level drug offenders. In addition to saving money, scaling back federal prosecutions of drug couriers and street dealers would be a much-needed first step toward addressing our embarrassingly high incarceration rate, and one that could be achieved without changing federal drug laws.

While supply-side programs should be the primary targets for cuts, the Obama Administration should also carefully review prevention spending and reduce or eliminate funding for ideologically driven programs that have not achieved results. The chief example in this area is the federal drug testing grant program, started by the Bush Administration in 2004. Each year since, ONDCP has sought funding increases for the program, which has been a darling of drug war adherents. Much of the funding is used to encourage and assist schools with the establishment of drug testing programs, even when they have not sought the programs, rather than responding to an unmet demand for drug testing program funding on the part of schools and communities. However, the only major study on student drug testing, conducted by the University of Michigan researchers for the National Institute on Drug Abuse, found that they are utterly ineffective and do not reduce drug use.²⁶ With so many programs that have a proven track record of results currently under-funded, federal resources should not be used on programs that have been shown not to work.

IV. LEGISLATIVE REFORMS

While a good deal of progress in setting our drug policy on the course toward a more effective and sensible public health model can be achieved by changing budget priorities, real change will also require the repeal or amendment of a number of federal laws and policies. In the long term, reversing the failures of the war on drugs will almost certainly require significant and far-reaching legislative action. There are, however, a number of discrete federal laws and policies that the Obama Administration should work to repeal or reform in the short term. These policies represent the fringe excesses of the drug war: laws that are not only ineffective but actually do more harm than good. In addition, these are areas in which there is broad agreement on the need for change among voters and policy analysts from across the political spectrum. This list is by no means exhaustive, but aims to identify some of the policies where change is especially needed and most likely to be achievable.

A. RESERVE MANDATORY MINIMUM DRUG SENTENCES FOR SERIOUS OFFENDERS

As discussed above, low- and mid-level drug offenders comprise a substantial percentage of federal drug prosecutions. Just as problematic is the fact that these offenders are very often subjected to long mandatory minimum sentences that should be

²⁵ Michael Edmund O'Neill, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors*, 41 AM. CRIM. L. REV. 1439, 1454 (2004).

²⁶ RYOKO YAMAGUCHI ET AL., INST. FOR SOCIAL RESEARCH, DRUG TESTING IN SCHOOLS: POLICIES, PRACTICES, AND ASSOCIATION WITH STUDENT DRUG USE 2 (2003), available at <http://www.rwjf.org/files/research/YESOccPaper2.pdf>.

reserved only for drug kingpins and other top lieutenants. Drug sentencing has received a great deal of attention in the context of the “100 to 1” disparity between sentencing for crack and powder cocaine offenses, meaning that it takes 100 times the quantity of powder cocaine to trigger the same mandatory minimum penalty as for crack cocaine. The issue is an important one, and the Obama Administration has already formally announced its support for eliminating the disparity.²⁷ However, eliminating the disparity in crack and powder sentencing only scratches the surface of the real problem: a sentencing scheme in which sentences are based almost entirely on drug quantity.

The Anti-Drug Abuse Act of 1986 established the current framework for weight-based mandatory minimum drug sentences and the United States Sentencing Commission generally followed this weight-based approach in formulating federal sentencing guidelines. Under this scheme, a day laborer who unloads a truck full of cocaine for \$100, or a mule who drives it across the border for \$1,000, is exposed to the same mandatory minimum sentence and base level guidelines sentencing range as the drug ringleader who actually owns the cocaine and reaps all the profit.²⁸ The result is a system in which federal drug sentences are often minimally related to culpability²⁹ and federal tax dollars are being spent to warehouse small-time drug participants for years with no discernable benefit.

Solving this problem will require detailed changes to the federal sentencing guidelines in order to strike a more appropriate balance between drug quantity and an offender’s role in a drug organization. And there is a strong case for eliminating mandatory minimum provisions entirely.³⁰ At a minimum, however, the Obama Administration should work with Congress to amend the mandatory minimum drug sentencing provisions in Title 21 of the United States Code to exclude low- and mid-level offenders from their reach. Specifically, mandatory minimum sentences based on drug quantity should not apply to offenders whose role is limited to that of a drug courier, street-level dealer, or peripheral player (such as those whose role is limited to providing the location for a drug transaction, loading and unloading drugs, or driving someone to a drug transaction.)³¹ Removing these classes of offenders from mandatory minimum

²⁷ See The White House, The Agenda: Civil Rights, http://www.whitehouse.gov/agenda/civil_rights/ (last visited Mar. 13, 2009) (“President Obama and Vice President Biden believe the disparity between sentencing crack and powder-based cocaine is wrong and should be completely eliminated.”).

²⁸ See, e.g., Ian Weinstein, *Fifteen Years After the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 AM. CRIM. L. REV. 87, 107-08 (2003); U.S. SENTENCING COMM’N, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 28-29 (2007) (noting that for cocaine and crack offenses, “[e]xposure to mandatory minimum penalties does not increase substantially with offender culpability as measured by offender function”).

²⁹ See Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 70-71 (2003) (“In their concern to design a workable system and to minimize disparity, the original Commission clearly preferred objective factors, such as drug weight or dollar amount, to subjective ones, such as the offender’s role or state of mind, which might be applied inconsistently. The result, however, is that important moral questions of culpability are relatively neglected, while more easily quantifiable issues of harm are elevated to a significance beyond their worth.”).

³⁰ See, e.g., Molly M. Gill, *Correcting Course: Lessons from the 1970 Repeal of Mandatory Minimums*, 21 FED. SENT’G REP. 55, 62 (2008) (proposing the elimination of mandatory minimum provisions for drug offenses).

³¹ Currently, large percentages of offenders in these categories are exposed to mandatory minimum sentences. U.S. SENTENCING COMM’N, *supra* note 30, at 28-29 (2007). A 1994 “safety valve” law that permits courts to sentence below a mandatory minimum in certain limited circumstances provides relief for about one quarter of drug offenders, but still leaves a large number of low- and mid-level offenders subject

sentencing provisions will give judges the ability to apply the relatively more flexible sentencing guidelines to help eliminate some of the most egregious examples of unfair federal drug sentences.

B. REFORM FEDERAL MEDICAL MARIJUANA LAW

One of the most striking examples of the ideological excesses of the war on drugs, where scientific evidence and compassionate policies are rejected entirely on the basis that they are incompatible with the drug war's zero tolerance regime, has been the federal government's approach to medical marijuana. There is a broad scientific consensus that marijuana can help to control the symptoms of serious and chronic illnesses such as pain and spasticity, nausea, and loss of appetite. Most recently, for example, the American College of Physicians called for the federal government to review reclassifying marijuana from its status as a Schedule I controlled substance, a category defined as drugs that have no currently accepted medical use and a high potential for abuse, in light of the scientific evidence of its efficacy and safety. Similarly, nearly every government commission to investigate the issue has concluded that marijuana has proven value as a medicine, including a 1999 review by the Institute of Medicine of the National Academy of Sciences, and commissioned by the ONDCP, which concluded that "[s]cientific data indicate the potential therapeutic value of cannabinoid drugs ... for pain relief, control of nausea and vomiting, and appetite stimulation."³²

The overwhelming scientific evidence has led 13 states to enact their own medical marijuana laws since 1996 and opinion polls consistently show that more than 70% of Americans support allowing the medical use of marijuana. The federal government, meanwhile, has moved in the opposite direction and adopted an increasingly hostile view toward medical marijuana. Starting in 1978, the federal government operated the Investigative New Drug Compassionate Access Program ("Compassionate IND"), which provided marijuana to a limited number of patients through a cumbersome and detailed application process. But the program was abruptly discontinued in March 1992. Then, in the aftermath of the passage of California's medical marijuana ballot initiative, the Clinton Administration sought to effectively dismantle the law by seeking an injunction against medical marijuana providers and threatening that doctors who recommended marijuana to patients might have their license to prescribe controlled substances revoked.³³ According to then-Drug Czar Barry McCaffrey, the actions were necessary because allowing the medical use of marijuana would "threaten to undermine efforts to protect our children from dangerous psychoactive drugs."³⁴ Under the Bush Administration, federal anti-medical marijuana efforts reached a new height, with the DEA routinely conducting armed raids of medical marijuana hospices in California.

Attorney General Eric Holder recently announced that the new administration would end the medical marijuana raids in accordance with statements President

to a mandatory minimum sentence. See, e.g., Gill, *supra* note 32, at 59-60 (2008) (discussing the safety-valve provision).

³² INST. OF MED., MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE (Janet E. Joy et al. eds., 1999).

³³ The effort to punish physicians was enjoined by the Ninth Circuit on the grounds that it would infringe on their First Amendment speech rights. *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002).

³⁴ *Prescription for Addiction? The Arizona and California Medical Drug Use Initiatives: Hearing Before the S. Comm. on the Judiciary*, 104th Cong. (1996) (Statement of General Barry R. McCaffrey, Director of National Drug Control Policy).

Obama made during his campaign.³⁵ Ending the DEA's raids is an important and necessary step that will allow states to implement their medical marijuana laws without undue federal interference. It is, however, only a temporary solution to the underlying dissonance between federal law on the one hand and the scientific evidence and public opinion on the other. In addition to stopping the raids, the Obama Administration should work to support legislative proposals that would formalize federal respect for state medical marijuana laws. Prominent bills in this category that have been introduced in recent years have included the Patients' and Providers' Truth in Trials Act, which would have allowed defendants to raise medical necessity as a defense to federal marijuana prosecutions and the Hinchey-Rohrabacher Amendment, which would have prevented the Justice Department from using federal funds for interfering with the implementation of state medical marijuana laws. The Administration should also assist patients in states that have not yet adopted their own medical marijuana laws by re-opening the Reagan-era Compassionate IND program. Finally, the new Drug Enforcement Administrator should recognize the overwhelming scientific evidence that marijuana has a currently accepted medical use and grant the rescheduling petition, filed by the Coalition to Reschedule Cannabis in 2002 and still under review, to remove marijuana from the list of Schedule I controlled substances.

C. LIFT THE 1988 BAN ON FEDERAL FUNDING FOR NEEDLE EXCHANGE PROGRAMS

Needle exchange programs are a prominent example of the "harm reduction" approach to addressing problems related to drug abuse. The programs allow individuals to trade used syringes for clean syringes in order to help reduce the transmission of HIV/AIDS and Hepatitis C among intravenous drug users. Eight federally-funded reports and a 2005 international scientific review have concluded that the programs are effective at reducing the spread of disease without increasing incidents of illegal drug use. In 1997, for example, the National Institutes of Health Consensus Panel on HIV Prevention found that needle exchange programs led to a 30% or greater reduction in HIV transmissions. With approximately 25% of new HIV cases attributed to intravenous drug use, these programs could result in a substantial reduction in new transmissions. Yet, since 1988, there has been a ban on federal funding for needle exchange programs under an amendment to the Public Health and Welfare Act.

Despite the federal funding ban, and laws in a number of states that criminalize the unauthorized possession and distribution of syringes, there are over 200 needle exchange programs operating in 38 states, the District of Columbia, and Puerto Rico. These programs, however, have a significant need for federal funding. The Obama Administration has already expressed its support for lifting the federal funding ban on needle exchange programs³⁶ and should act on this position at the earliest opportunity by supporting the Community AIDS and Hepatitis Prevention (CAHP) Act of 2009 introduced by Representative Jose Serrano. Once the ban has been removed, ONDCP should allocate funding to establish a needle exchange grant program, with a particular emphasis on programs that provide other services such as substance abuse treatment. Federal needle exchange funding would be a cost-effective method for reducing

³⁵ Alex Johnson, *DEA to Halt Medical Marijuana Raids: Holder Confirms States Have Final Say on Use of Drug for Pain Control*, MSNBC.com, Feb. 27, 2009, <http://www.msnbc.msn.com/id/29433708/> (last visited Mar. 14, 2009).

³⁶ See The White House, *supra* note 29 ("The President also supports lifting the federal ban on needle exchange, which could dramatically reduce rates of infection among drug users.").

the spread of HIV/AIDS and, by coupling the funding with support for substance abuse treatment services, could also help to reduce addiction rates. Indeed, early studies have indicated that needle exchange programs that have integrated treatment services may decrease intravenous drug use.

D. REPEAL THE HIGHER EDUCATION ACT DRUG PROVISION

In 1998, Representative Mark Souder added an amendment to the Higher Education Act reauthorization bill to strip federal financial aid from students if they are convicted of any drug offense, including simple possession. Since then, nearly 200,000 students have been denied federal financial aid under what has become known as the HEA Drug Provision. This law, while relatively limited in scope, is emblematic of some of the more bewildering legislation that has been enacted, and remains in place today, because of the dominance of the “get tough” ideology of the war on drugs. Indeed, while the law singles out drug offenses for removal of financial aid, all other criminal offenders—including rapists and murderers—remain eligible to receive federal financial aid.

Putting roadblocks on the path to education for students who are at risk of abusing drugs is counterproductive to the goal of reducing drug abuse. Students who are forced to drop out of school because they cannot receive financial aid are more likely to continue using or abusing drugs and less likely to become productive members of society. Furthermore, because students from wealthy families can afford college without financial aid, the law has a disproportionate impact on students from low- and middle-income families. Finally, because students must maintain good academic standing to receive aid in the first place, the HEA Drug Provision only affects people who are working hard and doing well in school.

In 2006, in response to growing support for repealing the HEA Drug Provision, Congress scaled back the law so that it does not apply to students who are convicted of a drug offense before they begin college. However, students who are convicted of a drug offense during college are still ineligible for aid. In 2008, Representative Barney Frank and Senator Christopher Dodd each introduced bills to repeal the financial aid elimination penalty. The Obama Administration should support repealing the HEA Drug Provision and work to ensure passage of repeal legislation the next time it is introduced. Repealing this law would not only help to keep thousands of at-risk students on the path toward an education and a productive life, it would send a strong signal that the era of judging drug policies based on how “tough” they are rather than how effective they are is coming to an end.

V. CONCLUSION

As Congress prepares to consider President Obama’s nomination of Seattle Police Chief Gil Kerlikowske to head the ONDCP, now is an ideal time to come to grips with the fact that adopting a “war” strategy to address a public health problem has not worked. After 40 years, there is a rapidly growing consensus among policy analysts, foreign leaders, and the public that our war on drugs has been a failure. It has cost us billions of dollars and been chiefly responsible for making the United States the number one incarcerator in the world. And, yet, our drug use rates are higher than in countries that have adopted a more humane and less costly approach. On the campaign trail, President Obama voiced support for shifting toward a public health-oriented approach to drug policy and his administration has sent early signals in support of initial reforms, such as ending the medical marijuana raids and eliminating

the crack and powder cocaine sentencing disparity. This paper has proposed a number of somewhat more substantial, though still modest and achievable, actions that the new administration can take to begin the process of re-orienting our federal drug strategy. None of these proposals is groundbreaking—indeed, most have been the subject of debate for some time—but together they can point the way toward a new and more effective approach to dealing with the problem of drug abuse.

Finally, while the proposals discussed in this paper will result in dramatic improvements, in the long term more substantial change will be required. The recent explosion in drug cartel violence at the Mexican border, which is reminiscent of the days of Al Capone during alcohol prohibition, serves as a stark reminder of the depths of the problems that remain after our 40-year war on drugs. Thus, perhaps more than any specific policy reform, the most important action President Obama can take would be to follow the Brookings Institute's recommendation and form a commission to conduct a comprehensive reevaluation of our drug policies in light of the evidence from our own experiences, as well of the experiences in other countries over the past four decades.

Reaching Through the Schoolhouse Gate: Students' Eroding First Amendment Rights in a Cyber-Speech World

Frank D. LoMonte*

I. INTRODUCTION

Forty years ago, the Supreme Court resoundingly affirmed that young people attending public schools do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”¹ The unmistakable implication of *Tinker v. Des Moines Independent Community School District* was that students showed up at the schoolhouse possessing the full benefits of the First Amendment; the only question was how much of that bundle of rights they were forced to check at the gate.

Recent developments in the law of online speech, however, are rattling the certainty of that assumption. In the view of at least some federal judges, students do not enjoy—anywhere, anytime—the same right to comment on school events as ordinary citizens. Rather, so long as the impact of students' words may foreseeably reach school grounds, courts are increasingly willing to tolerate school punishment for the content of online speech that would enjoy full First Amendment protection if written by anyone not enrolled in school. Once First Amendment rights are lost, they seldom are recovered because people who cannot speak cannot arouse support. The loss often is incremental, with each descending stair step becoming “the new normal,” and so this latest incursion on young people's rights must be viewed in the larger context of decades of dangerous retrenchment.

Over the last 20 years, the federal courts have substantially eroded the First Amendment protection of students' speech in the public schools, exhibiting a growing reluctance to second-guess even the most irrational disciplinary overreactions. As a result, student publications in many schools operate under a “zero tolerance” regime for dissent or controversy. Even a mention that students might be gay, get pregnant, or need information about sexually transmitted diseases can bring reprisals, and cost journalism instructors their jobs.

When confronted with censorship, students have always been able to take their messages off campus to enjoy the greater freedom that comes with self-publishing. Self-publishing has allowed young writers to address sensitive social issues candidly, and to vent their criticism of school personnel and programs. This speech can have real value—not just for the writer, and not just for the student audience, but for adults who

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¹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

seek an inside glimpse into what young people are thinking, even if it may be uncomfortable reading, and we would all be poorer if it were lost. Yesterday, self-publishing meant starting an “underground newspaper.” Today, it means creating a website.

The law of online speech is still evolving, and the relatively few cases testing the limits of school authority over students’ homemade web pages have arisen not from traditional journalism, but from attacks on school personnel posted on blogs, discussion boards, or social networking sites. There is, however, just one First Amendment. Because it is impossible to craft an intelligible First Amendment standard that places “bad” speech on one side of the line and “good” speech on the other, a ruling that administrators may punish writings with no physical connection to school casts an ominous shadow over all speech, including legitimate journalism and whistleblower activity.

It is hard not to empathize with burdened school principals who see disrespectful websites and blog entries as undermining their ability to keep order. But when students engage in injury-causing behavior off-campus, there are ample off-campus remedies: those victimized may contact the parents, sue for defamation or invasion of privacy, and in extreme cases alert the police. If the speech is itself not injurious—that is, if it merely causes a bothersome level of chatter at the school—there are effective ways to respond that are not directed to the content of the message (*i.e.*, punishing those who will not stop looking at MySpace during class). The First Amendment requires exhausting those remedies first.

The creep of government regulatory authority into students’ off-campus expression should concern anyone who values the free exchange of ideas on the internet. Some of the recent First Amendment jurisprudence views speech on the internet as qualitatively different from that in print, because of its ease of worldwide access, justifying greater regulatory leeway to prevent harm. This may sound familiar. It was only three decades ago that in *FCC v. Pacifica Foundation* (the “seven dirty words” case),² the Supreme Court determined that over-the-air broadcasting is so much more intrusive and accessible to youth than the printed word that the government may restrict speech that is merely “indecent” rather than legally obscene. If we are not vigilant, what happens to student speech today could impact all online speech tomorrow.

II. STUDENT SPEECH RIGHTS IN THE PRE-CYBERSPACE ERA

A. “STUDENTS ARE PERSONS...”

To begin with first principles, the Supreme Court recognized in *Tinker* that “students are persons under our Constitution,” so that—even on school grounds during the school day—administrators may restrict student speech only if such speech “materially and substantially disrupts the work and discipline of the school.”³ In that instance, three students’ display of black armbands in silent support of a cease-fire between the United States and North Vietnam was held to be protected speech, even though the protest provoked sometimes-heated responses from other students. Justice Fortas’s opinion emphasized that, in analyzing students’ First Amendment rights, the government’s enhanced disciplinary powers at school were to be considered in “light of the special characteristics of the school environment” and the need to maintain order during the school day.⁴

² 438 U.S. 726 (1978).

³ *Tinker*, 393 U.S. at 513.

⁴ *Id.* at 506.

While *Tinker* often is cited as a landmark in recognizing that the First Amendment applies to students even while under school supervision, the decision was not a break from the Court's jurisprudence but a natural progression from it. The decision expressly relied on the Court's earlier First Amendment ruling in *West Virginia State Board of Education v. Barnette* that students could not be compelled to forsake their religious opposition to swearing allegiance to the American flag.⁵ In *Barnette*, school officials claimed that the state's interest in promoting "national unity" overrode the rights of the individual students to refuse to recite the Pledge of Allegiance. In one of the most famous passages in all of constitutional jurisprudence, Justice Fortas decisively established the paramount right of all citizens—including children—not to be coerced to espouse beliefs dictated by their government: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."⁶

Tinker stands as the high-water mark for student First Amendment rights, and it was not long before the Burger and Rehnquist Courts began chipping away at it. In 1986, the Court decided in *Bethel School District No. 403 v. Fraser* that, even in the absence of a substantial disruption, a school did not violate the First Amendment by punishing a student for "offensively lewd and indecent speech" when he used a string of sexual double-entendres while addressing a student assembly.⁷ Chief Justice Burger's opinion emphasized the "captive" nature of the audience—attendance was mandatory—and the interest of the school in disowning the speaker's message: "A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students. Accordingly, it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education."⁸ Concurring in the result, Justice Brennan wrote separately to emphasize that the unique setting of the assembly heightened the state's interest, and that a different setting—even elsewhere in the school—might have yielded a different outcome. Citing the Court's decision in *Cohen v. California*, the case of a young war protester who was found to have a protected right to wear a "Fuck the Draft" jacket in public areas of a courthouse, Brennan observed: "If [Fraser] had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate[.]"⁹

The affiliation between school and message was likewise pivotal to the last of the troika of landmark student speech decisions, *Hazelwood School District v. Kuhlmeier*.¹⁰ In that case, a St. Louis-area high school principal ordered the removal of articles from the Hazelwood East High School *Spectrum* in which teenagers discussed their perspective on divorce, pregnancy, and other social issues. His primary justification was that the student authors failed to effectively disguise the identities

⁵ 319 U.S. 624 (1943).

⁶ *Id.* at 642. In a less-celebrated passage, the Court directly confronted the school's contention that schoolchildren occupy a lesser First Amendment status that must yield to the state's paramount interest in instilling fundamental values: "That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Id.* at 637.

⁷ 478 U.S. 675, 685 (1986).

⁸ *Id.* at 684.

⁹ *Id.* at 688 (Brennan, J., concurring) (citing *Cohen v. California*, 403 U.S. 15 (1971)).

¹⁰ 484 U.S. 260 (1988).

of teens who agreed to discuss their pregnancies anonymously, and that they neglected to seek rebuttal from a divorced father who was unflatteringly portrayed. Three *Spectrum* staff members sued, alleging the censorship violated their First Amendment rights. The Supreme Court rejected their challenge. The Court forged a distinction between publications that had by rule or by historical practice been maintained as a public forum for the expression of student opinion, versus non-forum newspapers that functioned as, in effect, the official “voice” of the school, or that might reasonably be so perceived by readers. In a non-forum paper, the Court held, administrators may overrule students’ editorial decisions so long as the decision is “reasonably related to legitimate pedagogical concerns.”¹¹ Significantly, the *Kuhlmeier* Court fell back on the justification recognized in *Tinker*—“the special characteristics of the school environment”—and elaborated: “A school need not tolerate student speech that is inconsistent with its ‘basic educational mission,’ even though the government could not censor similar speech outside the school.”¹²

An instructive line can be drawn between the speech in *Barnette* and *Tinker*, which was unmistakably that of the individual students alone, versus that in *Fraser* and *Kuhlmeier*, in which the speech could, in the Court’s view, be ascribed to the school. Only in the latter instance has the Supreme Court ever permitted the state’s interest in keeping order to override that of the speaker, and in the absence of those special circumstances, *Tinker* continues to supply the default standard.¹³

B. BEFORE THE WEB: A BRIGHT(ER) JURISDICTIONAL LINE

In the pre-internet era, courts generally had no difficulty concluding that school officials could not constitutionally punish off-campus publications, even if copies were brought onto campus. For instance, in *Thomas v. Board of Education, Granville Central School District*,¹⁴ the Second Circuit reversed a school’s decision to suspend the editors of an off-campus student newspaper, *Hard Times*, who were punished because their humor publication contained lewd drawings and language. Though there were some physical ties to campus—some articles were written or typed at school, and copies were stored in a closet at school—these minimal contacts did not transform *Hard Times* into “school speech” and give school officials broad regulatory leeway over it: “[O]ur willingness to grant school officials substantial autonomy within their academic domain rests in part on the confinement of that power within the metes and bounds of the school itself.”¹⁵ Because school administrators had “ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith,” the *Thomas* court held, “their actions must be

¹¹ *Id.* at 273.

¹² *Id.* at 266 (internal citation omitted).

¹³ See, e.g., *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 211-14 (3rd Cir. 2001) (Alito, J.) (explaining *Tinker* exceptions recognized in *Fraser* and in *Kuhlmeier*, and concluding, “Speech falling outside of these (*Fraser* and *Kuhlmeier*) categories is subject to *Tinker*’s general rule: it may be regulated only if it would substantially disrupt school”); *Guiles ex rel. Guiles v. Marineau*, 461 F.3d 320, 325 (2d Cir. 2006) (“[F]or all other speech, meaning speech that is neither vulgar, lewd, indecent or plainly offensive under *Fraser*, nor school-sponsored under *Hazelwood*, the rule of *Tinker* applies. Schools may not regulate such student speech unless it would materially and substantially disrupt classwork and discipline in the school.”).

¹⁴ 607 F.2d 1043 (2d Cir. 1979).

¹⁵ *Id.* at 1052.

evaluated by the principles that bind government officials in the public arena.”¹⁶ The court was wary of letting schools regulate off-campus speech that might find its way onto campus only fortuitously:

It is not difficult to imagine the lengths to which school authorities could take the power they have exercised in the case before us. If they possessed this power, it would be within their discretion to suspend a student who purchases an issue of *National Lampoon*, the inspiration for *Hard Times*, at a neighboring newsstand and lends it to a school friend.¹⁷

Similarly, the court in *Shanley v. Northeast Independent School District*¹⁸ ruled that the First Amendment precluded punishing five high school students for the content of an underground newspaper they created off-campus and distributed after-hours on school grounds.¹⁹

Once a student has purposefully brought writings created off-campus into the schoolhouse during the school day, the rules change. Courts generally have had no difficulty concluding that schools may, under the *Tinker* standard, police independently created writings that are circulated or displayed during class time.²⁰ This includes authority to require that “underground” publications be reviewed by an administrator for substantially disruptive content before they may be distributed on campus during the school day, although the review must be circumscribed in scope and duration to avoid its abuse as a “pocket veto.”²¹

¹⁶ *Id.* at 1050.

¹⁷ *Id.* at 1051.

¹⁸ 462 F.2d 960 (5th Cir. 1972).

¹⁹ See also *Bystrom v. Fridley High Sch., Indep. Sch. Dist.*, 822 F.2d 747 (8th Cir. 1987). In *Bystrom*, the Eighth Circuit held that it was not categorically unconstitutional for a high school to require prior administrative review of a publication to be distributed on school grounds, but then added this caution: “The school district asserts no authority to govern or punish what students say, write, or publish to each other or to the public at any location outside the school buildings and grounds. If school authorities were to claim such a power, quite different issues would be raised, and the burden of the authorities to justify their policy under the First Amendment would be much greater, perhaps even insurmountable.” *Id.* at 750.

²⁰ Compare *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608 (5th Cir. 2004) (student’s First Amendment rights were violated when he was disciplined for two-year-old homemade drawing depicting violent siege at his school, which his brother brought onto campus without his knowledge) with *Boim v. Fulton County Sch. Dist.*, 494 F.3d 978 (11th Cir. 2007) (no First Amendment violation in disciplining student for violent journal entry written off-campus that described a dream about killing a specific teacher, where the student brought the notebook containing the poem to class and was caught passing the book to a classmate).

²¹ See, e.g., *Bystrom*, *supra* note 19; *Shanley v. Northeast Indep. Sch. Dist.*, 462 F.2d 960, 969 (5th Cir. 1972) (“Given the necessity for discipline and orderly processes in the high schools, it is not at all unreasonable to require that materials destined for distribution to students be submitted to the school administration prior to distribution.”); see also *Eisner v. Stamford Bd. of Educ.*, 440 F.2d 803 (2d Cir. 1971) (striking down overbroad prior-review policy but indicating that narrowly tailored policy with brief deadline within which reviewer can act would be constitutional); *Baughman v. Freiemuth*, 478 F.2d 1345 (4th Cir. 1973) (same). A requirement of prior review before a publication may be distributed is recognized as a form of prior restraint. See, e.g., *Slotterback v. Interboro Sch. Dist.*, 766 F. Supp. 280, 298 (E.D. Pa. 1991) (“To be sure, these paragraphs [establishing mandatory prior review of ‘nonschool written materials’] form a system of prior restraint on students’ protected, personal first amendment speech.”). Prior restraint is the most noxious and disfavored of incursions on the First Amendment, to be tolerated only in the most extreme circumstances. See *Near v. Minnesota*, 283 U.S. 697, 714 (1931) (noting that the First Amendment’s primary purpose is to prevent “previous restraints upon publications” by the government).

III. DISCIPLINARY AUTHORITY JUMPS THE SCHOOLHOUSE GATE: *MORSE V. FREDERICK*

The Supreme Court had the opportunity in 2007 to categorically determine whether school disciplinary power could reach off-campus conduct at an event that, unlike a field trip, was not an official school function. Instead, in *Morse v. Frederick*,²² which is often referred to as the “Bong Hits 4 Jesus” case because of the message written on the banner that was the subject of the case, the Court fashioned a narrow, fact-specific exception to *Tinker* where speech at a “school sanctioned” event is reasonably interpreted as encouraging students to use illegal drugs.

In *Morse*, a 5-4 majority of the Court held that a school did not violate the First Amendment in punishing a student who, at a public gathering during school hours where teachers provided supervision, stood directly across from the school and displayed a banner that the student later claimed was a nonsensical ploy for attention. Writing for the majority, Chief Justice Roberts expressly rejected the argument that *Morse* “[wa]s not a school speech case,” noting that the events “occurred during normal school hours” and at an activity “sanctioned” by the school.²³ Even in *Morse*, the Court emphasized that the speech was made at a school activity, echoing the point Justice Brennan made in *Fraser*: “Fraser’s First Amendment rights were circumscribed” while at school, but had he “delivered the same speech in a public forum outside the school context, it would have been protected.”²⁴

Justices Alito and Kennedy supplied the decisive votes to create a majority, and their concurrence makes plain that *Morse* does not provide an unrestrained license for policing off-campus expression: “I join the opinion of the Court on the understanding that . . . it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use[.]”²⁵ Justice Alito went on to explain that the First Amendment would not tolerate a standard under which a school could censor speech merely because, in the judgment of administrators, it interfered with the school’s self-defined “educational mission,” a standard fraught with potential for mischief.²⁶ *Morse* can be read narrowly, for the unremarkable proposition that when students are acting under school supervision, as they are on a field trip, they are speaking “at school,” or more broadly, to say that speech physically off school grounds that is directed at the school equals speech “at” school. The Alito concurrence plainly counsels in favor of a limited reading, but a few courts have regarded *Morse* as a broad license to extend school authority beyond school boundaries.

The limiting Alito construction notwithstanding, *Morse* almost immediately began being cited for the proposition that students no longer enjoy refuge in the First Amendment for any speech reasonably, or even unreasonably, interpreted as condoning *anything* dangerous and illegal—specifically, violence. Courts have always been

²² *Morse v. Frederick*, 127 S.Ct. 2618 (2007).

²³ *Id.* at 2624. The event in this case involved attendance at the torch relay for the 2002 Winter Olympic Games.

²⁴ *Id.* at 2626-27.

²⁵ *Id.* at 2636 (Alito, J., concurring).

²⁶ “The opinion of the Court does not endorse the broad argument . . . that the First Amendment permits public school officials to censor any student speech that interferes with a school’s ‘educational mission.’ . . . This argument can easily be manipulated in dangerous ways, and I would reject it before such abuse occurs. The ‘educational mission’ of the public schools is defined by the elected and appointed public officials with authority over the schools and by the school administrators and faculty. As a result, some public schools have defined their educational missions as including the inculcation of whatever political and social views are held by the members of these groups.” *Id.* at 2637 (Alito, J., concurring).

hesitant to second-guess the disciplinary decisions of school administrators, but never more so than when administrators are responding to perceived threats against students or school personnel.²⁷ Hence, in one of the earliest applications of *Morse*, the Fifth Circuit found no constitutional violation in a Texas principal's decision to remove a high school sophomore from school and transfer him to a disciplinary alternative school in response to a violent fantasy story written in a notebook the student was carrying in his school backpack.²⁸ The opinion expressly cited the infamous April 1999 killings of 12 students and a teacher at Colorado's Columbine High School, and the somewhat less well-known March 1998 slaying of four middle-school students and a teacher in Jonesboro, Arkansas, by a pair of shooters aged 11 and 13. It concluded: "School administrators must be permitted to act quickly and decisively to address a threat of physical violence against their students, without worrying that they will have to face years of litigation second-guessing their judgment as to whether the threat posed a real risk of substantial disturbance."²⁹

IV. COURTS STRUGGLE WITH SCHOOL AUTHORITY OVER CYBER-SPEECH

A. JURISDICTIONAL LINES BLUR WHERE SPEECH INVOLVES VIOLENCE

Anxiety over school violence has prompted a number of courts to relax the geographical barriers to school discipline where students use electronic communications to share thoughts interpreted as signaling violent tendencies. While "true threats" lie outside the purview of the First Amendment,³⁰ these cases entail something noticeably less than concrete and imminent danger—speech that in the world outside of school would normally be protected.

In some instances, courts have found sufficient nexus with the school by showing that the off-campus speaker actually "brought" the website onto campus, such as by using a school computer to show the site to others. In one such case, *J.S. v. Bethlehem Area School District* ("*Bethlehem*"),³¹ the Pennsylvania Supreme Court held that a school did not violate the First Amendment by expelling an eighth-grade student for creating a web page that profanely enumerated the reasons his teacher should die and solicited donations for a hit-man. The court emphasized both the severity of the impact on the targeted teacher—she was so traumatized that she went on antidepressants, was unable to complete the school year, and did not return for the following year—and that the student creator used school computers at least once to show the site to a classmate, and told others at school about the site. While the court looked at other factors indicating that the student directed his speech at the school—the audience was a "specific audience of students and others connected with this particular School District" and school officials "were the subjects of the site"—it appears that the student's actual dissemination of the speech on school grounds was essential to

²⁷ See, e.g., *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 992 (9th Cir. 2001) (finding no First Amendment violation in school's expulsion of student with troubled personal history who showed his teacher a violent poem, even though he was diagnosed as not being dangerous: "We review ... with deference, schools' decisions in connection with the safety of their students even when freedom of expression is involved.... School officials have a difficult task in balancing safety concerns against chilling free expression.")

²⁸ *Ponce v. Socorro*, 508 F.3d 765, 768 (5th Cir. 2007).

²⁹ *Id.* at 772.

³⁰ *Watts v. United States*, 394 U.S. 705, 707 (1969).

³¹ 807 A.2d 803 (Pa. 2002).

the outcome. The court framed the standard this way: “[W]here speech that is aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech.”

In other cases, no physical nexus with the school has been required. Rather, these courts have permitted school discipline on the theory that online speech is capable of reaching school, and foreseeably likely to do so, or that the impact of the speech is anticipated to be felt at school. For instance, in *Wisniewski v. Board of Education*,³² the Second Circuit found no impediment to disciplining a student for his use of an instant messaging icon designed to look like a cartoon of his teacher being shot. The student, Aaron Wisniewski, did not use school computers to create or send his message, and there was no evidence that he showed the icon to anyone at school or that he intended for his classmates to do so. Nevertheless, the court found that it was reasonably foreseeable that the caricature would come to the attention of the teacher and of school officials, and that if seen, it would “foreseeably create a risk of substantial disruption within the school environment.”³³

It is unsurprising that courts hesitate to second-guess disciplinary decisions where school officials are responding to what they say were credible threats of bodily harm. Nevertheless, the leap made in *Wisniewski* to reach the court’s desired outcome ought not to be made casually. *Wisniewski* may mean that digital speech off campus is punishable under the same standards as on-campus speech because, owing to the pervasiveness of electronic communications, *the speech itself* is capable of entering the school. What is missing in this standard is any requirement that the speaker intend that the message be viewed at school, or that he do anything on campus to call attention to the speech; indeed, the court said Wisniewski’s intent was immaterial.³⁴ Importantly, the *Wisniewski* case did not involve content posted on an unsecured website, where anyone with an internet connection could view it, but rather an electronic text message. Wisniewski’s teacher could not stumble onto his message with a Google search; the message could not reach the teacher unless one of its recipients forwarded or printed it. This means that the speaker is charged with anticipating that his message will be shown, without his authorization, to people with whom he never intended to communicate. That legal standard would be dangerously open-ended enough, but the alternative way to read *Wisniewski*—that online speech is punishable as on-campus speech because the *effects* of the speech will be felt on campus—is even more perilous, for that rationale can apply equally to all speech, online or not. If this latter reading of *Wisniewski* prevails, then it is no exaggeration to say that students never—at any time and in any medium—have First Amendment rights coextensive with those of adults.

To be sure, the Supreme Court’s constitutional analysis in *Kuhlmeier* is deeply flawed, but like it or not, *Kuhlmeier* is the law. And by applying “public forum” analysis to school speech, *Kuhlmeier* roots school officials’ disciplinary authority squarely in geography. As the real-estate pros say, location matters. Public forum analysis is all about the government’s ability to control the way that the space it owns—the park, the sidewalk, the courthouse lobby—is used for expressive conduct. Outside the school context, no one would seriously suggest that government may regulate lawful speech off government property based on the way people might react to it on government

³² 494 F.3d 34 (2d Cir. 2007).

³³ *Id.* at 39-40.

³⁴ *Id.* at 40.

property. The state may reasonably regulate the time, place and manner of speech *on* government property, not *affecting* government property.

We would not in any other context permit the punishment of legal off-campus activity—and recall that in *Wisniewski*, the police investigated and found no unlawful conduct—based solely on its impact on persons on-campus. We would not permit the principal to discipline a student who cheats on his girlfriend and callously breaks off their relationship, even though the girlfriend comes to school sobbing and the breakup distracts her and those around her from their studies. We would not permit the principal to punish an 18-year-old beauty queen who poses scantily clad for a swimsuit magazine, even though the magazine is the talk of the school and students cannot stop discussing it during class time. If we would not countenance state interference in these contexts, then surely we cannot afford speech a uniquely *lesser*-protected status.

B. DISCIPLINARY POLICIES WITHOUT GEOGRAPHICAL LIMITS ARE FATALY OVERBROAD

In several recent instances, students have brought facial challenges to disciplinary policies purporting to penalize all “disruptive” or “abusive” speech, regardless of where the speech is uttered and whether it physically makes its way onto campus. Courts evaluating disciplinary policies that lack any geographic nexus with the school have had little difficulty recognizing the policies as unconstitutional, because they are not sufficiently tailored to minimize impact on legitimately protected speech.

In *Killion v. Franklin Regional School District*,³⁵ a student was suspended from school for making crass comments about the school’s athletic director—including crude remarks about the size of his genitals—in an email circulated to several classmates. A copy of the email was left in a teacher lounge, but the message otherwise had no physical connection to the school or school events. The court held that the school district’s policy penalizing “verbal/written abuse of a staff member” was unconstitutionally vague and overbroad, because it was neither limited to instances in which the conduct caused or threatened a substantial disruption, nor geographically limited to school premises.³⁶

In *Flaherty v. Keystone Oaks School District*,³⁷ a different judge in the Western District reaffirmed *Killion* in the case of a high school student disciplined for using an online message board to transmit vulgar trash-talk, including insults about a student athlete and his mother, in discussing a school volleyball rivalry. The school took the position that it could punish the student because he brought “shame” and “embarrassment” to the volleyball program and the school with his comments. The court disagreed. The court found that a school handbook policy prohibiting “[i]nappropriate language” and “verbal abuse” toward school employees or students was overbroad and vague, “because they permit a school official to discipline a student for an abusive, offensive, harassing or inappropriate expression that occurs outside of school premises and not tied to a school related activity.”³⁸

³⁵ 136 F. Supp. 2d 446 (W.D. Pa. 2001).

³⁶ *Id.* at 459.

³⁷ 247 F. Supp. 2d 698 (W.D. Pa. 2003).

³⁸ *Id.* at 706. See also *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088 (W.D. Wash. 2000). In *Emmett*, high school administrators suspended a student who had created a website with “mock obituaries” of his classmates. The District Court enjoined the suspension, finding that the speech in question had no connection to any “class or school project” or was in any way “school-sponsored.” Indeed, while “the intended audience was undoubtedly connected to” the high school, “the speech was entirely outside of the school’s supervision or control.” *Id.* at 1089.

Although these cases arise out of First Amendment challenges, their reasoning is grounded in fundamental notions of due process—namely, that the government may not punish conduct without giving reasonable notice of what is prohibited. A student cannot be expected to live her life looking over her shoulder and wondering whether her statements about conditions at her school might get back to those at school and prompt a reaction.

V. DUELING VIEWS OF “SUBSTANTIAL DISRUPTION” VIA ONLINE SPEECH

A. DONINGER AND BLUE MOUNTAIN: *TINKER* STRETCHED TO THE BREAKING POINT

Whether perceived or real, threats of violence against the school community present the trickiest interplay of First Amendment freedoms versus legitimate public safety interests. But when the speech presents opinions that are merely insulting or belittling of school personnel, with no undercurrent of violence, the school cannot invoke “public safety” to validate a disciplinary decision. These latter types of cases are the most foreboding for legitimate journalism, and for the rights of journalists and commentators to frankly criticize school officials. Although *Tinker*’s requirement that the school demonstrate actual or foreseeable disruption should guard against the worst overreaching by errant officials, that protection is often more illusory than real, because of the leeway that courts afford schools in determining when a student’s conduct is “disruptive.”

The most egregious reach by a court seeking to rationalize school discipline of purely off-campus speech came in the case of a Connecticut high-school junior who used a personal blog to seek public support for her side in a dispute with school administrators. The student, Avery Doninger, was a class officer who became frustrated in negotiating with her principal over the scheduling of a battle-of-the-bands concert. Doninger created a publicly accessible entry on the blogging site LiveJournal.com in which she used a coarse word (“douchebags”) to refer to administrators and asked those who supported her position to email and phone the administrators to rally support for the concert. Her principal responded by declaring Doninger ineligible to seek senior-class office and by refusing to seat her when her classmates elected her anyway, and later by banning Doninger and her supporters from wearing T-shirt messages protesting her treatment.

The case initially came to district court on Doninger’s petition for an injunction to permit her to reclaim her student office pending trial. The district court denied the petition, finding no First Amendment violation on two bases: first, that Doninger’s off-campus blog posting was punishable as “lewd” speech under the *Fraser* standard even though it took place far outside *Fraser*’s “captive audience” context, and second, that holding class office was a privilege and not a right, and that school officials were free to revoke the privilege if the student failed to demonstrate “good citizenship.”³⁹

The Second Circuit affirmed denial of the injunction, but on a different rationale.⁴⁰ The appeals court questioned whether *Fraser* could legitimately apply to off-campus speech, and instead decided the case under the *Tinker* standard, finding Doninger’s speech to be substantially disruptive. The court relied on evidence that Doninger’s blog entry was misleading, because a portion of the blog, which both the district and

³⁹ *Doninger v. Niehoff* (“*Doninger I*”), 514 F. Supp. 2d 199 (D. Conn. 2007).

⁴⁰ *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008).

appellate courts took out of context, asserted that a final decision had been made to cancel the concert, when in fact there was a chance it would be held, as it ultimately was. In the Second Circuit's view, that transmittal of misleading information created a foreseeable risk that administrators would have to waste time quelling protests from students incensed by the "cancellation." The court ignored evidence that disruption of school was not cited as the basis when the school disciplined the student—the only justification given was the use of disrespectful language. The court also glossed over the fact that three weeks elapsed between the blog posting and the discipline with no sign of unruly student reaction to the "cancellation." In the court's view, *Tinker* permits not merely preemptive action to stop a potential disruption, but after-the-fact punishment of a potential disruption that never came to pass.

The case returned to district court on the school officials' motion for summary judgment. The court granted judgment for the defendants on Doninger's main First Amendment claim, leaving only a subsidiary claim arising from the ban on pro-Doninger T-shirts at a school function. The court recognized that the facts were in dispute as to whether the discipline truly was based on disruption of the school or the use of crude language, but concluded that in either case, First Amendment law was not clearly settled that the discipline was unlawful. Because they violated no clearly established legal right, Doninger's principal and superintendent were entitled to qualified immunity, meaning they could not be compelled to pay damages.

Both the district and appellate courts emphasized that the outcome was driven by the unique nature of the discipline—stripping the student of elective office but not removing her from classes or otherwise depriving her of a constitutionally protected interest. This provides a future speaker the opportunity to challenge a suspension or expulsion as distinct from Avery Doninger's punishment. But in the process, it does violence to the law of First Amendment retaliation, for it has never been the law that retaliation for the content of speech is lawful so long as the speaker is not deprived of a constitutional entitlement. Rather, retaliation for engaging in protected speech is unlawful if the retaliatory act would be sufficient to deter a reasonable person from speaking again—an analysis that none of the *Doninger* rulings bothered to conduct.⁴¹

A few months after the Second Circuit handed down *Doninger*, a district court in Pennsylvania fashioned a makeshift First Amendment standard to uphold a middle school's punishment of a student who, angry over being punished for a dress-code violation, created a mock MySpace profile ridiculing her principal.⁴² The profile was a wildly exaggerated mockery of a typical social networking page, in which the principal, who was pictured but not named, bragged about being a pedophile who had sex in his office. As in *Doninger*, no school resources or time were used, and there was no evidence that the student displayed the contents of the web page on school grounds; in fact, MySpace was inaccessible on school computers. The sum total of the profile's impact on school decorum was one teacher's testimony that he twice had to quiet his class at the start of the day to silence talking about the website, and more generalized testimony about a "buzz" among students indicating they had viewed the site. Nevertheless, the court in *J.S. v. Blue Mountain School District* ("*Blue Mountain*")

⁴¹ See, e.g., *Mendocino Env'tl. Ctr. v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999) ("[T]he proper inquiry asks whether an official's acts would chill or silence a person of ordinary firmness from future First Amendment activities.") (internal quotations omitted); *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982) (harassment for exercising the right of free speech not actionable if it was "unlikely to deter a person of ordinary firmness from that exercise").

⁴² *J.S. v. Blue Mountain Sch. Dist.*, No. 3:07cv585, 2008 WL 4279517 (M.D. Pa. Sept. 11, 2008).

held that the website was sanctionable under a legal analysis that borrowed elements from *Tinker*, *Morse*, and *Fraser*. Even conceding that no substantial disruption occurred, the court found that a school may lawfully punish “vulgar, lewd, and potentially illegal speech that had an effect on campus.”⁴³

The *Blue Mountain* ruling heavily emphasized the ease with which the internet empowers students to transmit messages, suggesting that the availability of online communications makes established First Amendment standards obsolete: “Today, students are connected to each other through email, instant messaging, social networking sites, and text messages. An email can be sent to dozens or hundreds of other students by hitting ‘send.’ . . . Off-campus speech can become on-campus speech with the click of a mouse.”⁴⁴ This perception that digital media are uniquely dangerous, and that their dangerousness calls for relaxing the burden on government to justify limiting speech, pervades the rulings in *Blue Mountain*, *Bethlehem*, *Wisniewski*, and *Doninger*. Fortunately, this casualness about First Amendment standards is not universally accepted.

B. DISCUSSION DOES NOT EQUAL DISRUPTION: LAYSHOCK

In *Layshock v. Hermitage School District*,⁴⁵ a district court confronted a high school student’s claim that his school violated his First Amendment rights by suspending him for an off-campus MySpace page that, like the page in the *Blue Mountain* case, used vulgar language to ridicule the school principal. The court did not linger over the propriety of school authority over online speech, simply observing that it was the state’s burden to show a sufficient “nexus” with the school—and indicating that a substantial disruption of school orderliness could supply that nexus. The court applied the *Tinker* standard, finding that the parody page merely caused curiosity and discussion on campus, not true disruption: “The actual disruption was rather minimal—no classes were cancelled, no widespread disorder occurred, there was no violence or student disciplinary action.”⁴⁶

The school argued for application of the *Fraser* “lewd speech” standard, contending that Justin Layshock’s parody profile—in which the “principal” purported to describe himself as a “big whore” and a “big hard-ass”—was punishable by virtue of its accessibility on campus. The court categorically rejected extending *Fraser* to off-campus speech: “[B]ecause *Fraser* involved speech expressed during an in-school assembly, it does not expand the authority of schools to punish lewd and profane off-campus speech. There is no evidence that Justin engaged in any lewd or profane speech while in school.”⁴⁷

Significantly, the *Layshock* court took care to examine the basis for the punishment, and had no difficulty concluding that the suspension was imposed purely for the content of the student’s speech, and not for any non-speech disruptive conduct on campus. Thus, the school could not justify its actions by claiming that the discipline was for on-campus misconduct, such as Layshock’s admitted use of a school computer to show the profile to several classmates during a Spanish class. The court properly

⁴³ *Id.* at *6.

⁴⁴ *Id.* at *17.

⁴⁵ 496 F. Supp. 2d 587 (W.D. Pa. 2007). The case is on appeal to the Third U.S. Circuit Court of Appeals, Docket Nos. 07-4465 and 07-4555.

⁴⁶ *Id.* at 600.

⁴⁷ *Id.* at 599-600.

recognized that contention as a post-hoc attempt to decouple Layshock's punishment from the content of his message.

VI. THE PERILS OF UNBRIDLED SCHOOL DISCRETION OVER ONLINE SPEECH

A. RUNAWAY GOVERNMENT AUTHORITY: THE FAILED EXPERIMENT OF *KUHLMEIER*

Twenty years of experience with the *Kuhlmeier* standard has proven that, given largely unreviewable discretion to determine what content is hurtful to the school's educational mission, many school administrators will abuse that authority to refuse to publish anything they perceive as critical or controversial. This includes benign mentions of same-sex relationships between students,⁴⁸ acknowledgment that high-school girls have babies,⁴⁹ and disclosure of possible wrongdoing by school employees.⁵⁰ The brunt of censorship falls disproportionately on gays, religious minorities and other "outliers," for whom being a teenager in high school can already be a daily gamut of ostracism. When such students seek the empowerment of a voice in student media as an antidote to their alienation, they often are told by school authorities that their mere visible presence in a student publication is intolerable to the community.⁵¹ This noxious brand of censorship lends official sanction to the heckler's veto; for the students victimized by it, the impact is as palpable as a schoolyard beating.

Censorship of topical speech, even where it is sharply critical of school policies or school personnel, cheats the listening audience, including the adult audience, as well as the speaker. Some of the most important policy decisions facing America involve the effectiveness of our educational programs. If a student wishes to voice her opinion that abstinence-only sex education is ineffective, and that students are tuning out the lectures, that is potentially valuable information—for educators, policymakers, and parents. Sadly, in some school districts, publication of that student's opinion will be treated as a career-ending infraction for her journalism teacher.⁵²

⁴⁸ See, e.g., Kevin Wilson, *School Board Plans to Update Publication Policy*, CLOVIS NEWS J., June 25, 2008 (New Mexico school district decided to strip students of editorial control over publications in response to yearbook's publication of photo of same-sex couple as part of a spread about relationships).

⁴⁹ See, e.g., Kathleen Fitzgerald, *Principal Pulls Pregnancy Story from Texas Yearbook*, STUDENT PRESS LAW CENTER NEWS FLASH, Feb. 13, 2008 (Texas high school principal refused to distribute yearbook containing photo spread telling story of two teenage mothers who returned to school to complete their diplomas, claiming that the story "glamorized" unwed motherhood).

⁵⁰ See, e.g., Melanie Hicken, *She's Making Headlines*, ORANGE COUNTY REG., Aug. 8, 2008 (California teacher was stripped of high school newspaper adviser position "after allowing students to run several editorials criticizing dirty bathrooms, bugs in cafeteria food and teachers who were unavailable after class"); Steven Harmon, *Bill Makes it Safe to Protect Students' Free Speech Rights*, SAN JOSE MERCURY NEWS, Mar. 2, 2008 (discussing incident in which school board threatened closure of student newspaper in retaliation for articles critical of school); Eun Lee Koh, *Muckraking is Permitted, Student Journalists Learn, But Just a Bit*, N.Y. TIMES, Jan. 7, 2001 (New York high school principal forbade publication of an article criticizing the unsanitary conditions and lack of availability of bathrooms "until the tone was changed").

⁵¹ See, e.g., Claudia Lauer, *Students Fight to Write: Battle Begins After Principal Halts Paper with Gay Editorial*, MYRTLE BEACH SUN NEWS, Dec. 18, 2008 (principal would not permit students to distribute independently funded and produced newspaper on campus because it contained a front-page column criticizing California's anti-gay-marriage amendment with a photo of two openly gay male students holding hands).

⁵² See, e.g., Bruce Lieberman, *ACLU Sues District over Student Paper*, SAN DIEGO UNION-TRIBUNE, Nov. 12, 2008 (teacher's lawsuit alleges that high school principal killed journalism program and eliminated adviser position in retaliation for an article accurately reporting on a local controversy involving use

Those who oppose the censorship of student expression frequently find themselves shadow-boxing against mythical justifications. The first is the contention that schools are legally liable for the speech of students, so that administrative control is necessary to minimize exposure. In reality, there is no evidence that student publications are litigation-prone; indeed, there is not a single published appellate case holding a public high school liable for defamation, invasion of privacy, or other tortious injury inflicted by student media. To the contrary, in the very few student-media cases on record, all of which are at the college level, courts have been quite clear that schools incur *greater* risk of liability by interjecting themselves into editorial decisions.⁵³ The second myth is that, like journalists in the professional world, students must be answerable to an experienced editor (*i.e.*, the principal) so they can learn sound journalistic practices. But there is no “teaching” in the typical censorship case. A student learns nothing about journalistic standards by being told: “I am killing your story because I allow only coverage that is biased in favor of the school.”⁵⁴ As flimsy as these rationales are when applied to school-sponsored newspapers or broadcasts, they are of course wholly inapplicable to individual speech on social networking pages. There can be no pretense that schools’ interest in controlling that speech is based on anything other than its editorial content.

B. THE INTERNET DOES NOT JUSTIFY A NEW FIRST AMENDMENT RULEBOOK

Those who advocate for a greater government role in policing students’ online speech invariably come back to one assertion: as Judge Munley postulated in *Blue Mountain*, the internet is qualitatively different from other methods of communication, making traditional First Amendment jurisprudence a poor fit. Under this view, the ability of students to instantaneously reach a worldwide audience—including the entire school community at once—so magnifies the ability to do harm that greater restraints are justified. This contention misfires for several reasons.

First, as *Tinker* makes clear, school authority over student speech must be moored in the state’s interest in maintaining the orderly functioning of the school. Students have always had the ability to reach enough fellow students—through leaflets, posters or whisper campaigns—to create disorder within the school. The courts have not previously seen fit to relax the *Tinker* standard simply because, for instance, copiers and fax machines became more plentiful, or cellular telephones more ubiquitous. One’s right to display a yard sign endorsing a political candidate does not change just because the country road fronting the house is widened into an interstate highway. The ease with which the message can be successfully transmitted and received has never been the deciding factor in whether speech enjoys First Amendment protection.⁵⁵ The district court’s sly turn of phrase in *Doninger*—that online speech can enter the

of the school building as an emergency shelter, and an editorial criticizing abstinence-only sex education).

⁵³ See *Milliner v. Turner*, 436 So. 2d 1300 (La. Ct. App. 1983) (university could not be held liable for allegedly defamatory article in student newspaper over which it exercised no editorial control); *McEvaddy v. City Univ. of N.Y.*, 633 N.Y.S.2d 4 (N.Y. App. Div. 1995) (same); *Lewis v. St. Cloud State Univ.*, 693 N.W.2d 466 (Minn. Ct. App. 2005) (same).

⁵⁴ It goes without saying that professional newspaper editors are not allowed to review stories about themselves.

⁵⁵ If the ease of immediately reaching those capable of disrupting the school were a decisive consideration, that factor would weigh in favor of tighter regulation of the *lowest*-technology methods. Not every home has internet access, and not every student will stumble onto a website criticizing the principal, but every student will see a hand-drawn paper flyer taped to the school entryway.

campus “with the click of a mouse”—could just as easily be replaced by “the whirr of a fax machine,” or even “the scrape of a pair of sneakers.” Communication has been portable since the day cave paintings gave way to mastodon skins. Interestingly, no school has ever argued that school newspapers should be entitled to a higher level of First Amendment protection than that afforded to the *New York Times* on the grounds that it is far easier to reach a damagingly large audience in the *Times*.

There is in fact no evidence that websites are such an efficient way of successfully reaching a sufficiently large audience to disrupt school that a new-and-different level of First Amendment solicitude is warranted. There are professionally trained journalists operating professionally designed blogs whose viewership numbers in the double digits. The implication that the online medium makes speech punishable in a way that verbal communication or a handwritten note would not be relies on the fanciful notion that teenagers’ social networking pages enjoy an audience the size of the “Drudge Report.” It is not enough to say that speech was “put on the internet” any more than it would be sufficient to say that speech was “put on a sign.” Some signs are illuminated in neon over Broadway, and others are planted in a front yard in the countryside. And so it is with the web.⁵⁶

The concern that online remarks about the principal could be viewed by a nationwide audience and could persist indefinitely in cyberspace is of no constitutional significance. That a viewer in Tacoma might form a negative impression of a principal in Tampa has no bearing on the school’s ability to maintain good order. If the principal is injured in his career ambitions, like landing that dream job in Tacoma, by factually false allegations, he can and should pursue a defamation action. But his career prospects are not the interests of the state, and they carry no weight in a *Tinker* analysis.

The pervasiveness of digital communications cuts against unbridled expansion of state authority, not in favor of it. To a greater and greater degree, young people live their lives online—they form and dissolve relationships, collaborate in playing games or creating works of art, and furnish the real-time minutiae of their daily lives for their friends to follow. The Pew Internet and American Life Project reports that more than half of all teenagers have created and posted content to the internet so that they could be considered “publishers.”⁵⁷ For this generation and those to come, to say that government can regulate their “electronic communication” is meaningless; there is no other communication. In short, while it is fashionable to assert that “the internet has changed everything” in American culture, the foundational rules of our Constitution remain. It is our view of the nature of speech, not the Constitution, that must change to keep pace with technology.

Consider the practical implications of a rule that off-campus speech is punishable if people on campus are reasonably likely to learn about the speech (*Wisniewski*) and if the speech causes school officials to expend any substantial amount of time responding to it (*Doninger*). Such a rule is inherently flawed because it lacks a limitation that only “wrongful” or “low-value” speech may be punished, and, indeed, it is impossible to create a “low value speech” standard that intelligibly constrains the

⁵⁶ In the *Wisniewski* case, the facts showed that 15 people received the instant message depicting the teacher being shot. *Wisniewski v. Bd. of Ed.*, 494 F.3d 34, 36 (2d Cir. 2007). In the *Blue Mountain* case, the student’s MySpace page spoofing her principal was, after briefly being available to any MySpace user who discovered it, placed on an invitation-only basis so that it was viewable only by 22 approved friends. *J.S. v. Blue Mountain Sch. Dist.*, No. 3:07cv585, 2008 WL 4279517, at *2 (M.D. Pa. Sept. 11, 2008).

⁵⁷ AMANDA LENHART & MARY MADDEN, PEW INTERNET & AMERICAN LIFE PROJECT, TEEN CONTENT CREATORS AND CONSUMERS, (2005), available at http://www.pewinternet.org/pdfs/PIP_Teens_Content_Creation.pdf.

government's enforcement discretion. The problem is clear when you consider the student who addresses a state legislative committee at a public meeting to call attention to a safety hazard at her school. Although most would agree that the student's speech is of high value and is worthy of protection, she has engaged in speech that people at the school are reasonably likely to learn about (*Wisniewski*) and that is quite likely to require a response from school officials (*Doninger*). As a result, in the Second Circuit, she may have no First Amendment claim if she is vindictively punished by her principal. This illustrates why the analysis applicable to on-campus speech is such a poor fit for off-campus speech. When analyzing on-campus speech, the substantive merit of the speech is not decisive, because the *Tinker* line of cases speaks in terms of control over school premises while school business is being conducted. If the freshman algebra class decides that they will no longer answer questions about algebra because they wish to turn the class into a discussion group about recycling, they have said nothing wrongful—their speech beneficially addresses a matter of public concern—but they have disrupted class and can be punished. But if a student's off-campus website asks community members to contact the principal's office to urge the school to recycle, it should be beyond dispute that the website is protected speech even if the principal's email box is bombarded with messages. That we can no longer be confident of the answer exposes the fatal weakness in attempting to cram off-campus speech into an ill-fitting on-campus framework.

The notion that speech can be punishable merely because it “targets” a school audience is untenable. There is a meaningful difference between speech that is *about* the school and speech that is *intended to be read at* the school during school hours. It is one thing to say that a student who holds up a “Bong Hits” banner while surrounded by fellow students at a school-supervised outing across the street from school is purposefully addressing his speech to a school audience. It is quite another matter to assert that a blog posted in the evening on LiveJournal.com—the potential audience of which is comprised mostly of adults who never intend to set foot in the school—is “targeting” a school audience. To shut down speech that is theoretically accessible to the entire world to make sure that none of it reaches the sliver of the world that attends Avery Doninger's Lewis B. Mills High School is overbreadth writ large.

The Supreme Court has thus far regarded the internet with the same First Amendment solicitude as print publishing, and not the lesser status afforded to over-the-air broadcasting. Accordingly, the Court has resisted efforts to impose content-based controls in the name of protecting young viewers, finding congressional efforts unconstitutionally overbroad.⁵⁸ Though the Supreme Court has not yet had occasion to apply its online-speech jurisprudence in the school setting, Justice Alito's forceful concurrence in *Morse* suggests that he and concurring Justice Kennedy are prepared to venture outside the schoolhouse gate as far as the neighboring hillside, but no further. This should give pause to expansionists who believe *Wisniewski* and *Doninger* flung the gate wide open.

⁵⁸ See, e.g., *Reno v. ACLU*, 521 U.S. 844 (1997) (striking down as vague and overbroad provisions of the Communications Decency Act prohibiting transmission of obscene or indecent communications to persons under age 18, or sending patently offensive communications through use of interactive computer service to persons under age 18, because those provisions impinged on the rights of adults to send and receive indecent materials, with no showing that less-restrictive protective measures were unavailable or ineffective); *Ashcroft v. ACLU*, 542 U.S. 656, (2004) (upholding injunction against enforcement of Child Online Protection Act provision outlawing use of World Wide Web to transmit material “harmful to minors,” because provision burdened speech lawful between adults, and government failed to show that filtering or other less-restrictive alternatives were ineffective).

Let us be clear about what is at stake if the *Doninger* line of reasoning is allowed to prevail. Courts generally have held that where a student produces an off-campus publication for distribution on school premises during school time, it is not unconstitutional to require prior administrative review as a precondition to circulating the publication.⁵⁹ If speech about the school on a student's website occupies the same status as an underground newspaper because of the website's potential to be accessed at school, or to provoke a reaction at school, then there is no principled objection to prior administrative review before the website may be posted—or to discipline of a student who posts without prior review. That is the path down which the *Doninger* reasoning inexorably points us.⁶⁰

If administrators assert authority to pre-approve or punish students' speech about the school in their off-hours that has the potential of reaching school, commentary on social networking sites will be the least of the casualties. As we have seen, administrators frequently invoke "disruption" as a pretext to suppress speech that is merely factual and critical. Journalism, when practiced at its best, is meant to be provocative; that is, to cause people to talk. If anecdotal evidence that students talked during school hours about something they read equated to "disruption," then even the best journalism—in fact, especially the best journalism—would be subject to prior restraint and to disciplinary sanction.

Factual—and yes, critical—coverage of school affairs by student journalists has never been more important. Established media companies are in financial free-fall, slashing jobs and cutting news space, with education reporting among the unavoidable casualties. Recently in Minnesota, the story of a police inquiry into a teacher's text-message communications with students was broken by a professional newspaper as a result of reporting by high school journalists, who took the story to the local newspaper because the principal censored it from the student paper.⁶¹ If students are not free to report frankly on the goings-on in their schools, the community may never learn that "temporary" trailer classrooms have become permanent, that restrooms are dangerously unsanitary, or that campuses are prowled by gangs.

VII. CONCLUSION

The first generation of online First Amendment law has, regrettably, developed around a recurring fact pattern: a relatively unsympathetic student plaintiff challenging a relatively sympathetic principal's imposition of discipline for relatively frivolous speech. This fact pattern represents only a small fraction of the range of students'

⁵⁹ See *supra* note 21 and accompanying text.

⁶⁰ In the context of the professional media, courts have distinguished between government restraint of publication, which is virtually never permissible, versus government punishment of speech that proves to be unlawful. Thus, the state could not enjoin *The New York Times* from publishing editorial content alleged to be defamatory, but could enforce a civil judgment compelling the *Times* to pay damages for libelous content once published. *Tinker*, however, makes no distinction between a prior restraint on speech and an after-the-fact penalty—indeed, the Supreme Court's decision is directed not primarily to the students' punishment but to the constitutionality of the armband prohibition itself, a classic prior restraint. Thus, if *Tinker* permits the prior restraint of speech when substantial disruption is reasonably forecast, then a literal application of *Tinker* to online speech suggests that schools could not merely punish online speech that proved to be disruptive, but could prohibit entire categories of speech from ever coming into existence, on or off campus, based on a forecast of disruption.

⁶¹ Jim Hammerand, Christen Hildebrandt & Ben Jackson, *Police, District Investigate Teacher*, FARIBAULT DAILY NEWS, Dec. 10, 2008; Chris Ison, *Faribault's Student Journalists Fight Censorship*, MINNPOST, Dec. 16, 2008, available at http://www.minnpost.com/stories/2008/12/16/5303/faribaults_student_journalists_fight_censorship.

online expression, yet it is setting the standard for the more substantive speech in which students engage, and will increasingly engage, on blogs, on website bulletin boards, and on news sites both student and professional.

To the extent that student speech receives any attention in the adult world today, that attention is overwhelmingly negative, focusing on the handful of admittedly heartbreaking cases in which young people have abused websites and text-messaging to abuse their peers, at times with tragic consequences. But there is another student speech story to be told. Student journalists are high achievers, and study after study confirms the link between student journalism and improved school retention, higher standardized test scores and greater college readiness.⁶² When courts speak of the “special characteristics” of the school environment, their focus is on the captive listeners who may be exposed involuntarily to offensive speech. But it is because students are legally compelled to stay in school for the best hours of their day that we must proceed with extreme caution in letting schools punish their expression, let alone extending that disciplinary authority without boundary. And it is because student journalism is such a valuable outlet for expression that courts cannot be permitted to carelessly improvise new constitutional standards to catch the Aaron Wisniewskis of the world. The Supreme Court’s jurisprudence is clear, and technological innovation has not rendered it obsolete. If the publication of a student’s speech does not take place on school grounds, at a school function, or by means of school resources, then a school cannot punish the speaker without violating her First Amendment rights.

Censorship carries real human costs. While irresponsible accusations posted online can be hurtful, reputations can be injured as well by disciplinary overreactions. Justin Layshock’s principal can readily demonstrate to the next employer that, notwithstanding what the employer may have read on MySpace, he is not a “big steroid freak” whose hobbies include “smoking big blunts.” A student will have a much more difficult time clearing his name and pursuing a successful future if branded guilty of disrupting classes and sent to “alternative school,” as Justin Layshock originally was before his parents interceded and got his punishment reduced. Federal courts afford school disciplinary decisions a wide berth of discretion and require only minimal due process safeguards for a suspension of up to ten days, even though the suspension may leave a permanent scar.⁶³ The practical difficulty of overturning a disciplinary decision—with the principal as accuser, judge, jury, and executioner—and the lasting consequences of an unjust conviction, counsel strongly in favor of restraint.

Although it is understandable that courts empathize with school administrators and wish to afford them leeway to respond rapidly to danger signs, schools are not seeking latitude only in dangerous situations. Avery Doninger and Justin Layshock manifested no violent tendencies, and it was known before discipline was imposed that their speech caused no discernable disorder. Where there is no emergency, we must be governed by Justice Brennan’s caution: “Because First Amendment freedoms

⁶² See JACK DVORAK, NEWSPAPER ASSOCIATION OF AMERICA FOUNDATION, *HIGH SCHOOL JOURNALISM MATTERS: JOURNALISM STUDENT ACADEMIC PERFORMANCE IN THE 21ST CENTURY*, (2008), available at www.naaafoundation.org/upload/foundation_pdf/scholastic_report.pdf.

⁶³ In *Goss v. Lopez*, 419 U.S. 565 (1975), the Supreme Court said public school students facing suspension have a due process right to be confronted with the charges against them and to present their account of the events, but that—at least with suspensions of 10 days or less—due process does not require a formal adversarial hearing. “We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident.” *Id.* at 584.

need breathing space to survive, government may regulate in the area only with narrow specificity.”⁶⁴ That is to say, courts are getting it exactly backward: it is the student speaker, not the school, who is entitled to latitude. If the speaker must approach the First Amendment line with trepidation, knowing that the first toe to touch the line will be sliced off, then the speaker will stop a yard short of the boundary, and a good deal of protected speech will never be said. Unless school administrators are required to respect the breathing space that Justice Brennan saw was so vital—unless they are required to work within narrow and specific parameters constraining their power to punish—then valid, protected, non-disruptive speech will be lost.

⁶⁴ *NAACP v. Button*, 371 U.S. 415, 433 (1963).

The Supreme Court's Two-Front War on the Safety Net: A Cautionary Tale for Health Care Reformers

Simon Lazarus and Harper Jean Tobin *

I. INTRODUCTION AND SUMMARY

The intense national debate over how to restore and improve the nation's health safety net is, understandably, focused on the new administration and Congress. What is a little less understandable is that zero attention is paid to the courts. In fact, during the near-half century since the contemporary structure of national health entitlement programs was put in place, federal courts have hosted wide-ranging and fierce battles over their terms, governance, availability to beneficiaries, and especially, remedial options for beneficiaries to vindicate their rights and interests. The decisions yielded by those battles have significantly affected the scope, effectiveness, and impact of those programs.

Regrettably, in the past two decades much of that impact has been negative. The jurisprudence of the Rehnquist Court, largely carried forward under Chief Justice John Roberts, more often than not narrowed the scope of the nation's health safety net laws, insulated public and private administrators from accountability, and disrupted or blocked citizens' access to benefits to which they are entitled. More often than not, these decisions frustrated rather than furthered the broad and generous goals that drove Congress to enact these programs.

The principal vehicle for this constriction of federal health programs has been a contradictory approach to policing the boundaries between state and federal power—venerated in judicial boilerplate as the “delicate balance” of federalism. First, the conservative bloc on the Supreme Court has sought to constrain Congress' power to enact progressive legislation, and in particular to limit citizens' ability to enforce federal statutory rights in court. To justify this side of their agenda, the justices have elaborated an idiosyncratic notion of “federalism,” emphasizing states' rights. Second, the Court has narrowly construed protective federal statutory provisions, and (without missing a beat) expansively deployed doctrines enabling federal judges to “preempt” (i.e., invalidate) state laws that conflict with or “frustrate” federal laws. In the main, the Court's trigger-happy use of its preemption power has been used to strike down state common law and consumer protections at the behest of industries or businesses seeking regulatory relief.

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Together, these antithetical doctrinal approaches advance a transparently ideological, deregulatory agenda, positioning a conservative Supreme Court as arbiter of acceptable state as well as federal regulation. As observed by Professor Ernest Young, “This ‘libertarian vision’ sees federalism as a tool of deregulation with the potential to keep both national and state governments within relatively narrow bounds.”¹

This paper spotlights two arenas in which the federal courts have been significant players in implementing—and undermining—the nation’s statutory safety net. The first is the health insurance back-stop for low-income Americans, Medicaid, and particularly the ability of Medicaid beneficiaries to enforce their statutory rights in court. Here, the Court has woven a web of rules that, while superficially merely procedural, in fact implement a substantive, ideological agenda. They are, as candidly acknowledged by prominent conservative scholar-advocate Michael Greve of the American Enterprise Institute, “The Supreme Court’s *anti-entitlement doctrines*,” which are “connected, such that plaintiffs who manage to evade one obstacle are bound to stumble over another.”²

The second area is the staple of middle-class health insurance, employer-sponsored health plans, again in particular the availability to beneficiaries of judicial remedies for violations of their rights. Here the Court has turned a landmark 20th century reform, the Employee Retirement Income Security Act of 1974 (ERISA),³ into what the late Judge Edward Becker described as “a shield that insulates HMOs from liability for even the most egregious acts of dereliction committed against plan beneficiaries, a state of affairs directly contrary to the intent of Congress.”⁴ To the 134 million Americans covered by employer-sponsored plans, the Court has delivered a judicial one-two punch—eviscerating ERISA’s remedial provisions while preempting state alternatives.

As the new administration and Congress roll out proposals for expanding health care protections, they need to be mindful of how the judicial branch has handled—and mishandled—these products of past reform Congresses. Contemporary reformers can maximize their own impact, both by carving out time and political energy to “fix” major court-imposed distortions of existing safeguards, and by using oversight powers, drafting strategies, and judicial nominations opportunities to minimize similar damage to new protections.

II. THE COURTS NURTURE—THEN UNDERCUT—MEDICAID

More than ever, Medicaid is a cornerstone of the nation’s health coverage structure. In 2008, nearly 63 million people were covered by Medicaid.⁵ These individuals are counted among the nation’s “insured,”⁶ and Medicaid “insures” more Americans than any other entity, including Medicare.⁷ Moreover, Medicaid is the only guarantor

¹ Ernest A. Young, *Federal Preemption and State Autonomy*, in *FEDERAL PREEMPTION: STATES’ POWERS, NATIONAL INTERESTS* 249, 249 (Richard A. Epstein & Michael S. Greve eds., 2007).

² Michael S. Greve, *Federalism, yes. Activism, No.* *FEDERALIST OUTLOOK* (The AEI Federalism Project, Washington, D.C.), July 2001, at 1, 3, *available at* <http://federalismproject.org/depository/FederalistOutlook7.pdf> (emphasis added).

³ 29 U.S.C. §§1001-1461 (2000).

⁴ *Difelice v. Aetna US Healthcare*, 346 F.3d 442, 553 (3d Cir. 2004).

⁵ CONGRESSIONAL BUDGET OFFICE, *FACT SHEET FOR CBO’S MARCH 2008 BASELINE: MEDICAID* (2008) (hereinafter CBO Baseline).

⁶ See U.S. CENSUS BUREAU, *INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2007* 19 (2008).

⁷ See CBO Baseline, *supra* note 5.

of health care for more than 30 million children in families below the poverty line—over 50% of poor children and 25% of all children.⁸ It is likewise the only guarantor for more than five million older Americans, and around ten million Americans with disabilities.⁹ Medicaid covers all or part of the cost of approximately 58% of all nursing home residents, accounts for 49% of all funds spent on nursing homes,¹⁰ and Medicaid regulations are the principal legal guarantees of minimum safety and quality of care standards for nursing homes nationwide. Without question, Medicaid deserves to be called “the workhorse of the U.S. health care system.”¹¹

A. THE COURTS FORTIFY THE MEDICAID ENTITLEMENT

This outcome was neither inevitable, nor widely foreseen when Congress passed the Medicaid Act more than four decades ago. As Sara Rosenbaum has observed, Medicaid was enacted as a “legislative afterthought” to Medicare.¹² Certainly, large political forces and pervasive public needs get most of the credit for evolving Medicaid from its unheralded start into the behemoth that it is today. But a significant, and little appreciated, player was the federal judiciary—as well as the advocacy community that originated goals and executed strategies for court enforcement. First, in the years immediately following the creation of Medicaid, and other historic programs under the Social Security Act, the Supreme Court and the lower federal courts (in tandem with guidance from the executive branch) gave definition to Medicaid’s broadly-worded mandates. These include:

- *Services for all eligible recipients.* Courts made clear that where the federal law provides for eligibility for certain groups (called “categorically needy”), states may not add additional limits on eligibility.¹³
- *Minimum services.* Courts construed broadly the categories of services that states must provide.¹⁴
- *Preventive screening for children.* Courts held that states have a special duty under Medicaid’s provision for Early and Periodic Screening, Diagnosis and Treatment (EPSDT). Rather than waiting for individuals to request these preventive services, states were required to aggressively promote them.¹⁵
- *Prompt provision of care.* Courts gave substance to the requirement that eligibility determinations be made and services provided with “reasonable promptness.”¹⁶

⁸ U.S. CENSUS BUREAU, *supra* note 6, at 66; CBO Baseline, *supra* note 5.

⁹ CBO Baseline, *supra* note 5.

¹⁰ GEORGETOWN UNIV. LONG-TERM CARE FIN. PROJECT, FACT SHEET: NATIONAL SPENDING FOR LONG-TERM CARE (2007), available at <http://ltc.georgetown.edu/pdfs/natspendfeb07.pdf>.

¹¹ Alan Weil, *There’s Something About Medicaid*, 22 HEALTH AFF. 13 (2003).

¹² Sara Rosenbaum, *Health Policy Report: Medicaid*, 347 N. ENGL. J. MED. 635 (2002).

¹³ See, e.g., *Hayes v. Stanton*, 512 F.2d 133 (7th Cir. 1975) (invalidating application of “spend down” requirement to categorically needy); *Fabula v. Buck*, 598 F.2d 869 (4th Cir. 1979) (states may not impose resource restrictions on medically needy recipients that are not applied to recipients’ eligibility by virtue of receiving Supplemental Security Income).

¹⁴ See, e.g., *White v. Beal*, 555 F.2d 1146 (3d Cir. 1977) (required optical services include eyeglasses for impairment of vision not caused by pathology); *Phila. Welfare Rights Org. v. Shapp*, 602 F.2d 1114 (3d Cir. 1979) (required dental services include orthodontic care).

¹⁵ See, e.g., *Stanton v. Bond*, 504 F.2d 1246 (7th Cir. 1974), *appeal after remand*, 655 F.2d 766 (7th Cir. 1981) (ordering state to aggressively pursue and track EPSDT rather than wait for individuals to request services).

¹⁶ See, e.g., *Smith v. Miller*, 665 F.2d 172 (7th Cir. 1981) (affirming order enforcing time limits for eligibility determinations by ordering all applications not resolved within limits automatically approved).

- *Availability of services.* Courts scrutinized Medicaid reimbursement rates to ensure that Medicaid recipients have the same access to care as the general population.¹⁷

Second, in a series of decisions the Supreme Court made these requirements enforceable by individuals against the states.¹⁸ The Court explicitly rebuffed the notion that review by federal regulators was the only recourse when a state ignored these requirements, refusing to “assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program.”¹⁹

Thus, in the early days of Medicaid, by broadly interpreting and ensuring the private enforceability of key substantive provisions, federal courts ensured that states could not belittle their commitments to health care access when accepting federal funds.

B. THE DRIVE TO CUT BACK (OR CUT OFF) COURT ACCESS FOR MEDICAID BENEFICIARIES

Unlike Medicare, Medicaid is administered by state agencies. While there is much to be said for this “cooperative federalism” approach, fluctuating political winds and state budgets make judicial enforcement of federal norms essential for ensuring that state governments are accountable for their administration of Medicaid. Since 1980, when the Court first held, in *Maine v. Thiboutot*, that 42 U.S.C. §1983 authorizes suits to redress state violations of federal statutory as well as constitutional provisions, this Reconstruction-era statute has been the primary mechanism for private enforcement of Medicaid requirements.²⁰

But since the *Thiboutot* decision, judicial hostility has ever more tightly closed courthouse doors to individuals seeking to enforce Medicaid and other federal requirements against the states. Progressively stricter limitations on enforcement of federal mandates have been purportedly based on solicitude for state prerogatives and an asserted need to preserve the “constitutional balance” between the States and the Federal Government.²¹ At the extreme, Justices Scalia and Thomas would bar Medicaid beneficiaries from court under all circumstances. They have developed a theory that Spending Clause-based statutes, like Medicaid, are less deserving of judicial deference than other law. In the Scalia-Thomas construct, such laws merely authorize “contracts” between the federal and grantee state governments, the terms of

¹⁷ See, e.g., *Ill. Hosp. Ass’n v. Ill. Dep’t of Pub. Aid.*, 576 F.Supp. 360 (N.D. Ill. 1983) (enjoining rate cuts that threatened to lead to severe cutbacks in hospital staff and services); *DeGregorio v. O’Bannon*, 500 F.Supp. 541 (E.D. Pa. 1980) (rejecting cross motions for summary judgment in suit alleging insufficient payments had led to shortage of nursing home beds); *Pharmacists Soc. of Milwaukee City v. Dep’t of Health & Soc. Servs.*, 79 F.R.D. 405 (E.D. Wis. 1975) (rejecting summary judgment for defendants in suit alleging insufficient payments led participating pharmacists to drop out).

¹⁸ See *King v. Smith*, 392 U.S. 309 (1968); *Rosado v. Wyman*, 397 U.S. 397 (1970); *Townsend v. Swank*, 404 U.S. 282 (1971); *Hagans v. Levine*, 415 U.S. 528 (1974); see also TIMOTHY S. JOST, *DISSENTMENT? THE THREATS FACING OUR PUBLIC HEALTH-CARE PROGRAMS AND A RIGHTS-BASED RESPONSE* 91-93 (2003) (summarizing cases).

¹⁹ *Rosado v. Wyman*, 397 U.S. 397, 420 (1970).

²⁰ 448 U.S. 1 (1980). Section 1983 authorizes suits against persons who, “under color of” state law, deprive any person of “rights, privileges, or immunities secured by the Constitution or laws [of the United States]”.

²¹ *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (holding Congress failed to clearly indicate intention to subject states to suit under Rehabilitation Act); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28 (1981). See also Note, *Clear Statement Rules, Federalism, and Congressional Regulation of States*, 107 HARV. L. REV. 1959, 1967-74 (1994) (tracing development of “clear statement” rules to limit suits against states).

which cannot be enforced in court by intended beneficiaries (whom they label mere “third-party” beneficiaries) without unambiguously specific direction in the statutory text—regardless of what ordinary canons of construction would treat as Congress’ actual “intent.”²²

Fortunately, the Scalia-Thomas theory has not been embraced by a majority of the Court.²³ However, erratically but persistently, Court majorities have moved in the direction of limiting enforcement of federal law—and particularly statutory conditions on federal funding for the states—piling up new obstacles to plaintiffs seeking to enforce statutory rights via Section 1983.²⁴ The most recent attempt, in the 2002 case *Gonzaga University v. Doe*, a 5-4 majority led by then-Chief Justice William Rehnquist embraced a subtler way to restrict enforcement of safety-net programs. Seizing on briefs by the Bush Administration and future Chief Justice John Roberts (as counsel for the appellant), Rehnquist held that in order to be enforceable through § 1983, a statute must “unambiguously” employ what the Court called “rights-creating language.”²⁵

While not explicitly overruling *Thiboutot*, *Gonzaga* has effectively rendered large portions of Medicaid and other safety net programs unenforceable. As the *New York Times* put it succinctly in 2005, “court decisions [following *Gonzaga*] are raising questions about what it means to have health insurance, if the terms of such coverage cannot be enforced.”²⁶ Conservative lower court judges have seized upon Rehnquist’s “rights-creating” language to continually raise barriers to court access under §1983.²⁷ Moreover, in a possible harbinger of further erosion to come, Justice Alito, in a 5-4 Supreme Court opinion in 2005, ominously went out of his way to announce a new, similarly anti-Congressional interpretive rule: “In a Spending Clause case,” he wrote, in a dictum unnecessary to the case before the Court, “*the key is not what a majority of the Members of both Houses intend* but what the States are clearly told [in the statutory text] regarding the conditions that go along with the acceptance of those funds.”²⁸ Justice Alito’s gratuitous assertion, if it metastasizes, could entrench a

²² *Blessing v. Freestone*, 520 U.S. 329, 349–50 (1997) (Scalia, J., concurring); *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 674–75 (2003) (Scalia, J., concurring); *Id.* at 675–83 (Thomas, J., concurring).

²³ See Rochelle Bobroff, *Section 1983 and Preemption: Alternative Means of Court Access for Safety Net Statutes*, forthcoming, LOYOLA U. J. OF PUB. INT. L. (forthcoming 2009) (manuscript at 63-68, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1273664); Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 385-93 (2008).

²⁴ This history is recounted and analyzed by Bobroff, *supra* note 23, at 5-42.

²⁵ 536 U.S. 273, 283-84 (2002). The decision was 7-2 on the judgment, but 5-4 on the applicable standard: Justices Breyer and Souter agreed that the statute at issue, the *Family Education Rights and Privacy Act*, was not meant to be privately enforced, but relied on the Court’s previous, less draconian § 1983 decisions and rejected Rehnquist’s test.

²⁶ Robert Pear, *Rulings Trim Legal Leeway Given Medicaid Recipients*, N.Y. TIMES, Aug. 15, 2005, available at <http://www.nytimes.com/2005/08/15/politics/politicsspecial1/15medicaid.htm>.

²⁷ See, e.g., *Equal Access for El Paso, Inc. v. Hawkins*, 509 F.3d 697 (5th Cir. 2007) (holding unenforceable the requirement of provider payments sufficient to ensure Medicaid patients equal access to quality services); *Sanchez v. Johnson*, 416 F.3d 1051, 1059-62 (9th Cir. 2005) (holding unenforceable Medicaid guarantees of quality care and adequate access to services).

²⁸ *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 304 (2006) (emphasis added). The case concerned remedies available under the Individuals with Disabilities in Education Act (IDEA). Notably, Justice Ginsburg concurred in the Court’s judgment, but wrote separately to criticize Justice Alito’s approach.

non-constitutional rationale for express judicial disregard for Congressional intent in interpreting landmark safety net statutes like Medicaid.²⁹

C. DISSING CONGRESS

The Court's iteration of new and ever more obscure and onerous criteria has not only blocked the vindication of individuals' rights to treatment, but sandbagged Congress. A *Harvard Law Review* note observed some years ago that these rules function "not as 'tie-breakers' that might be justified on various institutional grounds," but as "initial presumptions that erect potential barriers to the straightforward effectuation of legislative intent."³⁰ Moreover, these decisions have repeatedly and retroactively changed and tightened the applicable restrictions. Justice Stevens protested this "moving the goal posts" pattern in his dissent from a 1999 decision on state sovereign immunity:

It is quite unfair for the Court to strike down Congress' Act based on a . . . requirement this Court had not yet articulated. The legislative history . . . makes it abundantly clear that congress was attempting to hurdle the then-most-recent barrier this Court had erected in [a prior case involving a similar law].³¹

Professor William Eskridge has written that the conservatives' manipulation of so-called clear statement rules and kindred techniques for "promoting federalism and other structural values . . . amount to a 'backdoor' version of the constitutional activism that most Justices on the current Court have publicly denounced."³² Professor Sam Bagenstos shrewdly observes that this "super-strong clear statement" strategy not only "allows the Court to avoid the suggestion that it is second-guessing" Congress, but has the effect of undermining "spending clause statutes liberals care about," while avoiding "collateral damage to programs supported by conservatives."³³ Their efforts are close to yielding a result Congressional conservatives have tried and failed to achieve. As a leading health law expert has observed, "The idea of Medicaid as an enforceable entitlement is hanging by a thread."³⁴

III. THE SUPREME COURT UNDERMINES FEDERAL GUARANTEES OF HEALTH COVERAGE FOR WORKERS AND FAMILIES

In addition to undercutting the nation's principal low-income health insurance program, the Court has also eroded the principal guarantor of health coverage for the

²⁹ Professor Bagenstos forecasts that Justice Alito's gratuitous shot in *Arlington Central School District* will prove the likely "paradigm" of the Roberts Court's strategic design for curbing progressive spending clause-based programs like Medicaid. Bagenstos, *supra* note 23, at 350.

³⁰ Note, *Clear Statement Rules, Federalism, and Congressional Regulation of States*, 107 HARV. L. REV. 1959, 1959 (1994).

³¹ *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 654 (1999) (Stevens, J., dissenting).

³² William N. Eskridge, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 598 (1992).

³³ Bagenstos, *supra* note 23, at 394, 408-09.

³⁴ Sara Rosenbaum, Dean of George Washington University's School of Public Health, quoted in Robert Pear, *Legal Rulings Trim Leeway Given Medicaid Recipients*, N.Y. TIMES, August 15, 2005. *But see* Bobroff, *supra* note 23, at 55-63 (describing alternative strategy, so far successful, of enforcing some Medicaid provisions through federal preemption claims).

middle class, the 1974 Employee Retirement Income Security Act, otherwise known as ERISA. ERISA governs the employer-sponsored plans on which the vast majority of Americans depend for retirement and health security. As Professor Timothy Jost has explained,³⁵ the legal framework governing such plans is critical for ensuring that 134 million³⁶ Americans are legally entitled to adequate and affordable health care. The courts’—in particular, the Supreme Court’s—application of ERISA has frustrated Congress’s goal of ensuring that employer-sponsored health care is an entitlement that individuals can count on.

A. THE COURT GUTS ERISA REMEDIES

With Medicaid, as we have seen, at least at the outset, the courts stepped up to fill in empty statutory spaces with generous interpretations that established a robust health care entitlement program in line with the intent of the Congresses that enacted, modified, and expanded its provisions. Not so with ERISA. ERISA was enacted after more than a decade of Congressional investigations, most notably by Arkansas Senator John McClellan and his Chief Counsel, Robert F. Kennedy, into widespread abuses of employee benefit plans by company and union administrators. ERISA mandated that, henceforth, plan administrators would be legal “fiduciaries,” required as a matter of federal statutory law to act “solely in the interest of the participants and beneficiaries for the exclusive purpose of providing benefits” to them, and to do so with “care, skill, prudence, and diligence.” But over thirty years, principally in two decisions by Justice Antonin Scalia, the Supreme Court has turned these admirable and common-sense goals upside-down.³⁷ Justice Scalia’s handiwork on behalf of the Court has been repeatedly and widely condemned by what Justices Ginsburg and Breyer recently labeled “the rising judicial chorus urging that Congress and [this] Court revisit what is an unjust and increasingly tangled ERISA regime.”³⁸ The late Justice Byron White called Justice Scalia’s approach an “anomaly” for “construing ERISA in a way that would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted.”³⁹

The Court arrived at this perverse result via a remarkable flight of interpretive fancy. Unlike Medicaid, ERISA expressly authorizes beneficiaries of employer-sponsored health and retirement plans to sue in federal court to redress violations of its substantive provisions. The Court, however, truncated this statutory authority to exclude meaningful monetary compensation for loss in virtually all circumstances. Writing for the Court, Justice Scalia contended that ERISA’s remedial provisions, though enacted in 1974, specified only types of relief “typically available in equity” decades before, when there were separate courts of law and equity. To this dubious premise he boot-strapped the conclusion, repudiated by meticulously documented scholarship, that such remedies would have included only non-monetary redress, such as injunctions.⁴⁰ Justice Scalia admitted that his construction of the statute was

³⁵ JOST, *supra* note 18, at 96-98.

³⁶ DEP’T OF LABOR, EMPLOYEE BENEFITS SEC. ADMIN., FACT SHEET: WORKERS’ RIGHT TO HEALTH PLAN INFORMATION, <http://www.dol.gov/ebsa/newsroom/fserisa.html> (last visited Jan. 16, 2009).

³⁷ John H. Langbein, *What ERISA means by “Equitable”: The Supreme Court’s Trail of Errors in Russell, Mertens, and Great-West*, 103 COLUM. L. REV. 1317, 1318 (2003).

³⁸ *Aetna Health Inc. v. Davila*, 542 U.S. 200, 223 (2004) (citing *Difelice*, 346 F.3d 442, and other judicial and academic authorities).

³⁹ *Mertens v. Hewitt Associates*, 508 U.S. 248, 263 (1993) (White, J., dissenting).

⁴⁰ *Mertens*, 508 U.S. at 255-60; *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212-19 (2002). Scalia’s reasoning is dissected by Professor Langbein, *supra* note 37, at 1348-65.

“unlikely,” given that its authors had no personal experience with the old-style divided bench, and, especially in light of their core purpose, to strengthen beneficiaries’ access to health and retirement plan benefits. But he dismissed such “vague notions of a statute’s ‘basic purpose,’”⁴¹ insisting that his tortured interpretation was the only appropriate way to read the relevant text.⁴²

B. ERISA PREEMPTION CUTS OFF ALL RELIEF

However misguided, the Court’s erosion of ERISA remedies would not be totally fatal to the claims of beneficiaries harmed by bad-faith denial of treatment, as long as pre-existing common law remedies remained available in state courts. Yet in a series of decisions over two decades, the Court has held that ERISA preempts substantially all claims under state law by employees or their family members seeking redress for a health plan’s wrongful denial of treatment. Thus, the millions of workers and their family members covered by federally-subsidized, employer-sponsored health care plans are left without the guarantee of the “make whole” remedy they previously enjoyed under state law, and without any federal substitute. In short, there is no way to ensure that they get the benefits to which they are in principle entitled, let alone to help them if the denial of benefits leads to financial or physical injury. Justice Ginsburg decried the “regulatory vacuum” resulting from the Court’s one-two punch of “an encompassing interpretation of ERISA’s preemptive force [and] a cramped construction of the ‘equitable relief’ allowable under [the federal statute].”

As Judge Becker cogently explained, the real-world impact of the Court’s *de facto* deregulation is devastating, if predictable. Employers and their health insurers are driven to incorporate systematic stonewalling of claims into their business model:

Any rational HMO will recognize that if it acts in good faith, it will pay for far more procedures than if it acts otherwise. . . . Not only is there an incentive for an HMO to deny any particular claim, but to the extent that this practice becomes widespread, it creates a ‘race to the bottom’ in which, all else being equal, the most profitable HMOs will be those that deny claims most frequently.⁴³

This perverse incentive structure is not merely theoretical. A dramatic example was provided by a scandal involving the Unum/Provident Corporation, which in 2002 was revealed to have engaged in a systematic practice of bad faith claim denial, resulting in millions in verdicts and fines from state insurance commissions and non-ERISA-covered lawsuits.⁴⁴ The litigation unearthed a 1995 internal memorandum which instructed claims processors to “get new and existing policies covered by ERISA,” which entails “enormous” advantages. It identified 12 contested non-ERISA cases in which the company had paid out \$7.6 million in claims; had the same matters been covered by ERISA, the memo stated, the total pay-out would have ranged from zero to no more than 10% of that sum. Simply put, the company would simply have not paid at least 90% of the claims at all.⁴⁵

⁴¹ *Mertens*, 508 U.S. at 261.

⁴² *Id.* at 258.

⁴³ *Difelice*, 346 F.3d at 459.

⁴⁴ See John H. Langbein, *Trust Law as Regulatory Law: The Unum/Provident Scandal and Judicial Review of Benefit Denials under ERISA*, 101 NW. U. L. REV. 1315 (2007).

⁴⁵ *Id.* at 1321 (quoting memo).

In sum, the Court has transmuted this landmark law, enacted after years of investigation and policy development by Congress, into a safe haven to which less-than-conscientious health insurers flock, precisely to avoid compensating the workers and families Congress intended to protect.

IV. CONCLUSION: PUT A STOP TO REPEALING FROM THE BENCH

For contemporary health (and other) reformers, the bottom-line lesson from the Supreme Court's mishandling of Medicaid and ERISA is clear enough. Unlike the architects of the post-1937 New Deal, President Kennedy's New Frontier, and President Johnson's Great Society, they face a judiciary that, as a practical matter, stands as a political adversary as well as a necessary governmental partner. Cadres of life-tenured judges, led by members of the Supreme Court, have demonstrated their readiness to exploit—indeed, invent—opportunities to weaken or neutralize laws inconsistent with their own deregulatory policy preferences. They have brushed aside principle and consistency—embracing “states rights” to curb disfavored federal laws like Medicaid, while pushing the envelope of “federal supremacy” when targeting state laws such as common-law protections for health insurance beneficiaries. The Obama Administration and the 111th Congress must factor this reality into their policy agendas.

First, the administration and Congress need to address and undo the damage hostile courts have done to existing reforms. In limiting Congressional authority and aggressively misconstruing major federal statutes, the Court has been picking a fight with Congress. For decades, Congress has for the most part turned the other cheek. But in the 109th and 110th Congresses, there were some promising stirrings. During the Roberts confirmation hearings, members of both political parties attacked the Court's federalism rulings as usurpations of Congressional authority—in particular Senators Specter, Leahy, and Schumer.⁴⁶ In the Spring of 2007, Congress reacted with commendable dispatch to introduce legislation to overturn the May 2007 *Ledbetter* decision, which weakened equal pay guarantees of the 1964 Civil Rights Act and ignored a 1991 amendment passed to reverse a similar decision by the Rehnquist Court.⁴⁷ Although the bill was blocked by a Senate filibuster in the 110th Congress, the enhanced Democratic majority in the 111th Congress is sending similar legislation to the White House for President Obama's signature simultaneous with the release of this issue paper. In addition to grasping what now appear to be low-hanging targets like *Ledbetter*, the new Congress should move decisively to overturn other decisions that have inappropriately blocked enforcement of important statutory safeguards like Medicaid and ERISA.

As important as it is to formally reverse incorrect judicial decisions, training an unwonted spotlight on the Court's dismantling of statutory “pocket-book” reforms also may have substantial impact on the Court itself. Continuing, broad-based criticism of the *Ledbetter* decision, by Congress, the press, and political candidates, may have influenced Justices Roberts and Alito during the 2007-2008 term to produce Supreme Court rulings in favor of employment discrimination plaintiffs that surprised all observers.⁴⁸ For example, during the summer of 2008, Judiciary Committee

⁴⁶ See Simon Lazarus, *Federalism R.I.P.: Did the Roberts hearings Junk the Rehnquist Court's Federalism Revolution?*, 56 DEPAUL L.REV. 1, 9-14, 28-29 (2006).

⁴⁷ *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2183 (2007).

⁴⁸ See Linda Greenhouse, *Justices Say Law Bars Retaliation Over Bias Claims*, N.Y. TIMES, May 28, 2008 (discussing *Gomez-Perez v. Potter*, 128 S.Ct. 1931 (2008), and *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951 (2008)).

Chair Patrick Leahy held three oversight hearings focusing on the Court's relentlessly pro-business rulings. Senator Leahy stated, "Congress has passed laws to protect Americans in these areas, but in many cases, the Supreme Court has ignored the intent of Congress in passing these measures, oftentimes turning these laws on their heads, and making them protections for big business rather than for ordinary citizens."

To ensure that the Supreme Court in the first third of the 21st century does not become a graveyard for statutory safeguards like these, Congress needs to build on these first steps, voice sustained criticism, and ultimately enact corrective legislation. If this new, progressive Congress shows that its leaders are actively opposed to the Court's decisions, the Court may be influenced to take a more cautious and respectful approach. To protect future reforms, Congressional staff must treat legislative drafting as an adversarial exercise akin to litigation or contractual work, minimizing ambiguities and closing loopholes, and not trusting the courts to implement laws in ways that make them work as intended—particularly with regard to individual remedies. If Congress intends courts to align interpretation of particular provisions with certain core purposes—such as promoting health coverage for vulnerable individuals and groups—that intent will need to be spelled out in the statutory text. If Congress wants to ensure that private or governmental entities are accountable in court for compliance with statutory requirements, that intent will likely be ignored by the sort of judges who denied relief to Lilly Ledbetter, unless it is prescribed in highly specific terms. Finally, Congressional drafters need to define, as best they can, whether and precisely to what extent they intend any new federal laws to be construed to preempt existing state statutes or common law safeguards.

The new administration needs likewise to take due account of potential judicial obstructionism. The Solicitor General can stress the courts' obligation to "respect Congress' policy choices,"⁴⁹ by jettisoning interpretive methodologies and doctrines that inappropriately truncate federal remedies and preempt state protections.⁵⁰ In addition, together with allies in the Senate, the White House can sensitize prospective judicial nominees to the priority the President attaches to robust application of statutory protections for Americans' basic needs.

Finally, as President, Barack Obama himself can do more than anyone to let the public in on the secret that federal judges, no less than elected politicians, make a big difference in how effectively government meets day-to-day needs of ordinary people. To make this point, he need not merely express preference for judges with "empathy" for vulnerable individuals, as he has on several well-publicized occasions. Standing alone, that prescription has invited charges from the Right that his nominees will be "activists" who put their own preferences above the law and "legislate from the bench." In fact, however, it is conservative judges who, as Senator Leahy stressed in his summer hearings, are bending and breaking laws enacted to protect people in need—in effect, repealing from the bench. By reframing the debate about the courts, and championing judges who will faithfully follow laws like Medicaid and ERISA, President Obama can ensure that Americans, whether covered by public or private plans, receive the benefits that Congress intended to guarantee.

⁴⁹ Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073, 1078 (2001).

⁵⁰ See Rochelle Bobroff & Harper Jean Tobin, *A Course Correction for the Solicitor General*, NAT'L L. J. (forthcoming 2009).

Coaching Diversity: The Rooney Rule, Its Application and Ideas for Expansion

Douglas C. Proxmire*

On January 22, 2007, the Pittsburgh Steelers held a press conference to announce the hiring of Mike Tomlin as their new head coach. At the age of 34, Tomlin became the second-youngest head coach in the National Football League (“NFL”) and the tenth African-American coach in NFL history. As a sign of the NFL’s progress in the hiring of minority candidates to NFL head coaching positions, Tomlin’s race proved to be far less of an issue than Tomlin being picked over two long-time Steelers assistant coaches, Ken Whisenhunt and Russ Grimm. Pittsburgh chose Tomlin over Grimm, Whisenhunt, and at least nine others, even though Tomlin was the youngest candidate and had no connection with the Steelers organization as a player or an assistant coach. Given that Tomlin had no head coaching experience, had spent only one season as a defense coordinator, and at 34 was younger than some of the players on the Steelers’ roster, Tomlin was considered the longshot among the dozen candidates vying for the head coaching spot of one of the NFL’s marquee franchises. Nonetheless, Tomlin “bowled over”¹ Pittsburgh team chairman Dan Rooney and team President Art Rooney after a round of interviews with the Steelers front office. Tomlin’s intelligence, presence and charisma convinced the Steelers front office that Mike Tomlin was the person best-suited to succeed Bill Cowher and Chuck Noll, two legendary Steelers head coaches who also were hired at similarly young ages.²

Mike Tomlin’s ability to rise up and distinguish himself during the Pittsburgh interview process highlighted the continuing value of the “Rooney Rule” for both NFL teams and for minority candidates. The Rooney Rule requires that an NFL team with a head-coaching vacancy must interview one or more minority candidates for the position; given the NFL’s woeful history of considering and hiring minority candidates to fill head-coaching slots until the implementation of the Rooney Rule, the question can be reasonably asked as to whether Pittsburgh would have even considered Mike Tomlin as a candidate for the Steeler head job without the Rooney Rule. On its face, the Rooney Rule might appear to be solely about racial diversity in leadership positions within the NFL, but in fact, a discussion of the Rooney Rule involves broader issues that affect not just the NFL, but also other segments of the sports world, as well as employers at large. The Rooney Rule casts a spotlight on several critical workplace diversity issues, including the importance of having managerial leadership reflect the diversity of a workforce, strategies for ensuring that the best people for the job are

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¹ Gerry Dulac, *Tomlin, 34, is NFL’s Rising Coaching Star*, PITTSBURGH POST-GAZETTE, Jan. 18, 2007, available at <http://www.post-gazette.com/pg/07018/754788-66.stm>.

² *Id.*

considered, and tools for combating unconscious bias in hiring and promotion decisions. The balance of this paper will examine the development of the NFL's Rooney Rule, its adoption and impact on the NFL, and the possibility for the use of a similar rule for other NFL positions and for other industries.

I. THE ADOPTION OF THE ROONEY RULE

In 1921, Frederick Douglass "Fritz" Pollard, an African-American, was named player and co-head coach of the Akron Pros of the American Professional Football Association ("APFA"), the precursor to the NFL. Incredibly, Pollard would prove to be an exception, as over the next 68 years, no APFA or NFL team hired another African-American as a head coach until the Oakland Raiders hired Art Shell in 1989. In the twelve year period between 1989 and 2001, NFL franchises hired only five African-American head coaches, including an interim head coach with a term of three games. At the conclusion of the 2001 season, African-Americans comprised approximately 67% of the NFL players, but only 6% (2 out of 32) of the league's head coaches.³

In light of the vast disparity between African-American player participation and coaching representation and the NFL's seventy-plus year track record of failing to interview and hire African-American coaches except in rare cases, outside forces applied increasing pressure on the NFL to take affirmative steps to ensure that qualified African-American coaching candidates would be given opportunities to be considered for NFL head-coaching positions.

Exerting one of the strongest influences on the NFL to change its hiring practices was the team of litigator Johnnie L. Cochran Jr., civil rights attorney Cyrus Mehri, and labor economist Dr. Janice Madden. The three joined forces in 2002 to produce a detailed report on the NFL's head-coaching hiring practices, entitled "Black Coaches in the National Football League: Superior Performance, Inferior Opportunities."

This report exhaustively analyzed the NFL's hiring and firing practices over the previous fifteen seasons prior to 2002, and the statistics were revealing and disappointing. Among the findings:

- Black coaches averaged 1.1 more wins per year than white coaches.⁴
- Black coaches led their teams to the playoffs more frequently than white coaches (67% of the time for black coaches versus 39% of the time for white coaches).⁵
- In the last season before being fired, black coaches won an average of 1.3 more games than white coaches in their last seasons.⁶
- In the first season after being hired, black coaches won an average of 2.7 more games than white coaches in their first seasons.⁷

³ RICHARD LAPCHICK WITH BOMA EKIYOR & HORACIO RUIZ, UNIV. OF CENT.FLA. DEVOS SPORT BUS. MGMT. PROGRAM, THE 2006 RACIAL AND GENDER REPORT CARD: NATIONAL FOOTBALL LEAGUE 17 (2007).

⁴ JOHNNIE L. COCHRAN, JR. & CYRUS MEHRI, BLACK COACHES IN THE NATIONAL FOOTBALL LEAGUE: SUPERIOR PERFORMANCE, INFERIOR OPPORTUNITIES, at ii (2002).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

The evidence led to an obvious, but disconcerting, conclusion: despite an overall better record than their white counterparts, black coaches had a difficult time getting hired, and once hired, black head coaches were fired before their white counterparts.

After the publication of the Cochran/Mehri/Madden Report, Cochran, Mehri, NFL Hall of Famer Kellen Winslow and former NFL pro-bowler and NFL executive John Wooten decided to start contacting NFL teams to discuss minority hiring practices. They intended to find a way to break the glass ceiling holding back promising minority coaching candidates. Through meetings with NFL executives, the Cochran/Mehri/Winslow/Wooten group, which became known as the Fritz Pollard Alliance,⁸ raised awareness of the need to address and remedy the league's collective failure to consider and hire minority head coaching candidates.

On October 31, 2002, due to the rising concern about potentially discriminatory league-wide hiring practices, the NFL appointed a "Committee on Work Place Diversity" headed by Steeler President Dan Rooney to study the NFL's hiring practices, determine whether remedial action should be taken, and if necessary, recommend a plan for such action. On December 20, 2002, the Committee issued its recommendations, including that the NFL:⁹

- make a commitment to interview minority candidates for every head coaching job opening (unless the team had already made a prior commitment to hire a person from within its own staff);
- establish a coordinator/assistant head coach databank to assist NFL teams in the consideration of qualified coaching candidates; and
- allow early interview opportunities for assistant coaches of playoff teams.

The NFL owners held a series of conference calls to discuss the Committee's recommendations, and the owners "strongly agreed on the principle that any club seeking to hire a head coach will interview one or more minority applicants for that position."¹⁰ By the owners' adoption of the Committee's recommendations, the "Rooney Rule"¹¹ (named after Dan Rooney, the chair of the Committee) became binding on all NFL teams, and any team found in violation of the Rooney Rule (*i.e.*, failing to interview a minority candidate before filling a head coach vacancy) would now be subject to penalties at the NFL Commissioner's discretion.

While the announcement of the NFL's adoption of the Rooney Rule demonstrated the league's acknowledgement that the under-representation of African-Americans among NFL head coaches was a problem, concerns remained about the implementation and enforcement of this new rule. The Fritz Pollard Alliance suggested that the NFL incentivize the Rooney Rule by providing an additional draft pick to teams that hire a minority candidate, while also taking away draft picks from teams that fail to interview a minority candidate for an open head coaching position. Until the League actually enforced the Rooney Rule by punishing a team that failed to comply, considerable doubt remained as to whether the Rooney Rule would have any actual impact.

⁸ In 2003, this group officially took the name the "Fritz Pollard Alliance" in honor of the first African-American NFL coach.

⁹ Press Release, National Football League, NFL Clubs to Promote Diversity Program (Dec. 20, 2002), available at www.nfl.com/news/story/6046016.

¹⁰ *Id.*

¹¹ Interestingly, it does not appear that the NFL ever formally adopted the Rooney Rule in its by-laws, and there is no memorialized Rooney Rule text other than the NFL's December 20, 2002 press release.

II. THE IMPLEMENTATION AND ENFORCEMENT OF THE ROONEY RULE AND ITS IMPACT ON THE NFL

After the adoption of the Rooney Rule in December 2002, the number of African-American head coaches increased from two in 2002 to an all-time high of seven in 2006, but the numbers have leveled off since 2006. Midway through the 2008 season, there were seven African-American head coaches, including interim head coach Mike Singletary of the San Francisco 49ers. Most significantly, the additional coaching opportunities created over the last five years have led to on-the-field success for the teams headed by these coaches. In 2005, teams coached by African-Americans won three division titles (Lovie Smith—Chicago Bears, Tony Dungy—Indianapolis Colts and Marvin Lewis—Cincinnati Bengals). The next year, in Super Bowl XLI, both conference winners were headed by African-American coaches—Dungy and Smith. While Dungy was already a head coach at the time the Rooney Rule was implemented in 2002, Smith acknowledged that he likely would not have been considered for a head coaching job without the Rooney Rule.¹²

While the success of Dungy and Smith may now contribute to NFL teams' willingness to comply with the Rooney Rule when considering candidates to fill coaching vacancies, early on, NFL teams got the message that they needed to incorporate the Rooney Rule's guidelines into their hiring practices or sanctions would be levied. Cochran and Mehri's report had proposed awarding draft picks as an incentive for teams to hire minority candidates (as part of what they called a "Fair Competition Resolution").¹³ Instead, the NFL established a different precedent of punishment for teams failing to comply with the Rooney Rule.

In 2003, soon after the Rooney Rule was adopted, the Detroit Lions were looking for a head coach, and the team president, Matt Millen, made it clear to the candidates that the Lions expected to hire Steve Mariucci as the Lions' next coach. At the time, Mariucci was considered a desirable candidate as he had coached the San Francisco 49ers to the playoffs four times in the previous six years. In addition to his record of taking the 49ers to the playoffs, he was a Michigan native, and thus, a natural fit for the Lions.

Perhaps because the Lions' intention to hire Mariucci was made known by Millen, five minority coaching candidates understandably turned down Millen's request for an interview with the Lions. Concerned that time was slipping away and that Mariucci might become the target of another NFL franchise if the Lions did not act quickly, the team ceased its efforts to interview anyone else for the job and hired Mariucci in 2003 without interviewing any minority candidates.

The NFL responded strongly to the circumstances surrounding the Mariucci hire. Determining that the Lions had failed "to take sufficient steps to satisfy its commitment to the Rooney Rule," NFL Commissioner Paul Tagliabue publicly reprimanded the Lions and fined the team \$200,000 for conduct detrimental to the league. Tagliabue sent an unmistakable message by declaring that the next violator will face a \$500,000 fine.¹⁴ Since the NFL never formally identified the range of potential sanctions when/if a team violates the Rooney Rule, it is not clear whether the Commissioner can or

¹² Brian W. Collins, *Tackling Unconscious Bias in Hiring Practices: The Plight of the Rooney Rule*, 82 N.Y.U. L. REV. 870, 908 n.219 (2007).

¹³ COCHRAN & MEHRI, *supra* note 4, at iii-iv.

¹⁴ *Lions' Millen fined \$200K for not interviewing minority candidates*, SPORTSLINE.COM, JULY 25, 2003, <http://cbs.sportline.com/nfl/story/6498949>.

would levy non-monetary sanctions (e.g., the loss of draft picks) in addition to monetary sanctions for further Rooney Rule violations.

Other than the 2003 fine and reprimand levied on the Detroit Lions, no other NFL team has been found in violation of the Rooney Rule when hiring a head coach.¹⁵ By the Commissioner's determination, all other teams looking for a head coach since 2003 have taken sufficient steps to be in compliance. Nevertheless, heading into the 2008 season, only six of thirty-two (19%) NFL teams were coached by minorities. In addition, before the 2007 season, none of the four head coaching vacancies were filled by minority candidates even though none of the four new hires had head coaching experience. Similarly, before the 2008 season, none of the four head coaching vacancies were filled by minority candidates, and again, none of the new hires had head coaching experience.¹⁶

While the hiring results from the Rooney Rule are mixed (i.e., the number of minority NFL head coaching hires has increased, but a wide disparity remains between the percentage of African-American players and the percentage of African-American head coaches), the rule appears to have helped reduce the "unconscious bias" ¹⁷ that remains pervasive in the NFL. In 1992, NFL Hall of Fame Coach Bill Walsh described unconscious bias in the following way: "the hiring of coaches is ... a very fraternal thing. You end up calling friends, and the typical coach has not been exposed to many black coaches."¹⁸

More work remains to be done to remedy this unconscious bias. While the number of African-American assistant coaches has increased since 1992, a disparity still exists between the percentage of African-American players and the percentage of African-American assistant coaches.¹⁹ Additionally, the NFL has no African-American majority team owners, no African-American CEOs or team presidents, and only four of the thirty-two NFL teams have African-American general managers or player personnel directors.²⁰ As a result of the lack of African-American owners and high-ranking front office personnel, evidence remains that this unconscious bias still exists in the NFL, making it difficult for African-American coaching candidates to receive the same opportunities as white coaching candidates.²¹

¹⁵ In October 2008, the NFL did reject the draft contract between interim head coach Jim Haslett and the St. Louis Rams that would have ensured the Rams head-coaching job for Haslett if he reached a certain win threshold over the remainder of the 2009 season. In rejecting the contract, the NFL explained that the Rooney Rule required that the Rams interview a minority head coaching candidate when a head coaching vacancy exists, and the league ruled that the proposed Haslett contract violated that requirement. *NFL Rejects Haslett's Win-Based Contract With Rams*, SPORTINGNEWS.COM, OCT. 25, 2008, <http://www.sportingnews.com/yourturn/viewtopic.php?t=478303>.

¹⁶ The San Francisco 49ers did hire African-American Mike Singletary as interim head coach midway through the 2008 season. This hire raised the number of NFL black head coaches to seven (21.8% of NFL teams).

¹⁷ Claire Smith, *BASEBALL: EQUALITY'S HURDLES - A Special Report; Too Few Changes Since Campanis*, N. Y. TIMES, Aug. 16, 1992.

¹⁸ *Id.*

¹⁹ As of the end of the 2006 season, 35% of the NFL assistant coaches were black, 62% were white, 2% were Latino and 1% Asian. When the Rooney Rule was adopted prior to the 2003 season, 30% of the NFL assistant coaches were black. LAPCHICK WITH EKIYOR & RUIZ, *supra* note 3, at 18.

²⁰ *Id.* at 16, 19, 20.

²¹ It is this "unconscious bias" that the Rooney Rule seeks to address by compelling NFL teams to at least interview one minority candidate before hiring an NFL coach.

While the Rooney Rule has made only slow progress to counteract this unconscious bias, the Rule has at least caused each NFL team looking to fill a head coaching position to make extensive contact with a minority candidate who may impress the decision-makers and receive the job or alternately be considered for future coaching opportunities as a result of the interview. In order to prevent sham interviews, or at least to change the perception that interviews of minority candidates are merely a *pro forma* exercise before making the hiring decision, the NFL has an interview policy, which, among other things, prohibits telephone interviews and requires that the majority owner meet with the head coaching candidate for the contact to constitute an interview.

Additionally, it appears that the Rooney Rule has led to some progress for other NFL minority hiring practices. In the five years since the Rooney Rule has been implemented, the number of minority hires in NFL head coaching, assistant coaching and front offices has increased.²² In the University of Central Florida DeVos Sport Business Management Program's most recent Racial and Gender Report Card, which assessed the minority hiring practices at all front office and coaching levels among league teams, the NFL "raised its grade for race to a solid B+ approaching an A- with a score of 88.5 out of 100."²³ While it is impossible to quantify the precise impact of the Rooney Rule on the NFL's hiring practices, it is reasonable to conclude that the Rooney Rule has played a material role in the gains realized by minority coaching and front office candidates over the past six years.

III. EXPANDING THE ROONEY RULE'S APPLICATION

Currently, the Rooney Rule remains unique to the NFL, and more specifically, it applies only to NFL teams looking to hire head coaches. The limited scope of the Rooney Rule does not cover the hiring of front-office personnel or other coaching staff positions, such as coordinators. While there has been talk about expanding the Rooney Rule to cover additional vacancies, the NFL has yet to take that step.²⁴ However, the NFL has indicated that it is exploring the possibility of expanding the Rooney Rule to require that a minority candidate be interviewed when the NFL teams look to fill "top front office vacancies."²⁵ Only time will tell whether the NFL is willing to expand the Rooney Rule and enforce it to cover NFL front office job vacancies.

NCAA Division 1 college football would appear to be the next logical arena for adoption of the Rooney Rule, as some measure is desperately needed to address the woeful disparity between minority head coaches and minority Division 1A²⁶ football players. Even though more than half of Division 1A college football players are

²² LAPCHICK WITH EKIYOR & RUIZ, *supra* note 3, at 17, 18, 20, 22.

²³ *Id.* at 1.

²⁴ Marke Maske, *Expansion of the Rooney Rule Meets Resistance*, WASH. POST, Apr. 13, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/blog/2006/04/13/BL2006041300782.html>.

²⁵ Gary Mihoces, *NFL Minority Hiring*, USA TODAY, FEB. 3, 2007. When asked about expanding the Rooney Rule to include front office positions, NFL Commissioner Roger Goodell responded, "It's a good question. We've thought about it a lot." However, he did not commit the league to expanding it. "The great news about the Rooney Rule, I hope some day it's not going to be necessary," he said. "And I feel the same way about the front office. Clubs are doing it voluntarily because they believe it's paying dividends for them, and they're benefiting, and, most importantly, it's the right thing to do."

²⁶ Division 1A Football is also known as the NCAA Division 1 "Football Bowl Subdivision" and constitutes those schools that compete for the BCS Championship each year, which includes those schools in the Atlantic Coast, Big East, Big Ten, Big Twelve, Pac-10 and Southeastern conferences, among others.

African-American, only six of the 119 NCAA Division 1A head coaches are African-American (about 5%).²⁷ That number may further dip as two of the six African-American coaches (Ron Prince at Kansas State and Ty Willingham at University of Washington) plan to step down after the 2008 season.²⁸ If the number of African-American Division 1A coaches remains at four after the 2008 season, the number of African-American coaches in Division 1 football will drop to its lowest level in fifteen years.²⁹ Despite the ongoing under-representation of men of color in the NCAA coaching ranks, the NCAA has resisted calls to implement the Rooney Rule for college football.³⁰

While the NCAA has resisted taking the formal step of implementing the Rooney Rule, the NCAA Division 1 Athletic Director's Association has made a commitment to interview at least one minority candidate when an NCAA Division 1 football head coaching position opens.³¹ While this commitment will not include the threat of sanctions like the NFL's Rooney Rule, the promise to interview at least one minority candidate constitutes an acknowledgement that a problem exists, and it is receiving some attention.³²

Dutch Baughman, Executive Director of the Athletic Directors' Association, said that committing, without penalty, to interview at least one minority candidate when a major college head coaching position is open is "the best we can do," while respecting "the fact that there's institutional prerogative" on all hiring decisions. The 2009 off-season will be the first time that this commitment from the NCAA Athletic Directors Association will be in effect. Evaluating whether this nonbinding commitment to interview is effective enough to remedy the considerable underrepresentation of minority head coaches in major college football will need to take place over time.

Similar to college football, Major League Baseball ("MLB") and the National Basketball Association ("NBA") have no formal policies akin to the Rooney Rule. While not as vast a difference as noted in the NFL, MLB and the NBA also suffer from a disparity between the percentage of minority players and the percentage of minority coaches and front office personnel. A summary of the percentage of minorities in key roles for MLB, the NBA and the NFL is set forth below:

²⁷ RICHARD LAPCHICK WITH JENNY BRENDAN, UNIV. OF CENT.FLA. DeVOS SPORT BUS. MGMT. PROGRAM, THE 2006-2007 RACIAL AND GENDER REPORT CARD: COLLEGE SPORTS 12 (2008).

²⁸ Mark Wagrin, *Study: Black Coach Numbers Lowest in 15 Years*, USA TODAY, NOV. 6, 2008.

²⁹ *Id.*

³⁰ *The Lack of Diversity in Leadership Positions in NCAA Collegiate Sports: Hearing Before the Subcomm. on Commerce, Trade and Consumer Prot. of the H. Comm. On Energy and Commerce*, 107th Cong. (2007) (Statement of Myles Brand, NCAA President), available at http://energycommerce.house.gov/cmte_mtgs/110-ctcp_hrg.022807.Brand-testimony.pdf.

³¹ Steve Wieberg, *Minority-hiring Policy Stiffens for Major Football Programs*, USA TODAY, JAN. 16, 2008.

³² *Id.*

PERCENTAGE OF MINORITIES IN KEY ROLES:

	Major League Baseball	National Basketball Association	National Football League
Players	40.1%	80%	69%
Managers/Head Coaches	27%	40%	19%
Coaches/Assistant Coaches	31%	42%	38%
CEOs	0%	23%	0%
General Managers	6%	23%	13%
Vice Presidents	10%	15%	8%

As set forth above, even with the benefit of the Rooney Rule, the current group of NFL coaches and executives does not come close to reflecting the racial backgrounds of the players working under them, and the NFL's percentage of minorities in coaching or front office positions as compared to the percentage playing the sport still lags behind the other major sports leagues in the United States. As a result, MLB and the NBA do not appear to receive the same public pressure and attention as the NFL or even major college football to institute formal procedures with the intent of increasing minority coaching hires.

IV. CONCLUSION

As the center of the American sporting universe, the NFL is in a unique position to take steps to further reduce the disparity between the percentage of minority athletes that play in the NFL and the percentage that hold coaching and front office jobs. Those steps could include expanding the Rooney Rule to cover offensive/defensive coordinator and key front office positions. Also, the NFL Commissioner could levy non-monetary penalties (*e.g.*, the loss of draft picks) upon teams that fail to honor the Rooney Rule. A version of the Rooney Rule is now being informally implemented, admittedly without the teeth of a penalty, by the Athletic Directors representing universities playing major college football.

In addition to expanding the scope of the Rooney Rule in the NFL, due to the high profile that the NFL holds and due to the fact that NFL owners also head many of the largest corporations in the United States, the application and expansion of the Rooney Rule has the opportunity to influence societal practice. The continued use of the Rooney Rule to promote advancement of minorities to the highest positions in the NFL could help convince other industries of the benefit of implementing a similar rule in non-sports related businesses.

While the implementation of such a rule outside of the NFL would likely have to be voluntary in most instances, as there is no "commissioner" to enforce such a rule on Fortune 500 companies, individual businesses could vow to implement a requirement that at least one minority candidate must be considered and interviewed when executive positions in their organization become open. As established through the implementation of the Rooney Rule in the NFL, the fundamental benefit of the rule is self-serving: by forcing businesses to consider and evaluate the best candidates who otherwise might be overlooked for advancement, the rule combats unconscious bias and increases the chances of selecting the best person for the job. Just as Mike Tomlin "bowed over" Dan Rooney during his round of interviews with the Pittsburgh Steelers, providing a similar opportunity to at least one minority candidate when other businesses consider and recruit executives could prove to be a valuable tool to improve and diversify other businesses and industries.

The ID Divide: Addressing the Challenges of Identification and Authentication in American Society^{*}

Peter P. Swire and Cassandra Q. Butts^{**}

I. INTRODUCTION AND SUMMARY

How individuals identify themselves in our country grows more complex by the year. In this year's Indiana presidential primary, 12 nuns were turned away from voting booths because they lacked state identification (none of them drives), a stark reminder that the recent Supreme Court ruling that upheld Indiana's voter ID law poses lasting consequences to our democracy. And two years ago the personal identification data of 26.5 million veterans were lost from a government laptop, one in a series of data breaches that threaten the integrity of everyone's identification.

Those 12 nuns are among 20 million other voting age citizens without driver's licenses, and they join those 26.5 million veterans and many millions of other Americans who suddenly find themselves on the wrong side of what we call the ID Divide—Americans who lack official identification, suffer from identity theft, are improperly placed on watch lists, or otherwise face burdens when asked for identification. The problems of these uncredentialed people are largely invisible to credentialed Americans, many of whom have a wallet full of proofs of identity. Yet those on the wrong side of the ID Divide are finding themselves squeezed out of many parts of daily life, including finding a job, opening a bank account, flying on an airplane, and even exercising the right to vote.

For many reasons, the number of ID checks in American life has climbed sharply in recent years, especially in the wake of the 9/11 terrorist attacks on our country in 2001. In fact, the growing ID Divide is similar in many ways to the "Digital Divide" that exists for those who lack access to computers and the Internet, which in turn leaves them without access to numerous opportunities for education, commerce, and participation in civic and community affairs. The ID Divide leaves those without proper means of identification or with compromised ID unable to participate in the most basic functions of everyday life in our economy and democracy.

^{*} This Issue Brief is an edited version of a longer Report, with the same title, that was published in June 2008 by the Center for American Progress. PETER P. SWIRE & CASSANDRA Q. BUTTS, THE ID DIVIDE: ADDRESSING THE CHALLENGES OF IDENTIFICATION AND AUTHENTICATION IN AMERICAN SOCIETY, (2008) [hereinafter ID REPORT], *available at* http://www.americanprogress.org/issues/2008/06/pdf/id_divide.pdf. The ideas in this paper were generated from a larger "Progressive Identity Project" chaired by the Center for American Progress. An appendix to this paper describes the Progressive Identity Project.

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What's worse, Americans and their representatives in government at the federal, state, and local levels are divided about what to do about these problems. Some want stricter identification systems, most prominently to fight terrorism and to limit immigration. Their voices are joined by those who see massive profits to be had if the United States embraces ever more intrusive forms of personal identification—beyond fingerprints to iris scans, embedded ID chips, DNA profiles, and other forms of ID that, combined with personal and public financial records, would in fact throw more and more Americans onto the wrong side of the ID Divide. Others have a starkly different view. They are skeptical in general of new programs that require proof of ID, for cost, computer security, privacy, and civil liberties reasons.

Amid this debate, we recognize that there are circumstances where strong identification is required in the service of certain goals, such as national and homeland security. But in light of the many problems that can arise from use of identification, we support a process of careful vetting, or “due diligence” (to borrow a phrase from the financial world) for any new ID proposals. There should be scrutiny on cost and technical feasibility. There should be a detailed examination of whether an authentication procedure is reasonable given the goals rather than simply feasible because a new way to identify an individual is now possible.

In particular, we believe such due diligence would illustrate that many of the claims of ID vendors and other identity system proponents do not stand up well to such scrutiny. Fingerprint-based systems, for example, have much greater long-term flaws than most proponents and observers understand—and this form of ID has been around for decades. Due diligence must also include careful consideration of other important values, including: unequal effects on the poor and other disadvantaged groups; avoidance of excessive and uncompensated burdens on individuals (such as those wrongly put on watch lists); and burdens on important rights including privacy and the right to vote.

This paper focuses on the facts and implications of the ID Divide, identifying at least four important types of problems:

- A large population affected by identity theft and data breaches
- The growing effects of watch lists
- Specific groups that disproportionately lack IDs today
- The effects of new and stricter ID and matching requirements

These problems raise clear reasons for caution about implementing identification systems, which often have large, negative effects on those on the wrong side of the ID Divide. When systems need to be implemented, these problems show the great importance of designing systems with policies to address them. We argue that a strong set of progressive principles for identification systems (the “Progressive Principles”) must first determine whether to create the system at all; and if so, how to do it. Those decisions should be based on:

- Real security or other goals
- Accuracy
- Inclusion
- Fairness and equality
- Effective redress mechanisms
- Equitable financing for systems

How can these principles be honored in practice? That's where the "due diligence" process comes into play when considering and implementing identification systems. Due diligence in the financial world of mergers and acquisitions and other important corporate transactions is conducted before a company makes a major investment. Proponents of, say, a merger (or in our case, a new identification program) can err on the side of optimism, concluding too readily that the merger (or new ID program) is clearly the way to go. Thorough due diligence protects against such over-optimism.¹

This paper then applies our Progressive Principles and due diligence insights to a crucial current debate about identification. We detail why it would be bad policy to require government-issued photo identification for in-person voting, showing the usefulness of the Progressive Principles.

We believe the approach developed in this Issue Brief favors well-designed identification systems where they are carefully implemented and in the common interest. Design of identification systems should take full account of the Progressive Principles. If that occurs, then the problems of the ID Divide will become far more manageable.

II. PROGRESSIVE PRINCIPLES FOR IDENTIFICATION SYSTEMS

As a policy matter, there are two distinct steps in assessing possible identification systems: whether to create the system at all, and if so, how to do it. In practice, these two steps often merge, because the overall desirability of a system depends in large part on how it is implemented. The principles here thus can be usefully applied to both steps of the policy process. In response to the ID Divide, the project has thus identified six principles for identification systems.

A. ACHIEVE REAL SECURITY OR OTHER GOALS

New identification systems proposed in the name of security should be subject to a due diligence review to ensure that they actually promote security and do so cost-effectively compared to other available options. Similarly, identification systems proposed for other purposes, such as immigration policy, should only be deployed after they are shown to be effectively related to achieving the specified policy goals. This principle comes first for a simple reason—the financial and other costs of a new system are justified only if they actually achieve security or other goals. If they do not, then the analysis should end at this step.

B. ACCURACY

A system will only work in the long run if it has a high level of accuracy. Any system, such as a watch list, has "false positives" (people treated as terrorist suspects mistakenly) and "false negatives" (people who are dangerous who evade detection by the system). A proposed system should be carefully vetted to ensure that the accuracy produced by the system will result in a manageable number of false positives and negatives.

¹ For a longer discussion of how this due diligence process would apply to recurring technical problem with current and proposed identification programs, see ID REPORT, *supra* note *, at 21-27. We explain that ID programs that rely on "shared secrets," such as Social Security numbers or your mother's maiden name, are becoming more insecure due to the increased use of identification. Similarly, ID programs based on biometrics such as fingerprints or iris scans are not the "silver bullets" that some proponents claim they are, but rather could become compromised rapidly if deployed in haphazard ways. *Id.* at 23-25.

C. INCLUSION

As ID checks spread, it becomes increasingly important to ensure that people have a workable way to reduce the effects of the ID Divide. In many instances, there may be opportunities to rely on authentication approaches other than full identification. Where identification is used, however, then a goal of the policy process should be to foster inclusion of eligible persons.

D. FAIRNESS AND EQUALITY

New authentication and identification systems should be designed with consideration of their effects on the less wealthy and others who would suffer disproportionate burdens from any given design. Equality principles are especially important with respect to fundamental rights, such as the right to vote, and for any system where use of the ID is vital to daily tasks, such as opening a bank account or proving eligibility for a job. Where necessary, in order to enable people to live fully in society, fees should be waived based on financial hardship. Procedures for reasonable exceptions should also be developed, in recognition that any one method of identification will not work for the entire eligible population.

E. EFFECTIVE REDRESS MECHANISMS

Stricter and more numerous identification systems mean that burdens increase greatly on individuals who are mistakenly put on watch lists or otherwise disadvantaged by the system. An integral part of system design must be to have effective redress mechanisms. Otherwise, individuals will be turned into second-class citizens, deprived of the ability to conduct daily activities of life in a normal way. An effective security system must have not just on-ramps, but off-ramps as well. A properly designed system will allow government to distinguish between those who actually pose a threat and those who do not, and to proactively remove names from watch lists without a formal petition. If the security system remains the one-way street it is now, then it will inevitably collapse from its own weight.

F. EQUITABLE FINANCING FOR SYSTEMS

A major criticism of the REAL ID Act,² for example, has been its unfunded mandates. Congress has only provided the states with a small fraction of the expenses of implementing the federal requirements, now estimated at \$4 billion over 10 years, but perhaps more. Along with such unfunded expenses to states and localities, REAL ID and other new identification systems impose off-budget costs on individuals who must spend time and money to meet the system's requirements. These include: tracking down birth certificates and other documentation; the time needed to try to resolve problems; and the costs to eligible individuals who get put on watch lists or otherwise cannot meet the system requirements. New identification systems, built for the common good, should thus be funded in a transparent and equitable way.

III. THE ID DIVIDE AND ITS IMPACT

Much has been written about the "digital divide" that separates Americans with good computer access from millions of Americans who lack access to the Internet. The digital divide is a concern because those who lack access to computers and good

² The REAL ID Act sets strict federal standards for states to follow in issuing drivers' licenses. *See* 49 U.S.C. § 30301 (2005).

Internet connections lose numerous opportunities for education, commerce, and participation in civic and community affairs. The rising prevalence of identification today is creating a similar “ID Divide.” For millions of Americans, the recent rise in identification in the United States creates new challenges. IDs are requested in an increasing array of situations, such as getting on an airplane, opening a bank account, starting a job, entering an office building, or voting in elections. These insistent requests for identification detrimentally affect the lives of those who lack ID cards, are victims of identity fraud, or get wrongly placed onto terrorist watch lists or other “high-risk” lists.

A. THE CREDENTIALLED AND THE UNCREDENTIALLED

The problems of the ID Divide are invisible to many “credentialed” Americans of the middle or upper-middle class. These Americans include most government employees and policy experts who work on issues of identification. Credentialed Americans take ID checks for granted. Their wallets often contain a dozen forms of identification, all linked to the same name and address. The wallet often holds a driver’s license, some credit cards, and membership cards ranging from their employer to an airline to the local grocery store. For these credentialed Americans, showing ID has become second nature. When asked, these credentialed Americans may see little objection to requirements for showing ID to perform tasks in society. For instance, some polling shows that a majority of Americans favors showing ID in order to vote.³

The interest-group politics surrounding identification reinforce the views of credentialed Americans. Key decisions about most new identification initiatives happen deep within the government procurement process. Government contractors have a built-in interest in advocating for increased use of identification systems—they get lucrative contracts only if the new systems go forward. Government contractors thus have the economic incentive to be deeply involved in identification proposals at every step of the way.

These ID system vendors also have the economic incentive to develop studies and statistics that support expensive new identification systems. By contrast, public interest groups lack the same staffing and resources to be involved in every state and every federal agency identification initiative. As a result, even a clear public interest victory in one procurement contract can be ignored in other forums. For instance, the U.S. State Department, after intensive public criticism on security grounds, in 2006 agreed to put physical safeguards around the use of radio-frequency identification chips in U.S. passports. Unfortunately, the State Department and Department of Homeland Security subsequently neglected to use the same safeguards for the “passport cards” and “enhanced driver’s licenses” that U.S. citizens are supposed to be able to use at the border in place of full passports.⁴

³ In April of 2006, 62 percent of respondents to a national poll strongly favored the showing of photo identification before voting, 19 percent somewhat favored, 12 percent were neutral, 3 percent somewhat opposed, and only 4 percent strongly opposed. PETER HART & BILL MCINTURFF, NBC NEWS/WALL STREET JOURNAL SURVEY, STUDY # 6062, at 13 (2006), available at <http://online.wsj.com/public/resources/documents/poll20060426.pdf>.

⁴ *The Impact of Implementation: A Review of the REAL ID Act and the Western Hemisphere Travel Initiative: Hearing Before the Subcomm. on Oversight of Government Management, the Fed. Workforce, and the District of Columbia of the S. Comm. on Homeland Security and Governmental Affairs*, 110th Cong. (2008) (statement of Sophia Cope, Staff Attorney & Ron Plesser Fellow, Center for Democracy and Technology, available at <http://www.cdt.org/testimony/20080429scope-written.pdf>).

Credentialed Americans often have not realized what life looks like from the other side of the ID Divide. A major goal of this report is to inform the readers about the size and consequences of the ID Divide. There are at least four categories of problems under the ID Divide:

- A large population affected by identity theft and data breaches
- The growing effects of watch lists
- Specific groups that disproportionately lack IDs today
- The effects of new and stricter ID and matching requirements

These problems give reasons for caution about implementing identification systems—the systems often have large, negative effects on those on the other side of the ID Divide. Where systems are indeed implemented, then these problems show the great importance of designing systems with policies to address such problems.

B. LARGE POPULATION AFFECTED BY IDENTITY THEFT AND DATA BREACHES

The ID Divide can strike every American. Identity theft is the fastest-rising crime of the new millennium.⁵ The Federal Trade Commission reported that 8.3 million Americans suffered identity theft in 2005,⁶ and identity theft is by far the largest category of consumer protection complaints to the government.⁷ In a 2003 national telephone survey, 16 percent of adults reported they had been the victim of identity fraud.⁸ Identity theft can change any credentialed American into one who faces the insecurities and obstacles facing a person who lacks ID. Identity theft strikes both wealthy and poor Americans, and has happened even to members of Congress.⁹

The rising tide of data breaches increases Americans' vulnerability to identity theft.¹⁰ Recent years have seen innumerable press reports of loss of personally identifiable data from public and private databases. The Privacy Rights Clearinghouse has documented over 226 million data records of U.S. residents that have been exposed due to security breaches since 2005.¹¹ The TJMaxx clothing stores and affiliated stores lost over 45 million credit and debit card numbers in 2007. The databases of credit card processor CardSystems were hacked in 2005, resulting in loss of data for 40 million Americans. In the public sector, the Veterans Administration lost a data device containing the Social Security numbers and other personal data of 26.5 million

⁵ For instance, the Internal Revenue Service reported an increase of 644 percent in identity theft cases from 2004 to 2007. Many of the cases involved misuse of another person's Social Security number to get a refund. BNA PRIVACY LAW WATCH, IRS PLANS TO OPEN SPECIALIZED UNIT FOR HANDLING IDENTITY THEFT CASES, (2008).

⁶ FED. TRADE COMM'N, 2006 IDENTITY THEFT SURVEY REPORT (2007), available at <http://www.ftc.gov/os/2007/11/SynovateFinalReportIDTheft2006.pdf>.

⁷ In 2007, identity theft complaints totaled 32 percent of all consumer complaints. FED. TRADE COMM'N, CONSUMER FRAUD AND IDENTITY THEFT COMPLAINT DATA, JANUARY - DECEMBER 2007 (2008), available at <http://www.ftc.gov/opa/2008/02/fraud.pdf>.

⁸ HARRIS INTERACTIVE, IDENTITY THEFT: NEW SURVEY & TREND REPORT (2003), available at <http://www.bbbonline.org/IDTheft/IDTheftSrvyAug03.pdf>.

⁹ Theft of Rep. Anna Eshoo's (D-CA) Social Security number contributed to passage of financial privacy protections. See CHRIS JAY HOOFNAGLE & EMILY HONIG, VICTORIA'S SECRET AND FINANCIAL PRIVACY (2005), available at <http://epic.org/privacy/glba/victoriassecret.html>.

¹⁰ Michael E. Jones, *Data Breaches: Recent Developments in the Public and Private Sectors*, 3 I/S: A JOURNAL OF LAW AND POLICY FOR THE INFORMATION SOCIETY 555 (2007).

¹¹ PRIVACY RIGHTS CLEARINGHOUSE, A CHRONOLOGY OF DATA BREACHES, <http://www.privacyrights.org/ar/ChronDataBreaches.htm> (last visited October 3, 2008).

discharged veterans. Along with breaches from many other government agencies, there have been repeated reports of computer security problems in federal, state, and local government computer systems.

Most identity programs create centralized databases that are vulnerable to such data breaches. In addition, almost all identity programs create new forms of information sharing, such as when a new employer or motor vehicle bureau checks a name against a central database. These new databases and new information flows are sources of vulnerability, requiring better computer security than has often occurred to date. Especially for official government databases, the new databases can also become targets for organized crime and other groups that seek to commit ID theft on a large scale or gain false credentials for their members. A related problem is the devastating effect of a breach for fingerprints and other biometric information. When a breach occurs for a credit card, the bank can issue a new card. But once a fingerprint is known, it is very hard indeed to get a new finger.

The more ID checks in society, the more that identity theft matters. In previous decades, with little use of ID checks in America, identity theft was not an important issue. Today and in the future, as ID checks become far more widespread, any imperfections in a person's identity become more serious and likely more difficult to correct. Identity theft today applies to the credit card fraud and bank account takeovers that are perhaps most widely known. Other sorts of identity fraud, moreover, are becoming more common. Medical ID theft has grown, as uninsured people try to get medical care using the name and health insurance of other people. Convicted criminals have a strong incentive to take over an innocent's person identity so that they can present "clean" credentials to be hired, open a financial account, or do other everyday actions in society.

As identity fraud spreads, the victims of fraud may find it difficult or impossible to cleanse records of the false data created by the fraudster. This false data, in turn, increases the likelihood of additional problems for the innocent victim, such as failing a background check, flunking matches with another database (as discussed below), or being placed on a watch list. Identity theft thus can place any American on the uncredentialed side of the ID Divide. A crucial problem in badly designed identification systems is that they can lead to greatly increased rates of identity fraud. Design of identification systems, therefore, should carefully consider how to prevent or mitigate the effects of identity theft.

C. GROWING EFFECTS OF WATCH LISTS

Another way that any American can fall on the wrong side of the ID Divide is to get on a watch list. The No-Fly list operated by the Transportation Safety Administration is expected to expand to over 1 million names in 2008. Problems with this list have become famous. Sen. Ted Kennedy (D-MA) and Rep. John Lewis (D-GA) got on the list. So did Catherine Stevens, the wife of Sen. Ted Stevens (R-AK). Her nickname, "Cat" (as in Cat Stevens, the 1960s folk rock star turned Muslim poet), triggered the scrutiny.

Even these politically prominent individuals have found it very difficult to get removed from the watch list. Even after individuals think they have the problem fixed, they often get placed back onto watch lists, such as when the "evidence" that mistakenly put them on the list in the first instance gets sent into the database again. As with identity theft, a major problem for badly designed identification systems is that larger numbers of people get flagged as "suspicious," triggering a cascade of problems for individuals as they are asked for ID in daily situations. The problems of identity theft

and watch lists already affect many Americans directly. If and as identification systems continue to multiply, they are more likely to affect all Americans at least indirectly because authentication systems create a risk for each individual of losing control over one's identity, with the associated burdens of falling onto the wrong side of the ID Divide.

D. SPECIFIC GROUPS THAT DISPROPORTIONATELY LACK IDS TODAY

Many Americans mistakenly believe that almost all U.S. adults have a driver's license. Over 20 million Americans of voting age currently lack a valid driver's license, however.¹² The Carter-Baker Commission estimated that 12 percent of voting-age Americans lack a driver's license.¹³ Lack of a driver's license increasingly affects non-driving aspects of daily life, such as under the new state laws that require a government-issued photo ID in order to vote. Under the REAL ID Act, once implemented, lack of such an ID would prevent access to federal buildings and require additional screening before a person could fly in an airplane. Yet there are, of course, *driving-related reasons* why many Americans do not have a driver's license.

- **Blind and other disabled persons.** Roughly 1 million Americans are legally blind.¹⁴ Many Americans have other disabilities that make it difficult or impossible to drive. Persons who cannot drive clearly have less reason to go through the hassle and expense of getting a government-issued photo ID from the motor vehicle bureau. In addition, many blind and disabled people live in poverty.¹⁵
- **The elderly.** Millions of older Americans no longer drive. According to a study by the AARP Georgia chapter, 36 percent of citizens in Georgia over the age of 75 do not have a current driver's license.¹⁶ A Wisconsin study estimated that 23 percent of persons 65 years or older do not have a driver's license.¹⁷
- **The young.** Teenagers do not automatically get a driver's license when they turn 16. A license may be a costly luxury for cash-strapped families. Many states now require costly drivers' education before issuing a license. Auto insurance rates skyrocket when a teenager is added to the family policy. Some families, especially in urban areas, do not own a car. In addition, college

¹² One report estimates that 22 million voting-age citizens lack a driver's license. See BRENNAN CTR. FOR JUSTICE AT NYU SCHOOL OF LAW & SPENCER OVERTON, RESPONSE TO THE REPORT OF THE 2005 COMMISSION ON FEDERAL ELECTION REFORM 23 n.9 (2005), *available at* http://brennan.3cdn.net/7aad4859cd1bf5f49e_4zm6i2fli.pdf; TASK FORCE ON THE FED. ELECTION SYS., TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS 74-80 (2001), *available at* http://webstorage3.mcpa.virginia.edu/commissions/comm_2001_taskforce.pdf.

¹³ According to the Federal Highway Administration, 13.2 percent of U.S. residents 16 years and older lacked a driver's license. COMM'N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS 73 n. 22 (2005), *available at* http://www.american.edu/ia/cfer/report/full_report.pdf; FED. HIGHWAY ADMIN., U.S. DEPT. OF TRANSP., LICENSED DRIVERS BY SEX AND RATIO TO POPULATION—2003 (2004), *available at* <http://www.fhwa.dot.gov/policy/ohim/hs03/pdf/dl1c.pdf>.

¹⁴ DIANA M. ZUCKERMAN, BLIND ADULTS IN AMERICA: THEIR LIVES AND CHALLENGES, (2004), *available at* <http://www.center4research.org/blind0204.html>.

¹⁵ According to a recent study, 19 percent of legally blind persons live in poverty. *Id.*

¹⁶ Spencer Overton, *Voter ID Supporters Lack Hard Evidence*, ATLANTA JOURNAL-CONSTITUTION, Apr. 8, 2005, *available at* http://docs.law.gwu.edu/facweb/soverton/ajc_april8_2005.pdf.

¹⁷ One study reports that 91 percent of the state's elderly without a driver's license are white. JOHN PAWASARAT, EMPLOYMENT AND TRAINING INSTITUTE, UNIVERSITY OF WISCONSIN-MILWAUKEE, THE DRIVER LICENSE STATUS OF THE VOTING AGE POPULATION IN WISCONSIN (2005), *available at* http://www.brennancenter.org/page/-/download_file_50902.pdf.

students and other young people move often and so may lack proof of residence.

- **Suspended licenses.** Many states have expanded the range of reasons why driver's licenses are suspended or not renewed. In Wisconsin, "you can lose your driver's license if you forget to pay your library fines, don't shovel the snow off your sidewalk, or don't trim a tree that overhangs a neighbor's property."¹⁸
- **"Driving while poor."** Poor families clearly have a harder time than wealthy families in paying for driver's education, a license, and a car. An additional problem is that poverty can lead to inability to pay traffic tickets or other payments needed to renew a driver's license.
- **Urban users of mass transit.** Millions of Americans rely daily on buses, subways, and other forms of mass transit. In an era of dependence on foreign oil and concerns about global warming, this use of mass transit should be encouraged. Yet urban users of mass transit have less reason to get a driver's license, and thus are disproportionately excluded from systems that require one.
- **Lost, stolen, or mutilated driver's license.** Based on available statistics, approximately 20-to-25 percent of operating licenses issued each year are duplicates, issued because the original license was lost, stolen, or mutilated.¹⁹ The time and expense to get a replacement license is manageable for a well-to-do person, or one who needs to show a driver's license for ID checks regularly (such as a frequent airline traveler). In contrast, the expense and hassle of getting a replacement license will be more of an obstacle to low-income people and those who do not need an ID except to vote.

In addition, communities of color and some faith communities are significantly less likely to have government-issued photo IDs, among them:

- **African Americans.** According to a 2006 survey by the Brennan Center, 25 percent of African-American voting-age citizens nationwide have no current government-issued photo ID, compared to 8 percent of white voting-age citizens.²⁰ In the detailed Wisconsin study, only 47 percent of Milwaukee County African-American adults had a valid driver's license, compared to 85 percent of white adults in the rest of the state. The situation for young adults ages 18-to-24 was even more striking, with 26 percent of African Americans in

¹⁸ *Id.*

¹⁹ For instance, the rate of duplicate individual licenses in 2007 was 24.2 percent for Alaska (36,784 out of 151,502). Interview by Stacy Oates with Alaska Department of Motor Vehicles, in Wash., D.C. (May 19, 2008). For Florida, duplicates for the 2005-06 fiscal year were 19.4 percent (1,045,296 out of 5,380,905). DIV. OF DRIVER LICENSE, FLORIDA DEP'T OF HIGHWAY SAFETY AND MOTOR VEHICLES, PERFORMANCE STATISTICS (2006), *available at* <http://www.flhsmv.gov/html/FactsFiguresFY2006/PerStaDDL.htm>. For Idaho, duplicates in 2006 were 19.8 percent (46,319 out of 187,345). IDAHO TRANSP. DEP'T, DRIVERS LICENSE ISSUED CY 2006 (2006), *available at* http://www.itd.idaho.gov/econ/DriversLicense/DLAGE_SEX_06.pdf. For Wisconsin, duplicates for 2006 were 25.6 percent (322,201 out of 1,258,278). WISCONSIN DEP'T OF TRANSP., DRIVERS LICENSE/ID CARDS ISSUED (2006), *available at* <http://www.dot.state.wi.us/drivers/docs/drlcissue.pdf>.

²⁰ BRENNAN CTR. FOR JUSTICE AT NYU SCHOOL OF LAW, CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS' POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION (2006), *available at* http://www.brennancenter.org/page/-/d/download_file_39242.pdf.

Milwaukee having a license compared with 71 percent of young white adults in the rest of the state.²¹

- **Hispanics.** Similar statistics apply to Hispanics. In a Georgia study, Hispanics were twice as likely as whites not to have a government-issued photo ID. In Milwaukee County, Wisconsin, only 43 percent of Hispanic adults had such IDs, and only 34 percent of Hispanics ages 18-to-24 did. In addition, Hispanic citizens born outside of the United States often face significant barriers to obtaining ID, as discussed further below for foreign-born citizens generally.
- **Native Americans.** Although less data exists for Native Americans, the Brennan Center reports that in the five counties in South Dakota with the highest Native-American populations, voters in the 2004 primary were 2-to-8 times more likely not to bring ID to the polls than other voters in the state.
- **Faith communities.** Some Americans have religious objections to being photographed for government-issued photo IDs. Strict requirements to provide IDs thus can have a serious effect on the Amish and other faith-based communities. Approximately a dozen states have laws on the books with a religious exception to the photograph requirement on driver's licenses, but it appears that these laws may be overruled by the proposed rules for implementing the REAL ID Act.²²

E. ID REQUIREMENTS EXCLUDE MANY ELIGIBLE PERSONS

There is clear, recent evidence that the lack of identity documentation has harmful effects in programs where stricter ID is required. The Deficit Reduction Act of 2005, for example, required states to obtain satisfactory documentary evidence of U.S. citizenship or nationality for approximately 40 million Medicaid beneficiaries. The stated goal of the requirement was to prevent noncitizens, who are ineligible for Medicaid, from receiving the medical benefits. A Government Accountability Office study instead found that the major effects of the program were higher administrative costs for the states and denial of medical benefits to eligible U.S. citizens.²³

Although most states had not quantified the effect of this provision of the Act, the study reported that one state “that had begun tracking the effect identified 18,000 individuals in the 7 months after implementation whose applications were denied or coverage was terminated for inability to provide the necessary documentation, though the state believed most of them to be eligible citizens.”²⁴ Administrative costs and denials of coverage occurred because the documentation requirements lacked exceptions and mandated use only of originals, so individuals had to be processed in person rather than by mail. These higher costs meant that only one of the 44 reporting states experienced savings from the provision, which was designed to save money by screening out ineligible applicants.

This Medicaid experience illustrates the potentially harmful effects of ID requirements on eligible citizens. The effect is more striking because the affected individuals

²¹ Pawasarat, *supra* note 19, at 2.

²² Anne Broache, *Religious Minorities Face REAL ID Crackdown*, CNET NEWS, Feb. 6, 2008, available at http://www.news.com/Religious-minorities-face-Real-ID-crackdown/2009-1028_3-6229258.html.

²³ GEN. ACCOUNTABILITY OFFICE, MEDICAID: STATES REPORTED THAT CITIZENSHIP DOCUMENTATION REQUIREMENT RESULTED IN ENROLLMENT DECLINES FOR ELIGIBLE CITIZENS AND POSED ADMINISTRATIVE BURDENS (2007), available at <http://oversight.house.gov/documents/20070724110408.pdf>; see also, Robert Pear, *Lacking Papers, Citizens Lose Medicaid*, N.Y. TIMES, March 12, 2007.

²⁴ GEN. ACCOUNTABILITY OFFICE, *supra* note 25, at 5.

had an important incentive to participate in the program—to receive medical insurance. Where the tangible benefit to individuals is lower, such as getting an ID card in order to meet state voting laws, the exclusionary effects of an ID requirement quite possibly will be higher.

F. THE EFFECTS OF NEW AND STRICTER DOCUMENTATION AND MATCHING REQUIREMENTS

Proposals and programs are currently underway for stricter ID requirements in areas such as voting, employment, driver's licenses, and eligibility for Medicaid and other government programs. The stricter requirements will be costly for many Americans—in terms of time and money to gather documents, and also due to the effects on eligible people who are not able to prove their identity. Moreover, “even free is not free” when it comes to getting identification documents. That is, even if the state does not charge for a driver's license, there are significant and unevenly-distributed costs for many persons in proving their identity to the state.²⁵

Recent experience with “matching” programs also highlights the problems that occur when a large fraction of individuals don't “match” a database due to any of a number of possible causes, including name variation, address variation, typos and other transcription errors, and other sources of error. Indeed, there is compelling evidence of major problems in current matching programs that can result in the erroneous denial of drivers' licenses, and loss of jobs and even the right to vote.²⁶ Unless matching programs are conducted with high-quality safeguards, often not in place today, they may well increase the number of mistakes in the system.

G. SUMMARY ON THE ID DIVIDE

The rapid increase in the use of identification in American society has been accompanied by the growing problem of the ID Divide. Identity theft and watch lists can place any American on the wrong side of the ID Divide. In addition, far more adult American citizens lack a government-issued photo ID than most people realize. And matching programs in voting, employment, and driver's licenses currently fall far short of technical best practices and have shown deeply problematic effects of excluding many eligible citizens and residents.

Although Americans of all backgrounds may find themselves on the wrong side of the ID Divide, there are disproportionate effects on the poor, the young, the disabled, the less-educated, communities of color, and citizens born outside of the United States. For a credentialed, middle-class family that has the same home and jobs for years, it may be relatively easy to provide documentation and to rectify problems if they occur by producing multiple other documents. Such families may also be more skilled at navigating the bureaucracy than the less-educated, those who are less fluent in English, or those who can't afford to take off multiple days from work to satisfy the demands of the motor vehicles office. Because most legislators and policymakers are themselves thoroughly credentialed, it is especially important for them to learn about the daunting challenges facing the uncredentialed.

In recent years, debates in the United States about identification have been dominated by the goals of fighting terrorism or addressing immigration issues. As our country considers expensive identification systems, which are designed to last for

²⁵ For a fuller discussion of the costs associated with a “free” ID, see ID REPORT, *supra* note *, at 15-16.

²⁶ See *id.* at 16-19

many years, it is vital to consider the effects of new programs on all citizens and legal residents. The price of fighting terrorism should not be to exclude millions of law-abiding Americans from participation in society.

IV. APPLYING PROGRESSIVE IDENTIFICATION PRINCIPLES TO VOTER PHOTO ID REQUIREMENTS: A CASE STUDY

An area of intense current debate is whether government-issued photo ID should be required for in-person voting. Although other methods for identifying voters have long been in place, the first such requirements in U.S. history were passed by Indiana, Georgia, and Missouri beginning in 2002.²⁷ In May 2008, the U.S. Supreme Court held 6-to-3 that the Indiana law was constitutional on its face in *Crawford v. Marion County Election Board*.

A law can be constitutional but a very bad idea. For instance, a 90 percent income tax is constitutional, but many people would oppose such a measure. The same applies to mandatory photo ID. When measured against this report's principles for identification systems, mandatory photo ID is a bad policy choice that should not be adopted by the states. A due diligence review shows that requiring state-issued photo ID to vote badly flunks our six progressive identification principles.

A. ACHIEVE REAL SECURITY OR OTHER GOALS

Proponents of required photo identification say that it will reduce in-person voter fraud, because only those carrying an unexpired state-issued photo ID will be allowed to vote. There have been comprehensive refutations, however, of the claim that photo ID will reduce voter fraud.²⁸ A seminal article by George Washington University law professor Spencer Overton²⁹ examines the leading anecdotes that purportedly show voter fraud, and concludes: "While anecdotes about fraud are rhetorically persuasive, the narratives often contain false information, omit critical facts, or focus on wrongdoing that a photo-identification requirement would not prevent."³⁰

Despite an intensive effort by a conservative group to highlight incidents of in-person voting fraud, there were zero confirmed incidents of voter fraud at the polling place in the 2006 elections.³¹ Under President George W. Bush, there was a major effort to identify and prosecute cases of in-person voter fraud. A significant reason for the controversial firings of several U.S. attorneys was that they did not prosecute as many such cases as the Justice Department leaders wished.³² The Brennan Center examined each allegation of voter fraud mentioned in any of the briefs in the Indiana

²⁷ GA. CODE ANN. §21-2-417 (2005); IND. CODE ANN. §3-11-8-25.1 (West 2003); MO. ANN. STAT. §115.427 (West 2002).

²⁸ See generally, TOVA ANDREA WANG, THE CENTURY FOUNDATION, ELECTION REFORM: VOTER ID LAWS, available at <http://www.tcf.org/list.asp?type=IN&pubid=%7B647BD6E5-371F-434E-B9D5-5B09E3FFC363%7D>.

²⁹ Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631 (2006).

³⁰ *Id.* at 635.

³¹ TOVA ANDREA WANG, THE CENTURY FOUNDATION, WHERE'S THE VOTER FRAUD? (2006), available at <http://www.tcf.org/list.asp?type=NC&pubid=1452>.

³² See Mark Follman, Alex Koppelman, & Jonathan Vanian, *How U.S. Attorneys Were Used to Spread Voter-Fraud Fears*, SALON, March 21, 2007, available at http://www.salon.com/news/feature/2007/03/21/us_attorneys/; see also Josh Marshall, TalkingPointsMemo, April 12, 2007, <http://www.talkingpointsmemo.com/archives/013581.php>; LORRAINE C. MINNITE, THE POLITICS OF VOTER FRAUD, (2007), available at http://projectvote.org/fileadmin/ProjectVote/Publications/Politics_of_Voter_Fraud_Final.pdf.

case, and concluded that “the briefs cite one attempt at impersonation that was thwarted without a photo ID requirement, and nine unresolved cases where impersonation fraud at the polls was suspected but not proven.”³³

Due diligence for proposed identification systems would ask whether the program achieves the security goal and whether it does so cost-effectively. The academic studies show serious reasons to doubt that a photo ID requirement will reduce voter fraud because of the lack of evidence of the type of voter fraud that would be prevented by the ID. In addition, the cost-effectiveness calculus tilts strongly against having the photo ID requirement. An intensive study of 2.8 million Washington state votes in 2004 found that 0.0009 percent of the ballots involved double voting or voting in the name of deceased individuals.³⁴ Professor Overton calculates that this rate of fraud, when compared with the over 20 million Americans who lack a driver’s license, would mean that “photo-identification requirements would deter over 6,700 legitimate votes for every single fraudulent vote prevented.”³⁵

From a system security perspective, photo ID requirements target an especially unlikely method of voter fraud. The photo ID requirement targets one-at-a-time votes by people who are willing to commit fraud in the full light of day, examined by poll watchers of the various parties, in the community where they claim to reside. That kind of in-person fraud is riskier and less likely to swing an election than two other categories of fraud—absentee ballots and voting machine fraud.

Absentee ballot fraud, done literally out of sight of voting officials, is less risky for a fraudster than going to the polls, yet states such as Indiana and Georgia allow such voting without any photo ID. Machine-based fraud, such as old-fashioned ballot box stuffing or state-of-the-art hacking of software, has a much higher payoff for fraud because many votes can be stolen at once. In short, moving forward with a photo ID requirement while not addressing other more substantial sources of fraud is not a rational strategy if the goal is truly to reduce voter fraud. This lack of a rational basis for the photo ID requirement is one reason that many observers believe that support for the photo ID is based on partisan political calculations rather than an actual effort to reduce voter fraud.

B. ACCURACY

Accuracy is not a major issue in the debate over whether a photo ID should be required for in-person voting. Accuracy is a major issue, however, when matching programs are used to purge data rolls. As discussed in the full report, experiments have found error rates of 20 percent to 30 percent in programs designed to purge rolls, so great care is required before people are removed from eligibility to vote.

³³ JUSTIN LEVITT, BRENNAN CTR. FOR JUSTICE AT NYU SCHOOL OF LAW, ANALYSIS OF ALLEGED FRAUD IN BRIEFS SUPPORTING CRAWFORD RESPONDENTS (2007), *available at* <http://truthaboutfraud.org/pdf/CrawfordAllegations.pdf>.

³⁴ *Borders v. King County*, No. 05-2-00027-3 (Wash. Super. Ct. Chelan County June 24, 2005). Similarly, a survey of each of Ohio’s 88 county Boards of Elections found only four instances of ineligible persons attempting to vote out of a total of 9,078,728 votes cast in the state’s 2002 and 2004 general elections. This is a fraud rate of 0.000044%. COALITION ON HOMELESSNESS AND HOUSING IN OHIO & LEAGUE OF WOMEN VOTERS OF OHIO, LET THE PEOPLE VOTE: A JOINT REPORT ON ELECTION REFORM ACTIVITIES IN OHIO (2005), *available at* <http://www.cohhio.org/alerts/Election%20Reform%20Report.pdf>.

³⁵ Overton, *supra* note 31, at 635.

C. INCLUSION

Inclusion is a major reason to be skeptical of proposals for mandatory photo ID for voting. The facts of the ID Divide demonstrate the many millions of citizens who could be excluded from the right to vote—the fundamental basis for democracy—by overly strict ID requirements. As Professor Overton writes: “While a small amount of voter fraud hypothetically could determine a close election, the exclusion of twenty million Americans who lack photo identification could erroneously skew a larger number of elections.”

The principle of inclusion underscores the desirability of anti-fraud procedures that are less exclusionary than a mandatory photo ID. For instance, many states have long permitted an affirmation of identity, on penalty of perjury. States often match signatures to the signature at time of registration. Utility bills, bank statements, and other proofs of identity are unlikely to be in the hands of fraudsters. In short, identification approaches can be designed to address fraud while avoiding disenfranchising eligible voters.

D. FAIRNESS AND EQUALITY

A major reason for concern about photo ID proposals is the known disproportionate harm to specific groups, including African Americans, Hispanics, the blind, and other groups such as the disabled, the poor, the young, and the elderly. Especially in light of the long American history of discrimination in voting rights, any proposal that has known negative effects on such groups should be done only based upon compelling evidence of need, which is lacking for photo ID proposals.

E. EFFECTIVE REDRESS MECHANISMS

An important and effective redress mechanism is to have back-up forms of identification in addition to government-issued photo ID. The ability of the citizen to sign an affidavit or present more readily available documentation such as a utility bill would greatly mitigate the exclusionary effects of mandatory photo ID approaches. For matching programs, an important principle is to ensure that there is effective notice to any voter before a name is purged from the rolls, as well as realistic and effective ways for individuals to vote where the purging is done inaccurately.

F. EQUITABLE FUNDING MECHANISMS

ID requirements are done at the state level, so there is no problem of unfunded federal mandates. Matching programs, however, can easily raise the twin problem of unfunded mandates and technology or procedures that have a high error rate. In light of the high error rates in voting matching found by the Brennan Center, extreme caution is needed before assuming that the infrastructure and staffing are in place to avoid purging eligible voters from the rolls.

G. CONCLUSION ON MANDATORY PHOTO ID FOR VOTING

Following this report’s principles for identification, and based on the actual evidence about voter fraud, requiring photo ID for in-person voting would have significant harmful effects. The recent Supreme Court case may find such a requirement constitutional, but the approach is nonetheless clearly bad policy that should not be enacted. If enacted by states, then necessary safeguards should be put in place to eliminate exclusionary effects.

V. CONCLUSION

The rising quantity of identification systems, identity theft, and watch lists all are contributing to a newly important ID Divide in the United States. For passports and other purposes it makes sense to have identification systems, run by or on behalf of the government. A major finding of this report, however, is that new and existing identification systems should be subject to due diligence. Systems created in the name of security should only be implemented if they actually will improve security, and do so cost-effectively. Indeed, there are major security risks inherent in many current or proposed identification systems.³⁶ In many instances, it is desirable to seek authentication approaches that do not rely on identification.

A progressive approach to identity and authentication means that the systems should be developed in the common interest, and not primarily for the convenience or ease-of-use of those operating the systems. The actual effects of the ID Divide on ordinary people are a crucial factor in assessing the overall desirability of proposed systems. For that reason, we are recommending that proposed and existing systems be measured against the following principles:

- Achieve real security or other goals
- Accuracy
- Inclusion
- Fairness/equality
- Effective redress mechanisms
- Equitable funding mechanisms

This approach favors well-designed identification systems when they are in the common interest. A due diligence process should prevent proponents from assuming benefits, such as low cost and perfectly working biometrics, that will not pan out in practice. We can move forward as well on authentication approaches that do not rely on identification, and on long-run approaches that rely on secure devices having stronger security and privacy qualities. In short, there are measures to address the ID Divide.

When the next administration takes office in January 2009, it will need to make new policy going forward on numerous identification and authentication issues. The new administration will also have the first opportunity since the terrorist attacks of September 11, 2001 to examine decisions made since then in the light of nearly a decade of experience. We believe this Issue Brief will help the new administration tackle this critical issue early and swiftly, preparing our country for the challenges to civil liberties and national security posed by the complex issues of identification and authentication.

³⁶ See ID REPORT, *supra* note *, at 10-11, 21-25.

APPENDIX: THE PROGRESSIVE IDENTITY PROJECT

The Progressive Identity project arose from the recognition that the next administration will face identification and authentication issues in a wide range of contexts. Americans are increasingly being asked to identify themselves, both in person and online. The goal is to try to set forth principles and insights that will provide a coherent approach for diverse issue areas such as:

- ***National and homeland security.*** The REAL ID Act and numerous other identification programs have been proposed since the attacks of September 11, 2001
- ***Immigration.*** There have been prominent debates about identity requirements at the time a person starts a job and about government-issued IDs for non-citizens
- ***Voting.*** The last few years have seen unprecedented state laws requiring ID to vote, and subsequent litigation about those laws' constitutionality
- ***Electronic health records.*** It remains unclear how to accurately and securely link a patient's health records, held by different providers, as the system shifts to electronic medical records
- ***Online authentication.*** Many new approaches are underway for authenticating users online, both for e-government and e-commerce
- ***Computer security.*** Many computer security experts have argued that identification systems proposed to promote security can instead create new security risks
- ***Privacy and civil liberties.*** New identification systems, especially if they are badly designed, can pose serious problems for individual privacy and civil liberties

To study these issues of identification and authentication, the Center for American Progress convened a group of experts³⁷ from all of the issue areas listed above for an intensive one-day meeting in November 2007. The emphasis was on learning across issue areas because most previous debates on identification and authentication have occurred in isolation with limited cross-fertilization of ideas among experts. The group convened for a second meeting in March 2008. For the full report on "The ID Divide," visit http://www.americanprogress.org/issues/2008/06/pdf/id_divide.pdf; for the online resource page for the Progressive Identity project, visit http://www.americanprogress.org/issues/2008/06/id_resources.html.

³⁷ For a list of participants who wished to be listed, see ID REPORT, *supra* note *, at 36-37. The Center for American Progress warmly thanks all of the participants in this collaborative project

Reforming the State Secrets Privilege

Amanda Frost^{*} and Justin Florence^{**}

I. INTRODUCTION

Since September 11, 2001, President George W. Bush's Administration has repeatedly asserted the state secrets privilege as grounds for the dismissal of civil cases challenging the legality of its conduct in the war on terror. Specifically, the Administration has sought dismissal of all cases challenging two different government practices: (1) its use of "extraordinary rendition," under which the Executive removes suspected terrorists to foreign countries for interrogation; and (2) the National Security Agency's (NSA's) warrantless wiretapping of electronic communications. The government argues that the plaintiffs' claims in these cases can neither be proven nor defended against without disclosure of information that would jeopardize national security, and thus it seeks to have all cases related to these activities dismissed on the pleadings.¹

This issue brief provides a general overview of the state secrets privilege and then discusses the Bush Administration's recent assertion of the privilege in cases challenging extraordinary rendition and the NSA's warrantless wiretapping program. As will be explained, the Administration's blanket invocation of the privilege as grounds for immediate dismissal of these categories of cases is unprecedented, and threatens to eliminate the judiciary's role as a check on executive action. For that reason, courts should seek methods of protecting privileged material without dismissing litigation, as they have successfully done in the past, to ensure that legitimate challenges to these and other government actions get a fair hearing in court. In addition, the next presidential administration should revise its internal procedures and work with courts to limit the effect of the state secrets privilege so that it is used as originally intended, rather than as a de facto attempt to immunize executive action from judicial review. Finally, Congress should move quickly to pass pending legislation that would prevent indiscriminate use of the state secrets privilege.

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¹ See, e.g., *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190 (9th Cir. 2007); *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007); *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006), *remanded by* 539 F.3d 1157 (9th Cir. 2008); *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899 (N.D. Ill. 2006); *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 373 (2007).

II. THE ORIGINS OF THE STATE SECRETS PRIVILEGE

The privilege was first explicitly recognized by the Supreme Court in its 1953 decision in *United States v. Reynolds*.² *Reynolds* involved a claim for damages against the federal government brought by the widows of three civilians killed in the crash of a B-29 aircraft. During discovery, plaintiffs sought production of the U.S. Air Force's official accident investigation reports and statements made by three surviving crew members. The United States objected, claiming that it had constitutional authority to refuse to disclose information related to national security.³ The Supreme Court rejected this "broad proposition[],"⁴ but explicitly noted for the first time the existence of a privilege to protect military and state secrets.

As described in *Reynolds*, the state secrets privilege is a common law evidentiary privilege that accords with the President's authority over national security.⁵ The privilege can be asserted only by the head of an executive branch agency with control over state secrets, and only after that person has filed an affidavit demonstrating that he or she has personally reviewed the information at issue and determined that it qualifies as state secrets.⁶ The court itself must ultimately decide whether the evidence is admissible.⁷ The *Reynolds* Court accepted the government's representations about the classified nature of the materials and refused to require their disclosure.⁸ The Court remanded the case so that litigation could proceed, declaring that "it should be possible for respondents to adduce essential facts as to causation without resort to material touching upon military secrets."⁹

Unfortunately, *Reynolds* left the contours of the privilege unclear. The Supreme Court did not describe the specific types of information that qualified for protection as a "state secret," or explain how courts should determine whether the privilege has been properly asserted. Unsurprisingly, lower courts have differed in their application of the privilege. Extrapolating from the brief description of the privilege in *Reynolds*, lower courts have concluded that it can affect litigation in a number of ways. First, it is clear from the result in *Reynolds* that the privilege can bar evidence from admission in litigation. The plaintiff's case will then go forward without the excluded evidence, and will be dismissed only if the plaintiff is unable to prove the prima facie elements of the claim without it. Second, lower courts have concluded that if the privilege deprives the defendant of information that would provide a valid defense, then the court may grant summary judgment for the defendant. And third, some courts have held that "if the 'very subject matter of the action' is a state secret, then the court should dismiss the plaintiff's action based solely on the invocation of the state secrets

² *United States v. Reynolds*, 345 U.S. 1, 6-7 (1953). Although this was the first case in which the Court explicitly recognized the privilege, the Court stated that the privilege was "well established," stretching back at least to the 1807 trial of Aaron Burr for treason. *Id.* at 9. For an in depth discussion of the *Reynolds* litigation, see LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE REYNOLDS CASE 29-118 (2006).

³ Brief for the United States at *9-*10, *15-*16, *21-*22, *United States v. Reynolds*, 345 U.S. 1 (1953), 1952 WL 82378.

⁴ *Reynolds*, 345 U.S. at 6.

⁵ *Id.* at 6-12.

⁶ *Id.* at 7-8.

⁷ *Id.* at 8.

⁸ The accident report was eventually declassified and, according to Louis Fisher, "revealed . . . serious negligence by the government" but "contained nothing that could be called state secrets." Fisher, *supra* note 2, at xi.

⁹ *Reynolds*, 345 U.S. at 11.

privilege.”¹⁰ However, as explained below, the Supreme Court has only taken such drastic action in the very narrow category of cases involving covert espionage agreements, and it is not clear that the Court ever intended the evidentiary privilege it recognized in *Reynolds* to serve as a jurisdictional bar.

Although *Reynolds* is the first explicit recognition of a state secrets privilege, it was not the first time the government claimed that litigation threatened national security. The 1875 decision in *Totten v. United States* is one of the Court’s earliest cases addressing the issue, and is also one of only two cases in which the Court ordered that the case must be dismissed because its “very subject matter” concerned secret evidence.¹¹ *Totten* involved a contract dispute between a Union spy and President Abraham Lincoln. The contract, which the parties entered into in July 1861, provided that the spy was to travel behind rebel lines and transmit information about the Confederate Army in return for payment of \$200 per month. The spy performed the tasks agreed upon, but was reimbursed only for his expenses. The Supreme Court concluded that although President Lincoln had the authority to enter into the contract, no court could enforce it. The Court then stated: “[A]s a general principle . . . public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated.”¹² Accordingly, the Court dismissed the case.

Totten was recently reaffirmed by the Supreme Court in *Tenet v. Doe*, a case in which two former spies claimed that the government had reneged on its agreement to provide lifetime support for them in the United States in return for espionage services in their native country.¹³ Their complaint alleged that the government had violated their equal protection and due process rights by refusing to abide by the terms of their original agreement. The Supreme Court held that the so-called “*Totten* bar” precludes judicial review of any claim based on a covert agreement to engage in espionage for the United States.¹⁴ Aside from these two cases concerning the terms of covert espionage agreements, the Supreme Court has never required the dismissal of litigation on the ground that it concerns state secrets.

III. THE STATE SECRETS PRIVILEGE SINCE SEPTEMBER 11, 2001

A. THE BUSH ADMINISTRATION’S UNPRECEDENTED ASSERTION OF THE PRIVILEGE

Reynolds admonished that the state secrets privilege “is not to be lightly invoked,”¹⁵ and for over two decades following that decision the government rarely asserted the privilege. Starting in 1977, however, the privilege was raised with greater frequency by both Democratic and Republican administrations. The privilege was asserted two times between 1961 and 1970, 14 times between 1971 and 1980, 23 times between 1981 and 1990, 26 times between 1991 and 2000.¹⁶

¹⁰ Kasza v. Browner, 133 F.3d 1159, 1166 (9th Cir. 1998) (quoting *Reynolds*, 345 U.S. at 11 n.26).

¹¹ See *Reynolds*, 345 U.S. at 7 n.11 (citing *Totten v. United States*, 92 U.S. 105, 107 (1875)).

¹² *Totten*, 92 U.S. at 107.

¹³ *Tenet v. Doe*, 544 U.S. 1 (2005).

¹⁴ See *id.* at 3.

¹⁵ *Reynolds*, 345 U.S. at 7.

¹⁶ See Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249 (2007), app.

From 2001 through 2006 both the number of invocations of the privilege and the occasions on which the Administration sought to dismiss a case in its entirety increased significantly. A recent article reviewed all the published cases in which the government has invoked the state secrets privilege since *Reynolds*. The author found that in its first six years, the Bush Administration has raised the privilege 20 times, which amounts to 28% more cases per year than in the previous decade.¹⁷ The sample size is small, and it is hard to draw conclusions from published decisions alone.¹⁸ But to the degree that the published cases provide any insight into the policy of the Bush Administration, they are consistent with the conclusion that it has used the privilege with greater frequency than ever before.¹⁹

Furthermore, and of greater significance, the Bush Administration's recent assertion of the privilege differs from past practice in that it is seeking blanket dismissal of every case challenging the constitutionality of specific, ongoing government programs. The data show that the Bush Administration sought dismissal in 92% more cases per year than in the previous decade.²⁰ By comparison, the government responded to lawsuits brought in the 1970s and 1980s challenging its warrantless surveillance programs by seeking to limit discovery, and only rarely filed motions to dismiss the entire litigation.²¹ The current practice represents a marked change not only in the number of assertions of the privilege, but also in the degree to which it is aimed at restricting access to the courts.

The Bush Administration has asserted the privilege in every case challenging two controversial government practices: (1) the use of extraordinary rendition, under which the United States transfers foreigners suspected of having ties to terrorist organizations to foreign countries for interrogation; and (2) the NSA's warrantless wiretapping program, under which the NSA has eavesdropped on electronic communications without first obtaining a warrant. In these cases, the Executive has invoked the state secrets privilege, not just as grounds for excluding specific pieces of evidence, but as a basis for having all litigation challenging these two programs dismissed with prejudice prior to discovery. The government makes almost identical arguments regarding the need for dismissal in each of the extraordinary rendition and NSA warrantless wiretapping cases. Summarized below are two cases in each category to give

¹⁷ *Id.* The government has asserted the privilege even more frequently since 2006. In *Conner v. AT&T*, the government informed the court that it "intends to assert the military and state secrets privilege in all of the[] actions" pending against the telephone company that allegedly provided the United States access to telephone communications without a warrant, and would "seek their dismissal." No. CV F 06-0632, 2006 WL 1817094, at *2 (E.D. Cal. June 30, 2006).

¹⁸ As Professor Chesney is careful to note, using published decisions as the basis for determining the frequency of a particular administration's assertion of the privilege is problematic. Chesney, *supra* note 16, at 1301-02. The Executive's claims may often be decided in unpublished rulings that are not available for analysis. Furthermore, cases decided during one administration might have arisen out of an assertion of the privilege that originated in another administration. And in any event the frequency of the privilege's assertion might have more to do without the number of cases challenging executive branch activity than a particular administration's policy regarding use of the privilege. That said, Professor Chesney analyzed these cases because they provide the only data on the privilege, and because even with the aforementioned limitations they help to guide discussion of patterns in executive assertion of the privilege. *Id.* at 1302.

¹⁹ Professor Chesney did not think these numbers were significant, and in fact argued that they "do[] not support the conclusion that the Bush Administration employs the privilege with greater secrecy than prior administrations." *Id.* at 1301. We disagree with that conclusion.

²⁰ The Executive sought outright dismissal in five cases between 1971 and 1980, nine cases between 1981 and 1990, 13 cases between 1991 and 2000, and 15 cases between 2001 and 2006. *Id.* at app.

²¹ *Id.*

the reader a sense of the underlying controversy, the position taken by the Bush Administration, and the courts' responses.

B. CHALLENGES TO EXTRAORDINARY RENDITION

Secretary of State Condoleezza Rice has acknowledged that the "United States and other countries have used 'renditions' to transport terrorist suspects from the country where they were captured to their home country or to other countries where they can be questioned, held or brought to justice."²² The United States denies, however, that the purpose of rendition is to send suspected terrorists to countries that engage in torture.²³ Two subjects of the extraordinary rendition program, Khaled El-Masri and Maher Arar, claim that the United States mistakenly identified them as suspected terrorists and sent them to countries where the U.S. government knew they would be tortured. Both filed lawsuits in federal court against the United States and the private contractors involved in the rendition. In both cases the United States filed motions to dismiss on the ground that the very subject matter of the cases involved state secrets.

1. *El-Masri v. Tenet*

Khaled El-Masri, a German citizen of Lebanese descent, filed a lawsuit against CIA officials and private contractors alleging that he was transported against his will to Afghanistan as part of the United States' extraordinary rendition program, and that he was repeatedly interrogated, drugged, and tortured throughout his ordeal.²⁴ El-Masri claimed violations of his constitutional rights, as well as international legal norms prohibiting prolonged, arbitrary detention and cruel, inhumane, and degrading treatment.²⁵

The United States filed a motion to dismiss, claiming that maintenance of the suit would inevitably require disclosure of state secrets. The government asserted that "the plaintiff's claim in this case plainly seeks to place at issue alleged clandestine foreign intelligence activity that may neither be confirmed nor denied in the broader national interest," but could not give more details about the potential damage because "even stating precisely the harm that may result from further proceedings in this case is contrary to the national interest."²⁶ El-Masri responded that the government's practice of extraordinary rendition, as well as his rendition specifically, had been widely discussed in public. His counsel submitted evidence demonstrating that Secretary Rice, White House Press Secretary Scott McClellan, and CIA Directors George Tenet and Porter Goss had all publicly acknowledged that the United States conducts renditions, and that El-Masri's rendition had been recounted in "numerous" media reports.²⁷ Thus,

²² Statement of Condoleezza Rice, Dec. 5, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/05/AR2005120500462.html>. On September 6, 2006, President Bush publicly acknowledged a CIA program of detaining and interrogating suspected terrorists in foreign locations. See *El-Masri v. United States*, 479 F.3d 296, 302 (4th Cir. 2007).

²³ *El-Masri*, 479 F.3d at 302.

²⁴ *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006).

²⁵ Specifically, El-Masri brought: (1) a *Bivens* claim against George Tenet, former Director of the CIA, and unknown CIA agents for violations of his Fifth Amendment right not to be deprived of his liberty without due process and not to be subject to treatment that "shocks the conscience"; (2) a claim pursuant to the Alien Tort Statute for violations of international legal norms prohibiting prolonged, arbitrary detention; and (3) a claim pursuant to the Alien Tort Statute for each defendant's violation of international legal norms prohibiting cruel, inhuman, and degrading treatment.

²⁶ Motion to Dismiss at 11-12, *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006).

²⁷ *El-Masri*, 479 F.3d at 301.

El-Masri argued that neither he nor the government needed to rely on privileged information to make their respective cases.

Judge T.S. Ellis granted the government's motion and dismissed the case. Judge Ellis observed that "courts must not blindly accept" the executive branch's assertion of the privilege, but then stated that "courts must also bear in mind the Executive Branch's preeminent authority over military and diplomatic matters and its greater expertise relative to the judicial branch in predicting the effect of a particular disclosure on national security."²⁸ Although the government had publicly acknowledged that it engaged in rendition of suspected terrorists, Judge Ellis concluded that this general information did not render the details of the program as it may have been applied to El-Masri less worthy of being kept classified. Judge Ellis then determined that the case must be dismissed because the United States could not mount a defense without the privileged information.²⁹ He rejected El-Masri's suggestion that the court establish protective procedures to allow the case to go forward, such as providing defense counsel with clearance to review classified documents. Such measures would be "plainly ineffective," Judge Ellis concluded, because the "entire aim of the suit is to prove the existence of state secrets."³⁰ Accordingly, "El-Masri's private interests must give way to the national interest in preserving state secrets."³¹

El-Masri appealed the dismissal to the Fourth Circuit, which affirmed the district court.³² Like Judge Ellis, the Fourth Circuit noted that the Bush Administration had publicly acknowledged the existence of the CIA's extraordinary rendition program generally, and that El-Masri's detention and rendition had been the subject of public investigation and discussion.³³ Nonetheless, the court held that El-Masri could not demonstrate that the defendants were involved in his detention and interrogation without relying on information constituting state secrets.³⁴ The Fourth Circuit also rejected El-Masri's suggestion that the privileged evidence be admitted under seal, to be reviewed only by the court and El-Masri's counsel, who would first obtain the requisite security clearance.³⁵ The court explained that it "need not dwell long" on this proposal, finding that such measures are "expressly foreclosed by *Reynolds*."³⁶

2. *Arar v. Ashcroft*

Maher Arar's claims parallel those raised by Khaled El-Masri.³⁷ Like El-Masri, Arar alleged that he was abducted, detained, and then sent to another country where he was tortured as part of the United States' practice of extraordinary rendition. Arar, a Syrian-born Canadian citizen, was employed as a software engineer in Massachusetts. In September 2002, he was vacationing abroad and was detained by U.S. authorities at J.F.K. International Airport in New York City while making a flight connection on his way back to Canada. Federal officials took Arar into custody and held him for 13

²⁸ *El-Masri*, 437 F. Supp. 2d at 536.

²⁹ *Id.* at 539.

³⁰ *Id.* at 540.

³¹ *Id.* The district court did not address the United States' alternative argument that the case was nonjusticiable pursuant to the "*Totten* bar." *Id.* at 540.

³² *El-Masri*, 479 F.3d 296.

³³ *Id.* at 302.

³⁴ *Id.* at 308-10.

³⁵ *Id.* at 311.

³⁶ *Id.* at 311.

³⁷ *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006).

days. He was then flown by private jet to Amman, Jordan, where he was delivered to Jordanian officials, who in turn brought him to Syria. In Syria, Arar was imprisoned for a year in a small jail cell where he was beaten and tortured by Syrian security forces. He claimed that his Syrian interrogators worked with U.S. officials, who provided information and questions and received reports from the Syrians about Arar's responses. Arar was released on October 5, 2003. No charges were ever filed against him.³⁸ On October 24, 2007, Secretary of State Condoleezza Rice admitted in a hearing before the House Foreign Affairs Committee that Arar's case was not "handled as it should have been."³⁹

Arar filed suit in the Eastern District of New York claiming that his removal from the United States violated his Fifth Amendment rights, as well as the Torture Victims Protection Act and applicable treaties. Prior to discovery, the government moved for dismissal or summary judgment on state secrets grounds.⁴⁰ The Administration's arguments were identical to those made in El-Masri's case: the very subject matter of the case concerned the details of a program that was secret, and needed to be kept that way to safeguard national security. The government's reasons for detaining Arar, concluding that he was a member of al Qaeda, and then sending him to Syria rather than to Canada cannot be disclosed, the government argued, without jeopardizing national security. Because information at the "core" of Arar's first three claims is a state secret, the government argued that these claims must be dismissed.

The district court dismissed all of Arar's claims, holding that Arar could not seek damages for violation of his constitutional rights "given the national security and foreign policy considerations at stake."⁴¹ Thus, although the court did not directly address the Executive's claim that the case should also be dismissed on state secrets grounds, the government's national security concerns were the basis for dismissal of some of his claims.⁴² A panel of the Second Circuit affirmed the dismissal, and the state secrets privilege again was a factor in its conclusion that Arar could not seek damages from federal officials for violations of his constitutional rights. The Second Circuit stated that assertion of the privilege serves as "a reminder of the undisputed fact that the claims under consideration involve significant national security decisions made in consultation with several foreign powers," and thus "constitutes a further special factor counseling us to hesitate before creating a new cause of action or recognizing one in a domain so clearly inhospitable to the fact-finding procedures and methods of adjudication deployed by the federal courts."

In August 2008, the Second Circuit took the very unusual step of sua sponte granting rehearing en banc. Oral argument is scheduled for December 9, 2008.

³⁸ In January 2007, a Canadian commission charged with investigating Canada's role in Arar's extradition concluded that Canadian intelligence officials had erroneously linked Arar to al Qaeda, and then provided that inaccurate information to their American counterparts. Canada issued an official apology to Arar and awarded him approximately \$10 million. See Scott Shane, *Justice Dept. Investigating Deportation to Syria*, N.Y. TIMES, June 6, 2008, at A6.

³⁹ *Rice Admits U.S. Erred in Deportation*, N.Y. TIMES, Oct. 25, 2007, at A10.

⁴⁰ The government did not seek dismissal of Arar's fourth claim on state secrets grounds. That claim concerned his alleged mistreatment while detained in the United States. The United States and the individual defendants sought to dismiss that claim on other grounds.

⁴¹ *Arar*, 414 F. Supp. 2d at 287.

⁴² *Id.*

C. CHALLENGES TO THE NSA'S WARRANTLESS WIRETAPPING

President Bush publicly acknowledged the existence of the NSA's warrantless wiretapping program in December 2005 after an article describing the practice appeared in the *New York Times*. As the President explained at a press conference on December 19, 2005, he authorized the NSA to intercept communications for which there were "reasonable grounds to believe that (1) the communication originated or terminated outside the United States, and (2) a party to such communication is a member of al Qaeda, a member of a group affiliated with al Qaeda, or an agent of al Qaeda or its affiliates." Shortly thereafter, a number of different individuals who believed they had been subjects of the warrantless wiretaps filed suit in federal court challenging the legality of this practice.

1. *Hepting v. AT&T Corporation*

In *Hepting v. AT&T Corporation*,⁴³ filed in the Northern District of California, plaintiffs alleged that AT&T collaborated with the NSA to eavesdrop on the communications of millions of Americans. The complaint asserted that AT&T, acting as an agent of the U.S. government, violated the First and Fourth Amendment rights of U.S. citizens, as well as the Foreign Intelligence Surveillance Act (FISA) and various other state and federal laws. Plaintiffs sought damages, restitution, disgorgement, and injunctive and declaratory relief on behalf of the class.⁴⁴ The United States sought to intervene and moved for dismissal or summary judgment on the basis of the state secrets privilege, for three reasons: first, because the "very subject matter of [the action]" concerns privileged information; second, because the plaintiffs could not make their prima facie case without the privileged information; and third, because the absence of the privileged information would deprive AT&T of a defense.⁴⁵ In addition, because the case concerned a covert agreement between AT&T and the government, the United States contended that it qualified for dismissal under *Totten v. United States*.

Judge Vaughn Walker denied the government's motion, explaining that there was a great deal of publicly available information about the NSA terrorist surveillance program that cut against application of the "*Totten* bar."⁴⁶ Turning to the state secrets privilege, the court noted as a threshold matter that "no case dismissed because its 'very subject matter' was a state secret involved ongoing, widespread violations of individual constitutional rights," as were alleged here, but instead most cases concerned "classified details about either a highly technical invention or a covert espionage relationship."⁴⁷ In addition, the court stated that the "very subject matter of this action is hardly a secret" because "public disclosures by the government and AT&T indicate that AT&T is assisting the government to implement some kind of surveillance program."⁴⁸ Finally, Judge Walker concluded that it was "premature" to decide whether the case should be dismissed on the ground that plaintiffs could not make out a prima facie case or AT&T could not assert a valid defense.⁴⁹ Instead, he decided to let discovery proceed and then assess whether any information withheld pursuant to the state secrets privilege would require the suit's dismissal. In conclusion, Judge

⁴³ *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006).

⁴⁴ *Id.* at 979.

⁴⁵ *Id.* at 979, 985.

⁴⁶ *Id.* at 993.

⁴⁷ *Id.*

⁴⁸ *Id.* at 994.

⁴⁹ *Id.*

Walker commented that he viewed the state secrets privilege as limited, at least in part, by the role of the judiciary in the constitutional structure:

[I]t is important to note that even the state secrets privilege has its limits. While the court recognizes and respects the executive's constitutional duty to protect the nation from threats, the court also takes seriously its constitutional duty to adjudicate the disputes that come before it. . . . To defer to a blanket assertion of secrecy here would be to abdicate that duty. . . .⁵⁰

The decision was appealed to the Ninth Circuit. On August 21, 2008, a panel of the Ninth Circuit remanded the case to the district court "in light of the FISA Amendments Act of 2008."⁵¹

2. *ACLU v. NSA*

ACLU v. NSA was filed by a group of journalists, academics, attorneys, and non-profit organizations.⁵² The plaintiffs regularly communicate with individuals from the Middle East whom the government might suspect of being affiliated with al Qaeda, and thus they claimed a "well-founded belief" that their telephone calls and internet communications have been intercepted under the NSA's warrantless wiretapping program. They contended that even the possibility that the government is eavesdropping on their calls has a chilling effect on their communications and thus disrupts their ability to talk to clients, sources, witnesses, and generally engage in advocacy and scholarship.⁵³ Plaintiffs brought suit in federal court in the Eastern District of Michigan challenging the surveillance program as a violation of the separation of powers doctrine, their First and Fourth Amendment rights, FISA, and other federal laws. They sought declaratory and injunctive relief that would prevent the NSA from eavesdropping on domestic communication without a warrant.

The United States filed a motion to dismiss very similar to that in *Hepting*. The Executive conceded that the "issues before the Court" regarding the constitutionality of the NSA's surveillance program "are obviously significant and of considerable public interest."⁵⁴ But it contended that these questions cannot be explored in litigation because disclosure of the "intelligence activities, information, sources, and methods" relevant to the litigation would jeopardize national security.⁵⁵ Without this evidence, the Executive claimed that plaintiffs could neither establish standing to sue nor prove the merits of their claims. Furthermore, the Executive argued that the "very subject matter" of the lawsuit is a state secret, and thus asserted that the litigation must be dismissed, or alternatively the court should grant defendants' motion for summary judgment.⁵⁶

⁵⁰ *Id.* at 995 (internal citations omitted).

⁵¹ *Hepting v. AT&T Corp.*, 539 F.3d 1157 (9th Cir. 2008).

⁵² *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006).

⁵³ Complaint at 2, *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006).

⁵⁴ Memorandum of Points and Authorities in Support of the United States' Assertion of the Military and State Secrets Privilege; Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment; and Defendants' Motion to Stay Consideration of Plaintiffs' Motion for Summary Judgment at 1, *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006).

⁵⁵ *Id.* at 4.

⁵⁶ *Id.* at 5.

The plaintiffs responded that the Executive's public statements acknowledging the existence of the NSA's surveillance program were sufficient to determine their standing and the lawfulness of the program. The government, however, strongly disagreed: "[T]o decide this case on the scant record offered by Plaintiffs, and to consider the extraordinary measure of enjoining the intelligence tools authorized by the President to detect a foreign terrorist threat on that record, would be profoundly inappropriate."⁵⁷ The government argued that the President's exercise of his "core Article II and statutory powers to protect the Nation from attack" cannot be resolved on the basis of the public record alone.⁵⁸

On August 17, 2006, Judge Anna Diggs Taylor rejected the government's claim that the case should be dismissed on state secrets grounds, and found the NSA's warrantless wiretapping program to be unconstitutional.⁵⁹ The government's attempt to have the case dismissed prior to discovery suggested to Judge Taylor that the government was arguing that the case was not justiciable under the *Totten* doctrine. Judge Taylor concluded, however, that the *Totten* bar was not applicable because the case did not concern an "espionage relationship between the Plaintiff and the Government," as had been the case in *Totten* and in the most recent application of that doctrine in *Tenet v. Doe*.⁶⁰ Following the lead of Judge Walker, Judge Taylor reviewed the aspects of NSA's warrantless wiretapping program that had been publicly admitted by the Administration, and the defense of that program that the Administration had articulated thus far. She concluded that plaintiffs' challenge to the program could be resolved based on the Executive's on-the-record statements, and that neither the plaintiffs nor the government needed to discuss the allegedly privileged details of the program to pursue the litigation.⁶¹ For those reasons, Judge Taylor denied the government's motion to dismiss or for summary judgment, and went on to address the merits of the constitutional and statutory challenges to the NSA warrantless wiretapping program.

The Executive filed an appeal in the Sixth Circuit, which reversed the district court and concluded the plaintiffs lacked standing to litigate their claims. The Sixth Circuit agreed with the lower court that because the government had acknowledged engaging in warrantless wiretapping, the case could not be dismissed on the ground that the subject matter of the lawsuit was a state secret.⁶² But the Sixth Circuit concluded that the state secrets privilege applied to bar disclosure of documents that could have established standing. Without such records, the plaintiffs could not demonstrate that their own communications had been intercepted by the NSA.⁶³

D. CONCLUSION

The state secrets privilege has strayed far from the narrow evidentiary privilege described in *Reynolds*, and is now being asserted as a basis for dismissal of entire categories of litigation challenging government programs. *Reynolds* admonished that the privilege is "not to be lightly invoked," and yet it is now cited regularly by the government in numerous cases. As one commentator put it, the state secrets privilege

⁵⁷ *Id.* at 3.

⁵⁸ *Id.*

⁵⁹ *ACLU*, 438 F. Supp. 2d 754.

⁶⁰ *Id.* at 763.

⁶¹ *Id.* at 765-66.

⁶² *ACLU*, 493 F.3d at 650 n.2.

⁶³ *Id.* at 653.

has been “transform[ed] from a narrow evidentiary privilege into something that looks like a doctrine of broad government immunity.”⁶⁴

IV. THE STATE SECRETS PRIVILEGE AND THE COURTS

The cases described above demonstrate that many judges readily defer to executive claims of privilege. Judges explain that they are ill-equipped to determine whether the information sought in discovery would undermine relations with foreign governments, put informants at risk, or alert terrorists to government surveillance. Judges repeatedly assert that they must defer to the executive because they lack the ability to make independent judgments about the executive’s claimed need for the privilege, and frankly concede that they are reluctant second-guess the executive’s assertions that disclosure will put the nation at risk.

But the executive is also not a good judge of the need for the privilege. When high-ranking government officials are sued for violating the law, they have an obvious self-interest in avoiding scrutiny of their actions and the liability that might follow. Although there have been many legitimate assertions of the privilege, the executive has also been known to overuse the privilege to avoid the embarrassment, cost, and hassle of litigation. Indeed, *Reynolds* itself is claimed to have been just such a case. Although the United States had asserted that the accident investigation report sought in that case contained state secrets, when the report was eventually declassified many years later, a leading expert on the case observed that the report “revealed . . . serious negligence by the government” but “nothing that could be called state secrets.”⁶⁵ Judges cannot simply accept sweeping executive claims of privilege, because to do so would be to allow the executive to serve as judge and jury in its own case.

As James Madison explained, the federal courts play an essential role in checking the power of the executive, thereby preventing the “tyranny” that results from the “accumulation of all powers legislative, executive and judiciary in the same hands.”⁶⁶ Indeed, the Framers of the Constitution provided federal judges with life tenure and salary protections in part to ensure that courts can block legislative and executive branch overreaching without fear of retribution. When courts dismiss cases challenging the legality of executive conduct, they have abdicated this vital role in the tripartite system of government.

Of particular importance is the federal judicial role in safeguarding individual constitutional rights against executive abuse of power—issues directly implicated by challenges to extraordinary rendition and warrantless wiretapping. The Supreme Court has repeatedly asserted its power to review constitutional claims, despite executive and legislative attempts to strip courts of jurisdiction, observing that “serious constitutional questions [] would arise” if a plaintiff were denied “any judicial forum for a colorable constitutional claim.”⁶⁷ In the leading case on this question, *Webster v. Doe*, the government made many of the same arguments against judicial review that it raises in cases challenging extraordinary rendition and warrantless wiretapping. In *Webster*, a former CIA employee challenged his termination on the ground that it violated his constitutional rights to equal protection and due process. The government

⁶⁴ Henry Lanman, *Secret Guarding*, SLATE, May 22, 2006, available at <http://www.slate.com/id/2142155>.

⁶⁵ See Fisher, *supra* note 2, at xi.

⁶⁶ THE FEDERALIST No. 47, at 324 (James Madison) (J. Cooke ed., 1961).

⁶⁷ *Webster v. Doe*, 486 U.S. 592, 603 (1988) (citing *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)).

responded that no court could review the decision to terminate Webster, arguing that “judicial review even of constitutional claims will entail extensive ‘rummaging around’ in the Agency’s affairs to the detriment of national security.”⁶⁸ The Court rejected this argument, concluding that the need for a judicial forum in which to litigate constitutional claims was too weighty an interest to preclude litigation entirely, and explained that the district court could control discovery so as to “balance [the employee’s] need for access to proof . . . against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission.”⁶⁹ The recent decisions denying plaintiffs a forum in which to litigate their claims challenging the constitutionality of extraordinary rendition and warrantless wiretapping are incompatible with this long tradition of judicial protection of individual rights.

Plaintiffs challenging warrantless wiretapping claim that the practice exceeds statutory as well as constitutional limits, and thus these cases should be even harder for courts to dismiss without review. Congress enacted FISA precisely to limit executive power to monitor the communications of those within the United States.⁷⁰ When courts dismiss claims that FISA has been violated, they undermine Congress’s authority as well as their own, rendering laws like FISA a nullity. The Supreme Court has repeatedly rejected the executive’s attempt to assume the unilateral power to decide for itself what the law requires. As the Court explained in *Hamdi v. Rumsfeld*, “it would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his government, simply because the Executive opposes making available such a challenge.”⁷¹ Likewise, the executive cannot be allowed to ignore the limitations imposed by federal law and then seek to avoid judicial review entirely on the ground that the case concerns a “state secret.”

Although the federal courts may not have the expertise to determine in every case which information constitutes a state secret, they are well-equipped to apply safeguards and protective procedures that would allow litigation to proceed without jeopardizing national security. Indeed, courts have done so on a regular basis for decades. Long before the Bush Administration took office, courts responded to the Executive’s claimed need for secrecy in challenges to the CIA’s employment practices, in Freedom of Information Act (FOIA) cases, and in countless criminal cases. Such cases were not dismissed on the pleadings. Rather, courts applied longstanding litigation tools designed to allow litigation to proceed while at the same time safeguarding national security. For example, courts can require the executive to submit allegedly classified documents in camera, so that only the court can review them to determine whether the documents can be withheld from the opposing party. So too, courts can allow attorneys who hold appropriate security clearances to review classified materials on behalf of their clients. In FOIA cases, the government has long been required to generate an index describing each document withheld and explaining the basis for the executive’s claim that its disclosure would harm national security.⁷² This procedure allows both the court and the opposing party to determine which documents are truly relevant and to challenge the basis for the executive’s claim that the documents must

⁶⁸ *Id.* at 604 (citing Tr. of Oral Arg. 8-13).

⁶⁹ *Id.* at 604.

⁷⁰ Americo R. Cinquegrana, *The Walls (and Wires) Have Ears: The Background and First Ten Years of the Foreign Intelligence Surveillance Act of 1978*, 137 U. PA. L. REV. 793, 806-08 (1989).

⁷¹ *Hamdi v. Rumsfeld*, 542 U.S. 507, 536-37 (2004).

⁷² See *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

remain secret. Finally, courts regularly mandate that the United States segregate any non-classified material from classified documents to provide the opposing party with as much information as possible.⁷³

Significantly, courts and Congress have successfully worked together in the past to manage classified evidence in criminal prosecutions. In 1980, Congress enacted the Classified Information Procedures Act (CIPA) to balance the government's interest in protecting such information from disclosure against criminal defendants' need to obtain all information relevant to their defense. Under CIPA, the court responds to a defense request for classified documents by first determining whether the evidence sought is relevant and material. If so, the burden shifts to the government to show that the information contains sensitive information about national security that cannot be publicly disclosed.⁷⁴ Even if the government satisfies its burden, the information is not completely withheld from the defendant. Rather, the court decides whether a modification or substitute for the evidence is possible. CIPA requires the government to produce redacted versions of documents, submit a summary of the information in the classified documents, or substitute a statement admitting relevant facts that the classified documents would prove.⁷⁵ If the government fails to provide a sufficient substitute for the requested documents, the court may dismiss specified counts or even the entire prosecution.⁷⁶ Similar procedures should be followed in the context of civil cases, as is proposed in pending legislation that is described in more detail below.

In sum, there are many steps short of outright dismissal that judges can take to protect state secrets from public disclosure. At the very least, judges should allow discovery to proceed in some fashion before deciding whether the "very subject matter" of the case requires its dismissal. What courts should not do is find that executive claims of privilege are grounds for immediate dismissal of entire categories of cases challenging the legality of executive conduct. The dismissals are particularly egregious considering that the Bush Administration has expressly conceded the existence of both the NSA's warrantless wiretapping and the practice of extraordinary rendition, albeit only after journalists uncovered the practices and pressed the Administration to justify them. These activities are public, not secret, and determining their legality is important not just to those harmed by them, but to all who might be in the future. It is time the courts determined the legality of executive conduct rather than ducking these questions at the executive's behest.

V. THE STATE SECRETS PRIVILEGE AND THE NEW ADMINISTRATION

A. THE NEED FOR THE EXECUTIVE BRANCH TO REFORM THE PRIVILEGE

The next presidential administration should reform the use of the state secrets privilege. By adopting some or all of the steps proposed below, the new administration can ensure that the coordinate branches of government are able to fulfill their constitutional roles. These measures will reduce inter-branch friction, restore Congress's and the courts' trust in the executive branch, and ensure that Americans are not denied justice by their own government.

⁷³ See, e.g., *Schiller v. NLRB*, 964 F.2d 1205, 1209 (D.C. Cir. 1992).

⁷⁴ See *United States v. Yunis*, 867 F.2d 617, 622 (D.C. Cir. 1989).

⁷⁵ 18 U.S.C. App. § 4.

⁷⁶ 18 U.S.C. App. § 6.

As scholars, lawyers, and policymakers have recognized, the executive branch can place its programs on firmer ground, and better protect both the nation's security and liberty, through working with and not against the coordinate branches of government. Jack Goldsmith, a former senior official in the Bush Pentagon and Justice Department, testified before the Senate Judiciary Committee last year that "[t]he administration's failure to engage Congress deprived the country of national debates about the nature of the threat and its proper response that would have served an educative and legitimating function regardless of what emerged from the process."⁷⁷ As Professor Goldsmith explained, "[w]hen the Executive branch forces Congress to deliberate, argue, and take a stand, it spreads accountability and minimizes the recriminations and other bad effects of the risk taking that the President's job demands."⁷⁸ Just as an extreme unilateralist approach with respect to Congress ultimately undermines authority and support for administration programs, so too will an administration's efforts to limit the role of the courts through excessive use of the state secrets privilege eventually backfire.

When the executive branch deprives courts of the ability to perform their constitutional job of interpreting the law and administering justice, it calls into question the legal basis for its programs, and cause judges and the public at large to question whether the executive branch is operating in good faith. This may, over time, lead to a "boy who cried wolf" scenario where the executive cannot rely on the privilege in a situation in which it is truly necessary. Indeed, Maher Arar's case illustrates the growing skepticism regarding the Bush Administration's assertion of the privilege. Even as the government was claiming that Arar's case could not proceed because it might damage U.S. relations with Canada, the Canadian government was holding public hearings on the matter, and ultimately issued an apology to Arar and awarded him approximately \$10 million.⁷⁹ Distrust of the Administration's claimed need for secrecy may have been the basis for the Second Circuit's highly unusual decision to sua sponte grant rehearing en banc of an appellate panel's dismissal of Arar's case. If the new administration wishes to avoid judicial and legislative second-guessing of its claims of privilege, it should better police its assertions of the privilege.

B. SPECIFIC MEASURES THE NEW ADMINISTRATION SHOULD ADOPT

The next administration should consider implementing the following measures upon taking office. These proposals could be adopted individually, or grouped together as a comprehensive package. The list below is not intended to be exhaustive, but rather to suggest useful avenues for the new administration to pursue.

First, the new administration should conduct an across-the-board review of all pending litigation in which the government—either as a party or an intervenor—has invoked the state secrets privilege. Just because the Bush Administration invoked the privilege in a particular case does not mean the new administration should consider itself bound by its predecessor's litigation approach. This across-the-board review should be carried out by a joint group of career employees and political appointees of the new administration, and should include officials from both the Justice Department and the intelligence and national security communities. It should cover not only cases

⁷⁷ Testimony of Jack Goldsmith on "Preserving the Rule of Law in the Fight Against Terrorism" Before the S. Comm. on the Judiciary (Oct. 2, 2007) (hereinafter Goldsmith Testimony), *available at* http://judiciary.senate.gov/testimony.cfm?id=2958&wit_id=6693.

⁷⁸ *Id.*

⁷⁹ See Shane, *supra* note 38.

that are pending in district courts, but also those in which the state secrets privilege is at issue on appeal.

Second, the next president should issue an executive order, binding on all federal agencies, that sets out substantive legal standards regarding use of the privilege. This order might include a new definition of what constitutes a state secret and what evidence the government believes is appropriately subject to the privilege, based either on the current classification system,⁸⁰ or the definitions of “state secrets” in proposed legislation that is currently pending before Congress. An important element of an executive order on the privilege would be creating a standard for when the government may seek outright dismissal of a case, at the pleadings stage, on the basis of the privilege. For example, an effective order could emphasize that this approach is supported by precedent only in cases involving secret espionage agreements, such as those at issue in *Totten v. United States* and *Tenet v. Doe*, and may not be appropriate in cases relating to other subjects. The executive order should take into account the harm to litigants and the public of invoking the privilege either to prevent introduction of evidence or seek dismissal of the case. The president’s constitutional responsibilities include not only protecting the nation’s security, but also taking care that the laws are properly enforced.⁸¹ If important evidence is kept out of court, or entire cases are dismissed on the pleadings, the law cannot be optimally followed and enforced. Accordingly, the executive branch should adopt a substantive standard that requires it to evaluate the harm that will result when invoking the state secrets privilege.

Third, either as part of an executive order or through a formal memorandum issued by the new attorney general, the administration should create a durable and extensive review process within the executive branch for deciding when to assert the privilege in future cases. Internal procedural requirements within the bureaucracy can create a strong layer of checks and balances, taking advantage of the benefits of multiple viewpoints and the experience and judgment of career civil servants.⁸² When just a few executive branch officials make decisions without broader consultation and input, the results can be severely flawed. This is especially the case with complex legal analysis, as demonstrated by the failures resulting from the Bush Administration’s refusal to seek input from different officials within the administration.⁸³ As Professor Goldsmith testified before the Senate Judiciary Committee, “[c]lose-looped decision-making by like-minded lawyers resulted in legal and political errors that would be very costly to the administration down the road. Many of these errors were unnecessary and would have been avoided with wider deliberation and consultation.”⁸⁴

Judicial doctrine provides that the state secrets privilege may only be “lodged by the head of the department which has control over the matter”—not

⁸⁰ See Exec. Order No. 13292, 68 Fed. Reg. 15,315 (Mar. 25, 2003) (specifying classification guidelines).

⁸¹ See U.S. CONST., Art. II, § 3 (the President “shall take Care that the Laws be faithfully executed”).

⁸² See Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2317 (2006) (arguing that the bureaucracy can serve as a “critical mechanism to promote internal separation of powers” in part because it “contains agencies with differing missions and objectives that intentionally overlap to create friction.”).

⁸³ See Goldsmith Testimony, *supra* note 79 (“For example, the controversial interrogation opinion of August 1, 2002, was not circulated for comments to the State Department, which had expertise on the meaning of torture and the consequences of adopting particular interpretations of torture. Another example is the Terrorist Surveillance Program (TSP). Before I arrived at OLC, the NSA General Counsel did not have access to OLC’s legal analysis related to the TSP.”).

⁸⁴ *Id.*

a low-level official.⁸⁵ That official must give “actual personal consideration” to the issue, and attest to this in a formal declaration.⁸⁶ Recent practice suggests, however, that these doctrinal procedural requirements are insufficient in light of the significant impact of invocation of the privilege. And although officials from the Bush Justice Department have asserted that attorneys from the Department, in addition to counsel from the relevant agency, are involved in determining when to invoke the privilege, they have not indicated the existence of any formal review process within the Justice Department.⁸⁷

The new administration or Justice Department should institute a formal process for invoking the privilege, by setting out a list of offices or officials who must sign off on the decision. To begin, a senior official within the Department, perhaps the deputy attorney general, should be required to personally approve all invocations of the privilege. This will provide accountability for secrecy at the highest levels of the administration. Moreover, a new review process might include a referral to the Department’s Professional Responsibility Advisory Office (PRAO) to ensure that the privilege is not being invoked out of a conflict of interest.⁸⁸ Further, the Justice Department should consider establishing a litigant’s ombudsman who could serve as an advocate for the members of the public who would be harmed by invocation of the privilege.⁸⁹ By requiring that these offices approve the government’s exercise of the privilege, the new administration would bring more viewpoints into its deliberations and reduce the likelihood of error or unnecessary harm to the interests of justice.

Fourth, the administration should institute a system to automatically refer evidence that it asserts is privileged to an Office of the Inspector General (OIG). Even if the privilege is invoked appropriately and narrowly by the administration, and subjected to careful review by the courts, the state secrets privilege will prevent the introduction of some important evidence in court. This is the very purpose of the privilege, and it may sometimes be necessary to prevent the disclosure of secret information that would harm the nation’s security—even when that evidence demonstrates illegal activity. Because even proper use of the privilege can disrupt the usual system of checks and balances and limit oversight of the executive branch, it is important that an independent body within the executive branch review the evidence and take action to prevent or ameliorate violations of the law that cannot be disclosed in court. By mandating referral of assertedly privileged evidence to an OIG, the new administration can

⁸⁵ See *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953).

⁸⁶ *Id.*

⁸⁷ See Letter from Michael Mukasey, U.S. Att’y Gen., to Sen. Patrick Leahy (Mar. 31, 2008) (hereinafter Mukasey Letter) (asserting that “[s]everal procedural and substantive requirements preclude the state secrets privilege from being lightly invoked or accepted” but not delineating any within the Justice Department); Statement of Carl J. Nichols, Dep. Ass’t Att’y Gen., Before the S. Comm. on the Judiciary (Feb. 13, 2008), available at <http://www.fas.org/sgp/congress/2008/021308nichols.html> (“In practice, satisfying these requirements typically involves many layers of substantive review and protection. The agency with control over the information at issue reviews the information internally to determine if a privilege assertion is necessary and appropriate. That process typically involves considerable review by agency counsel and officials. Once that review is completed, the agency head—such as the Director of National Intelligence or the Attorney General—must personally satisfy himself or herself that the privilege should be asserted.”).

⁸⁸ See Professional Responsibility Advisory Office Website, available at <http://www.usdoj.gov/prao/mission.htm> (stating that the mission of PRAO includes providing “definitive advice to government attorneys and the leadership at the Department on issues relating to professional responsibility”).

⁸⁹ A model for this would be the Justice Department’s Office of the Victims’ Rights Ombudsman. See <http://www.usdoj.gov/usao/eousa/vr/index.html> (describing that office’s mission and operations).

ensure that any evidence of abuse or wrongdoing—even if properly covered by the privilege—will be addressed and corrected. The Justice Department’s OIG has demonstrated extraordinary integrity and independence in recent years, and thus would be the appropriate office to conduct the review. However, if the administration believes it appropriate, the privileged evidence could be referred to the relevant department or agency OIG, for example that within the Department of Defense or the CIA. The OIG could then serve as a partial substitute for the courts by investigating and providing accountability for any wrongdoing revealed by the privileged evidence.

Finally, the new administration should encourage the next Congress to enact the State Secrets Protection Act, discussed below, or similar legislation. Rather than work with Congress to craft state secrets legislation, the Bush Administration has attempted to undermine the proposed legislation by making specious attacks on its constitutionality and vowing to veto any bill passed by Congress.⁹⁰ The new administration should work with members of the House and Senate Judiciary Committees to pass and sign into law the State Secrets Protection Act. At a minimum, it should cooperate with the Judiciary Committees to modify these bills to address its concerns. The next section discusses the legislation and its benefits in more detail.

Adopting these measures would enable the new administration to restore a proper balance between the branches of government, fulfill its constitutional responsibilities to enforce the rule of law, and protect both national security and the interests of justice.

VI. THE STATE SECRETS PRIVILEGE AND CONGRESS

Congress also has the power to shape the judicial response to the state secrets privilege, and a bipartisan group of legislators has recently introduced legislation seeking to do so. In January 2008, Senators Edward Kennedy, Patrick Leahy, and Arlen Specter introduced the State Secrets Protection Act,⁹¹ which is a bill to regulate the use of the state secrets privilege. The Act was voted out of the Senate Judiciary Committee, but did not reach the floor. The House of Representatives also introduced a Bill to reform the use of the state secrets privilege, which was recently approved by the House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties.⁹² Although these bills likely will not be enacted into law by this Congress, we hope similar legislation will be revived by a future Congress to provide much-needed guidance to courts struggling to resolve blanket assertions of privilege.

A. OVERVIEW OF THE STATE SECRETS PROTECTION ACT

This section will briefly describe the Senate version of the State Secrets Protection Act, S. 2533, which is quite similar to the bill pending in the House. The Act states that a court shall not dismiss a case on state secrets grounds prior to holding a hearing on the matter. As is already the case, the Act requires that the government provide an affidavit, signed by the head of the executive branch agency responsible for the information, explaining the factual basis for the claim of privilege. In addition, the government must make all the evidence it claims is subject to the privilege available for review by the judge, together with an index explaining the basis for withholding each item of evidence. For each item the government asserts is privileged, the court must

⁹⁰ See Mukasey Letter, *supra* note 89.

⁹¹ The State Secrets Protection Act of 2008, S. 2533, 110th Cong.

⁹² The State Secrets Protection Act of 2008, H.R. 6507, 110th Cong.

determine whether the claim is valid, and whether it is possible to segregate and disclose non-privileged evidence.

If the court agrees with the government that material evidence is privileged, the Act provides that it should then attempt to craft a non-privileged substitute that will allow the case to go forward. This portion of the Act is modeled after CIPA, described in more detail above, which has proven effective in governing the use of classified evidence in criminal cases. For example, the court might order the government to provide a summary of the privileged information, or a statement admitting relevant facts established by the privileged information. If the government refuses to comply with such an instruction, the court must resolve the disputed question of fact or law to which the evidence relates in favor of the plaintiff. If, however, the court concludes that material evidence is privileged and a substitute is not possible, it may dismiss the claim if it concludes that, in the absence of evidence, the defendant would be unable to pursue a valid defense to the claim.

If attorneys for the nongovernmental parties obtain security clearance, the Act states that they may review the affidavits and motions, and participate in the hearings. The court also has the authority to appoint a guardian ad litem with the necessary clearance to represent a party at a hearing on the privilege, and to stay proceedings while an attorney applies for such a security clearance. Finally, the Act provides that the attorney general report to Congress any assertion of the state secrets privilege so that Congress can monitor its use.

B. THE CONSTITUTIONALITY OF THE STATE SECRETS PROTECTION ACT

Some have argued that the state secrets privilege is rooted in the executive's constitutional role as commander-in-chief, and thus contend that this legislation might impermissibly encroach on executive authority.⁹³ The Supreme Court has never held that the privilege is constitutionally required, however, or that it is within the exclusive control of the executive branch. In *Reynolds*, the United States argued that it had "inherent" power to withhold information that it claimed contained claimed secrets, but the Court expressly eschewed reliance on this "broad proposition[]." ⁹⁴ The Court made clear that the judiciary should not blindly accept the executive's assertions of the privilege, but rather declared that the "court itself must determine whether the circumstances are appropriate for the claim of privilege."⁹⁵ In short, administration of the privilege has always been shared by the executive and judicial branches, and the Constitution certainly does not bar Congress from playing an active role as well.

Moreover, the legislative, executive, and judicial branches have a long tradition of working together to provide access to information for litigants without jeopardizing national security. For example, FOIA provides that the government may withhold from public disclosure information that has been classified under Executive Order, but gives the courts the authority to decide de novo whether the classification is reasonable.⁹⁶ FOIA requires that administrative agencies segregate all non-classified material from classified documents, and assigns courts the task of ensuring that agencies have disclosed all "reasonably segregable" portions of classified records.⁹⁷ Likewise, CIPA

⁹³ See Mukasey Letter, *supra* note 89.

⁹⁴ *Reynolds*, 345 U.S. at 6 n.9.

⁹⁵ *Id.* at 8.

⁹⁶ 5 U.S.C. § 552(b)(1).

⁹⁷ 5 U.S.C. § 552(b). See also *Ctr. for Int'l Envtl. Law v. Office of the Trade Representative*, 505 F. Supp.2d 150, 158 (D.D.C. 2007) (stating that even when documents are classified, and thus exempt under

demonstrates that it is possible to enact legislation that protects sensitive information without sacrificing either national security or the role of the courts in upholding the law. The State Secrets Protection Act is a useful addition to this existing body of legislation, the constitutionality of which is well-established.

C. MERITS OF THE STATE SECRETS PROTECTION ACT

The pending legislation would accomplish a number of important objectives. First, by setting out parameters for use of the privilege, the Act would ensure that most cases challenging the legality of government conduct will proceed despite the presence of privileged information, and will do so without jeopardizing national security. Using CIPA as its model, the Act would provide judges with several different options as to how to proceed when the executive raises a claim that relevant evidence contains state secrets. These guidelines would assist the courts and litigants as they seek to find a means to litigate cases that involve evidence relating to national security, rather than leaving them to flounder under the ad hoc procedures and varying standards employed by the courts today.

Second, the Act would ensure that sensitive national security information will not be publicly disclosed. The Act provides the same security safeguards that have proven effective in CIPA cases, and prevents privileged evidence from ever being produced. At the same time, the Act attempts to ameliorate the impact this might have on innocent litigants as much as is possible.

Third, the Act would require the attorney general to report within 30 days to the House and Senate Intelligence and Judiciary Committees each instance in which the United States claims the privilege. In the unusual circumstance that a case must be dismissed due to the sensitive nature of evidence vital to a valid defense, Congress would be alerted to the problem and would be able to engage in the executive oversight that is no longer possible in court.

Finally, the Act would reestablish Congress's role in regulating the cases that come before federal courts and the evidence that can be heard in such cases. Under Article I, Section 8, and Article III, Section 2, of the U.S. Constitution, Congress has broad authority both to grant federal courts jurisdiction over cases challenging executive conduct and to establish rules regarding the evidence that may be presented in such litigation. Indeed, Congress has always taken an active role in providing for rules regarding the admission of evidence in federal court, as illustrated by FOIA, CIPA, and the Federal Rules of Evidence. Furthermore, Congress is ideally situated to craft procedures to protect national security information without sacrificing litigants' rights to hold the executive accountable for violations of federal law. The State Secrets Protection Act provides a systematic approach that takes into account both the security of the country and the interests of litigants, and would provide essential guidance to courts struggling with this issue.

VII. CONCLUSION

The Bush Administration's assertions of the state secrets privilege as grounds for immediate dismissal of challenges to the government's use of extraordinary rendition and warrantless wiretapping are unprecedented. Although the Administration has acknowledged both programs exist, and even revealed details of how they operate, it

FOIA, the government must disclose all reasonably segregable non-classified information within those documents).

nonetheless claims that the very subject matter of the litigation is too sensitive to undergo judicial review. In short, the privilege is no longer being used to exclude documents from litigation, as in *Reynolds*, but rather now is asserted as a bar to any judicial review of executive conduct in these areas. The transformation of the privilege into a claim of immunity is not supported by Supreme Court jurisprudence and is incompatible with the judicial role in overseeing the executive branch.

Fortunately, there is no need to choose between full disclosure of state secrets on the one hand or immediate dismissal of all pending litigation challenging these programs on the other. A middle ground exists that can accommodate both interests. Courts can respond to assertions of the privilege by structuring discovery so as to balance the need for secrecy against the rights of litigants. Judges have long crafted special procedures to protect privileged material, such as by requiring redactions, summaries, indexes, and other modifications to discovery requests, and these same techniques should be employed in cases in which the government raises the state secrets privilege. The executive branch can take steps internally to clarify the appropriate standards for assertion of the privilege and increase the participation of all relevant parties in making the decision to invoke the privilege. Finally, Congress can pass legislation such as the State Secrets Protection Act to protect both the interests of litigants and secret national security information.

21st Century Tools for Advancing Equal Opportunity: Recommendations for the Next Administration

Cyrus Mehri and Ellen Eardley*

Forty-plus years after passage of our nation's modern civil rights laws, Americans have much to celebrate with respect to equal opportunity in the workplace. Over the years, overt discrimination has become less prevalent and less socially acceptable. Yet discrimination persists, both the blatant variety and more subtle forms of stereotyping and favoritism, sometimes referred to as "second generation" discrimination.¹

January 2009 promises to usher in a burst of new reform in many areas of federal law and policy. One area that should be a priority of the next U.S. President—whether Barack Obama or John McCain—is eradicating all forms of discrimination in the workplace. This Issue Brief offers simple yet important reforms that would be relatively easy for a new Administration to implement. These reforms include: (1) harnessing transparency and technology to propel fair workplace practices by employers; (2) strengthening the abilities of federal enforcement agencies to address systemic discrimination; and (3) establishing a standard four-year statute of limitations under federal employment discrimination laws. Taken together, this set of policies will encourage employers to take steps to eliminate discriminatory practices; increase the effectiveness of the federal agencies charged with enforcing the anti-discrimination laws; and facilitate access to the courts for victims of discrimination.

I. THE CHALLENGE: ERADICATING WORKPLACE BIAS, INCLUDING ITS SUBTLE FORMS

Overt discrimination on the basis of race, gender or other improper factors clearly still occurs in the 21st Century; abundant examples may be found in federal court decisions.² "Second generation" discrimination is harder to detect. Professor Susan

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¹ Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 465-66 (2001).

² See, e.g., *Bailey v. USF Holland*, 526 F.3d 880 (6th Cir. 2008) (white co-workers referred to African-Americans as "boy," "colored boy," and "nigger" and nooses were hung in the workplace); *Jordan v. City*

Sturm describes “second generation” discrimination as “patterns of interaction among groups within the workplace that, over time, exclude non-dominant groups.”³ For example, a white supervisor might hire a white applicant over a more qualified black applicant because the white supervisor felt more “comfortable” with the white applicant. Research on stereotypes shows that “even before having any interaction with a particular individual, background assumptions will influence how a decision-maker perceives a job candidate.”⁴

While sometimes hard to see, these more subtle forms of discrimination are nonetheless pernicious. The Third Circuit Court of Appeals put it this way:

Though they still happen, the instances in which employers and employees openly use derogatory epithets to refer to fellow employees appear to be declining. Regrettably, however, this in no way suggests that discrimination based upon an individual’s race, gender, or age is near an end. Discrimination continues to pollute the social and economic mainstream of American life, and is often simply masked in more subtle forms. It has become easier to coat various forms of discrimination with the appearance of propriety, or to ascribe some other less odious intention to what is in reality discriminatory behavior.⁵

In-group favoritism, out-group aversion, and stereotyping are bolstered in the workplace by organizational policies that rely on subjectivity. Unchecked, undue subjectivity or discretion becomes a mechanism for stereotypes to improperly influence decisions affecting pay, promotions, and advancement.⁶ Subtle discrimination is particularly harmful to employees when it is reinforced by organizational structures that do not require decision-makers to be accountable for their choices. Professor Sturm explains: “[t]he glass ceiling remains a barrier for women and people of color largely because of patterns of interaction, informal norms, networking, training, mentoring, and evaluation, as well as the absence of systematic efforts to address bias produced by these patterns.”⁷

Discrimination in the workplace, subtle or not, has significant consequences. First, of course, a victim of discrimination loses an equal opportunity to compete for initial hiring and placement, compensation, and advancement. These barriers to success can in turn affect his or her ability to afford health insurance, pay for a child’s college education, or care for an elderly parent. Workplace discrimination can also adversely affect the employee’s health. And there are significant consequences for employers

of Cleveland, 464 F.3d 584 (6th Cir. 2006) (African-American firefighter was referred to as “Sambo” and “the welfare firefighter” and subjected to racial slurs and jokes; supervisors gave him extra work, referred to a predominantly black fire station as the “monkey island” and segregated employees by assigning black firefighters to all black shifts).

³ Sturm, *supra* note 1 at 468.

⁴ Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 746 (2005).

⁵ *Aman v. Cort Furniture Rental Co.*, 85 F.3d 1074, 1081-82 (3d Cir. 1996).

⁶ Legal scholar Linda Hamilton Krieger argues that subtle bias is “today’s most prevalent type of discrimination.” Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164 (1995).

⁷ Sturm, *supra* note 1 at 469; see also VIRGINIA VALIAN, *WHY SO SLOW? THE ADVANCEMENT OF WOMEN* (1998).

too. Corporations lose some of their most talented employees and best ideas when they limit opportunities based on stereotypes and biases. In short, the individual and collective stakes are enormous. Having effective tools to battle discrimination in the workplace is essential to the country's well-being.

II. SOLUTIONS: TRANSPARENCY, ENFORCEMENT, AND ACCESS TO COURT

Over the last few decades, the courts⁸ and Congress⁹ have slowly begun to grapple seriously with how to address subtle forms of discrimination. These developments are important, but additional measures are needed.

The reforms we advocate would hold employers accountable and thus help end discrimination, including “second generation” varieties—favoritism, aversion, and stereotyping. New disclosure requirements that help expose inequities in the workplace will help corporations themselves, as well as advocates and enforcement agencies, identify discrimination and look for ways to eliminate it. Where that does not work, a greater focus by enforcement agencies on systemic discrimination can ferret out the offending practices in the workplace and lead to effective remedies. And, when sunshine and government enforcement are insufficient, extending the statute of limitations to four years will provide workers more effective access to the courts for recourse.

Our proposals would represent a slight shift from the status quo for employers, but would significantly improve the workplace for those subject to discrimination. While these reforms are important to civil rights enforcement, they do not represent an exhaustive list.¹⁰ We hope this article will spur a dialogue in and among corporate, legal, political, and civil rights circles about the best methods for advancing equal opportunity in the 21st Century so that the next Administration will be fully equipped to implement changes when it steps into office.

A. TRANSPARENCY: ENHANCING DISCLOSURES TO EXPOSE PATTERNS OF DISCRIMINATION

A little bit of sunshine can be a low-cost and highly effective tool for dramatically increasing equal opportunity in the United States. Exposing bias in the workplace can lead to heightened awareness of it, and, in turn, a serious effort to address it. Employers

⁸ See, e.g., *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 159 n.15 (1982) (noting that plaintiffs might challenge a general policy of subjective decision-making processes); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (recognizing that sex stereotyping, including expectations that a female employee would not be aggressive, is sex discrimination); *Butler v. Home Depot Inc.*, No. c-94-4335, 1997 U.S. Dist. LEXIS 16296 (N.D. Cal. Aug. 29, 1997) (denying summary judgment when plaintiffs had raised an inference of pattern and practice sex discrimination using statistical data and anecdotal evidence of subjective hiring processes that were tainted by stereotyping); *Dukes v. Wal-Mart Stores, Inc.*, 474 F.3d 1214 (9th Cir. 2007) (holding that subjective decision-making is particularly susceptible to causing discrimination) *aff'd en banc*, 508 F.3d 1168 (9th Cir. 2007).

⁹ In 1991, Congress amended the Civil Rights Act to expressly allow mixed motive claims. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991). Though the mixed motive framework still focuses somewhat on intent, the mixed motive analysis more clearly allows plaintiffs to challenge employment decisions that are based on many factors, including inadvertent bias. Further, the 1991 Civil Rights Act recognized that a constellation of employment practices could constitute discrimination. See *McClain v. Lufkin Indus.*, 519 F.3d 264, 278 (5th Cir. 2008) (“Title VII permits a plaintiff to demonstrate that the elements of the employer’s decision-making process are not capable of separation for analysis and thus that the process should be analyzed as one employment practice”).

¹⁰ See, e.g., Civil Rights Act of 2008, S. 2554, 110th Cong. (2008); Employment Non-Discrimination Act, H.R. 2105, H.R. 3685 110th Cong. (2007).

made aware of discriminatory patterns can, for example, take steps to hold supervisors accountable for their actions. Contemporary social science has found that accountability is essential to reducing discrimination in the workplace.¹¹ Studies show that bias “can be minimized when decision-makers know that they will be held accountable for the process and criteria used to make decisions, for the accuracy of the information upon which the decisions are based, and for the consequences their actions have for equal employment opportunity.”¹² Examples of effective measures include: (1) requiring supervisors to explain their decision-making processes in hiring and promotion; (2) establishing consequences if employees do not follow anti-discrimination policies and procedures; and (3) tying bonuses and other incentive pay to successful implementation of equal opportunity procedures. An employer whose inequitable hiring, promotion, and compensation patterns are disclosed for all to see is much more likely to take such steps. That is why the next Administration should require the federal government and employers to use existing technological resources for greater transparency in equal employment opportunity statistics.

1. Harnessing the Transparency Tools of the SEC to Advance Equal Opportunity

Any Administration interested in quickly and effectively addressing 21st Century discrimination should require publicly traded companies to publicly file a Diversity Report Card along with the other information they submit to the Securities and Exchange Commission (SEC) pursuant to Section 13(a) and Section 14(a) of the Securities Exchange Act.¹³

Under Section 13(a) of the Act, the SEC collects registration statements and periodic reports from publicly traded companies in order to promote a stable market so that investors can make educated decisions about where to invest.¹⁴ Companies must file annual (Form 10-K) and quarterly (Form 10-Q) reports that give investors the information they need to make sound investment decisions. In addition, under Section 14(a) of the Act, the SEC outlines proxy rules for shareholder meetings that require disclosure “as necessary or appropriate in the public interest or for the protection of investors.”¹⁵ For periodic reporting and proxy rules, information must be disclosed if it is material or information which “a reasonable investor would find significant in making an investment decision.”¹⁶ Such transparency is central to the integrity of our marketplace.¹⁷

¹¹ Alexandra Kalev, Frank Dobbin & Erin Kelly, *Best Practices or Best Guesses? Assessing The Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOCIOLOGY REV., 589 (2006); Marc Bendick, Jr., Mary Lou Egan, & Suzanne M. Lofhjelm, *Workforce Diversity Training, From Anti-Discrimination Compliance to Organizational Development*, 24 HUM. RESOURCE PLANNING, 10 (2001).

¹² William T. Bielby, *Promoting Racial Diversity at Work: Challenges and Solutions*, in DIVERSITY AT WORK 53, 68 (Arthur P. Brief, ed., 2008); see also Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, AM. J. OF SOCIOLOGY 97: 1531-1576 (1992); Lauren B. Edelman and S. Petterson, *Symbols and Substance in Organizational Response to Civil Rights Law*, in SOC. STRATIFICATION & MOBILITY 17 (Kevin Leicht, ed., 1999); Sturm, *supra* note 1 at 519-520.

¹³ 15 U.S.C. § 78a *et seq.* (2007). For a more in-depth treatment of this proposal, see Cyrus Mehri et al., *One Nation, Indivisible: The Use of Diversity Report Cards to Promote Transparency, Accountability and Workplace Fairness*, 9 FORDHAM J. CORP. & FIN. L. 395 (2004).

¹⁴ See, e.g., 1 THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION § 9.2 (2d ed. 2002).

¹⁵ 15 U.S.C. § 78n.

¹⁶ 1 HAZEN, *supra* note 14 at § 9.2.

¹⁷ Louis Lowenstein, *Financial Transparency and Corporate Governance: You Manage What You Measure*, 96 COLUM. L. REV. 1335, 1340-41 (1996) (“More than any other nation, we have cast a broad

In addition to traditional financial disclosures, the SEC also requires disclosure of information such as competitive conditions in the market,¹⁸ expenditures on environmental protection compliance,¹⁹ the number of company employees,²⁰ and litigation the company faces.²¹ The SEC collects such non-financial information under its authority to ascertain material information for the benefit of investors. This trend of requiring wider disclosures to all stakeholders will likely accelerate given the recent crisis in the financial services industry and the call for “Wall Street” to be more accountable to “Main Street.”

Consistent with emerging trends that urge corporations to value not only stockholders but other stakeholders as well, the next Administration should issue regulations under Section 14(a) of the Securities Exchange Act requiring corporations to disclose equal employment opportunity (EEO) data. Because “corporate social behavior can affect profitability”²² and competitiveness, disclosure of corporate diversity data should be mandatory. Indeed, corporate diversity information can be seen as “material” to investment decisions, especially given that there has been a substantial rise in social concerns by investors and other stakeholders.²³ In addition to helping investors make sound decisions, mandatory disclosure of diversity data will create a marketplace in which companies will strive to improve their performance. In short, marketplace tools can be used to champion equal opportunity.

In order to serve this dual purpose of sound investments and enhanced civil rights compliance, companies should be required to submit a detailed Diversity Report Card as part of their annual reporting on their Form 10-K. Our proposed Diversity Report Card is based on the theory that corporations must be responsible not only to traditional shareholders but to other stakeholders as well—consumers, employees, and communities. The disclosure of corporate information to third parties or “informational regulation” enhances a corporation’s engagement with its social network and, ideally, produces positive results for that network at minimal cost. For example, studies show that corporate disclosure of environmental information has reduced companies’ environmental impact.²⁴

Adding a Diversity Report Card to the environmental and financial information the SEC already collects will provide stakeholders with a more complete understanding of companies in a global market. Indeed, requiring a Diversity Report Card component of SEC filings would be in line with new global trends. One report estimates that in 2003, “approximately 1,500—2,000 corporate annual reports world-wide provided information about the firms’ activities on some combination of social,

vote of confidence in the integrity and efficiency of the markets, and in the transparency not just of the markets but of the underlying companies.”).

¹⁸ 17 C.F.R. § 229.101(c)(x) (2008).

¹⁹ *Id.* § 229.101(c)(xi).

²⁰ *Id.* § 229.101(c)(xii).

²¹ *Id.* § 229.103.

²² Note, *Should the SEC Expand Nonfinancial Disclosure Requirements?*, 115 HARV. L. REV. 1433, 1436 (2002). This Harvard Note responds to a seminal article by Cynthia Williams that argues in favor of mandatory social disclosure. Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1266 (1999).

²³ *Should the SEC Expand Nonfinancial Disclosure Requirements?*, *supra* note 22 at 1436 (summarizing Williams’ argument in favor of social disclosure).

²⁴ MARY LOU EGAN, FABRICE MAULEON, DOMINIQUE WOLFF & MARC BENDICK, JR., FRANCE’S MANDATORY “TRIPLE BOTTOM LINE” REPORTING: AN INFORMATIONAL REGULATION APPROACH TO SUSTAINABLE DEVELOPMENT, SECOND INTERNATIONAL CONFERENCE OF THE INTERNATIONAL CENTER FOR CORPORATE ACCOUNTABILITY 11 (June 2007) (on file with authors).

environmental, and sustainability topics” as compared to 100 firms in 1993.²⁵ According to this report, “[i]n 2005, almost 80 percent of the *Fortune* Global 250 firms in 21 countries or regions issued corporate responsibility reports.”²⁶ France now requires all companies that are publicly traded on the Paris Stock Exchange to report financial, environmental, and social/employment data.²⁷ Moreover, even some U.S. companies, such as IBM, have voluntarily disclosed equal employment opportunity data in the past.²⁸ And some states require employers to keep records of employees’ wages to help identify discrimination.²⁹

The Diversity Report Card should include the following information:

- *Key Glass Ceiling Indicators*, such as the race, ethnicity, and gender of the 200 highest paid employees based on *total* compensation;
- *Special Compensation Data*, including the distribution of stock options and other forms of compensation by race, ethnicity, and gender;
- *Pay Equity Data*, including the range, median, and mean salary by job function by race, ethnicity, and gender;
- *Applicants and New Hire Data*, including the race, ethnicity, and gender of applicants and those hired by job function; this data should include positions that are internal promotions; and
- *Diverse Candidate Slates for Boards of Directors*, including the race, ethnicity and gender of candidates interviewed in-person for Board Positions.³⁰

Shining sunlight on diversity in this manner will inspire companies to take the actions necessary to advance equal opportunity. This data will help reveal areas in which companies could better address patterns of discrimination in the workplace. For example, in our experience, investigations of our clients’ claims reveal over and over again that the pay grade where stock options begin in earnest is where the glass ceiling is most apparent. The overlooked scandal about stock options is that female and minority employees have been virtually locked out of wealth-creating opportunities in

²⁵ *Id.* at 15.

²⁶ *Id.* at 30.

²⁷ *Id.* at 20-21, 42-43. France requires reporting of employment data such as the total number of employees, salaries, representation of women in the workforce, efforts to integrate women in physically challenging positions, and efforts to comply with the U.N. International Labor Organization’s conventions on employment discrimination.

²⁸ SOCIAL INVESTMENT RESEARCH ANALYST NETWORK, A CALL TO ACTION: FOR GREATER CORPORATE TRANSPARENCY 10 YEARS AFTER THE GLASS CEILING COMMISSION RECOMMENDATIONS (Dec. 2005), *available at* <http://www.siran.org/pdfs/calltoaction.pdf>. Through the result of litigation, The Coca-Cola Company publicly disclosed diversity data and reported systemic efforts to improve equal opportunity on its website for five years. The Coca-Cola Company, http://www.thecoca-colacompany.com/citizenship/our_progress.html (last visited Oct. 7, 2008).

²⁹ For example, in 2008, Maryland adopted House Bill 1156, establishing a commission to study pay disparities and segregation in female-dominated occupations. It also requires Maryland employers to keep records of gender and racial makeup of their employees. Act of Apr. 8, 2008, ch. 114, 2008 Md. Laws 114. As another example, Minnesota requires all public employers (including cities, counties and school districts) to “attempt to establish equitable compensation relationships” between female-dominated and male-dominated jobs, and requires employers to report wage data. MINN. STAT. § 43A.01 (2007), §§ 471.991-471.999.

³⁰ Letter from Mehri & Skalet, PLLC to Jonathan Katz, U.S. Sec. of Sec. Exch. Comm’n (Sept. 12, 2003), *available at* <http://www.sec.gov/rules/proposed/s71403/mehriskalet091203.htm>.

most companies.³¹ Other pay discrimination will also come to light. This is especially important given how difficult it is for employees to know what their co-workers are being paid, and thus whether they are the victims of pay discrimination. As Justice Ginsburg recognized in her dissent in *Ledbetter v. Goodyear Tire & Rubber Co.*: “Compensation disparities ... are often hidden from sight. It is not unusual ... for management to decline to publish employee pay levels, or for employees to keep private their own salaries.”³² Similarly, racial and gender breakdowns of hiring data will shine light on the effects of unchecked subjectivity in decision-making, which is “a ready mechanism for ... discrimination.”³³

If diversity and EEO information is made public, employees, consumers and other stakeholders can make educated decisions about places they want to work, products they want to buy, and companies in which they want to invest. Just as some transnational corporations voluntarily disclose human rights and labor rights compliance information “primarily in an effort to improve public relations and attract consumers and investors,”³⁴ public access to a Diversity Report Card will create a new burst of progress in advancing equity in the workplace. With these disclosures, companies will no longer neglect glass ceiling issues, but likely will move mountains to ensure fair compensation and equal opportunity in promotion and hiring decisions.³⁵ Many companies will be forced to examine the ways in which structural systems support subtle discrimination, and to embrace best practices to level the playing field. Companies will be motivated to improve diversity not only to avoid litigation but to impress stakeholders. The best companies will be rewarded.

The burden on companies to complete a Diversity Report Card will be relatively minimal. Companies are already required to collect baseline race, ethnicity and gender information in the EEO-1 Report they provide annually to the Equal Employment Opportunity Commission (EEOC).³⁶ To make this heightened reporting requirement palatable to companies that may be resistant, the SEC should establish a one-to-two-year gradual phase-in of the Diversity Report Card. This will allow the worst actors a chance to improve before the transparency begins. If there is one way that a new Administration can bring about the most progress for equal opportunity in America, with almost no taxpayer cost, it is to champion EEO transparency in the SEC’s 10-K Forms.

³¹ See, e.g., Alys Lebeau, *The New Workplace Woman: “Are We There Yet?”*, BUSINESS WOMAN, Fall 2001, (citing studies finding that men are awarded stock options and other bonuses at 20 to 30 times the rate of women and that men’s compensation consisted of 85% salary and 15% other (stock options, bonuses, profit sharing, etc.) whereas women’s compensation consisted of 91% salary and 9% other).

³² *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S.Ct. 2162, 2181 (2007) (Ginsburg, J. dissenting) (citation omitted).

³³ See, e.g., *Miles v. M.N.C. Corp.*, 750 F.2d 867, 871 (11th Cir. 1985).

³⁴ Rachel Cherington, *Securities Laws and Corporate Social Responsibility: Toward an Expanded Use of Rule 10b-5*, 25 U. PA. J. INT’L ECON. L. 1439, 1441-42 (2004).

³⁵ David Hess, *Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness*, 25 J. CORP. L. 41 (1999). Hess argues that “[I]f corporations were required to disclose information about their actions affecting [stakeholders], then pressure would mount to justify those acts; and justifying one’s acts, most ethicists would grant, is the first step toward improving one’s behavior.” *Id.* at 41.

³⁶ Private companies with 100 or more employees are required to file EEO-1 Reports with the EEOC describing the demographics of their workforce. This data can show employment patterns and point to potential problem areas, such as the underrepresentation of females or minorities in certain job categories. The EEOC is required by Title VII to keep these reports confidential. 42 U.S.C. § 2000e-8(e) (1976).

2. *Using Technology to Increase Transparency and Disclosures to OFCCP*

Under Executive Order 11246, signed by President Johnson in 1965,³⁷ federal contractors and federally-assisted construction contractors are prohibited from discriminating in employment on the basis of race, sex, religion, or national origin. This Executive Order is enforced by the Office of Federal Contract Compliance Programs (OFCCP) within the U.S. Department of Labor. OFCCP collects data from federal contractors, conducts compliance reviews, and investigates complaints.³⁸ According to OFCCP, federal contractors covered by the Executive Order employ approximately 26 million individuals, comprising nearly 22% of the U.S. civilian workforce.³⁹ The program thus has the capacity to have a huge impact on equal opportunity for workers across the country.

Under the Executive Order, federal contractors are required to develop written Affirmative Action Programs or Affirmative Action Plans (AAPs) annually, containing detailed information about representation and utilization of female and minority employees in their workforces.⁴⁰ The goal is to provide a diagnostic tool to ensure that women and minorities are being employed at a rate that would be expected given their availability in the relevant labor pool. If underutilization of women or minorities is uncovered, the contractor must offer practical steps to address this underutilization and work toward achieving the workforce that would be expected in the absence of discrimination.⁴¹ The main components of the AAP include: (1) an organizational and workforce profile; (2) job position analysis, which includes analysis of available minorities and women and the contractor's utilization of them in the workforce; (3) identification of problematic practices; and (4) development of programs to alleviate identified problems.⁴² Federal contractors typically prepare separate AAPs for each of the company's business units or locations. Thus, one federal contractor, depending on its size or internal organization, may create multiple AAPs.

One might think that these AAPs would be routinely reviewed by OFCCP. They are not. The plans are not even filed with OFCCP. Instead, the AAPs collect dust at corporate offices only to be tossed out in a few years, usually untouched and unseen by OFCCP unless OFCCP initiates a compliance review. But OFCCP conducts very few compliance reviews; for example, in 1999, OFCCP reviewed only 4% of federal contractors. In 2004, OFCCP conducted nearly 2,000 fewer compliance reviews than in 2003. No wonder many companies view OFCCP as a paper tiger.

The Executive Order program should be modified to require each contractor to electronically submit the statistical data from its AAPs to OFCCP each year. In addition, each contractor should also file a national statistical AAP report, combining the statistical information from each business unit's AAP into one national report. The information to be electronically submitted to OFCCP annually would include the statistical data only, and not the narrative sections of the AAP describing problematic

³⁷ Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965); Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (Oct. 13, 1967); Exec. Order No. 12,067, 43 Fed. Reg. 28,967 (June 30, 1978).

³⁸ The Executive Order applies to federal contractors who have contracts or subcontracts over \$10,000.

³⁹ OFCCP, U.S. DEP'T OF LABOR, FACTS ON EXECUTIVE ORDER 11,246 (Jan. 4, 2002), <http://www.dol.gov/esa/ofccp/regs/compliance/aa.htm>

⁴⁰ 41 C.F.R. § 60-2.1. (2000). The AAP requirements apply to contractors with contracts of \$50,000 or more, and 50 or more employees.

⁴¹ 41 CFR § 60-2.10.

⁴² *Id.*

practices and potential solutions. Employers would continue to prepare and keep on-site the traditional AAPs, including the written components discussed above.

Our proposal that employers electronically file a report of their statistical AAP data is designed to reduce the burden on employers while simultaneously improving OFCCP's systemic enforcement. OFCCP could use existing state-of-the-art technology to electronically search the submitted data to identify employers with potential underrepresentation of women and people of color. The understaffed OFCCP could use this data to maximize its compliance review efforts, by auditing employers based on indicators from analysis of the statistical data. This, in turn, would reduce the burden on employers because compliant employers would not be targeted for review and would not have to expend resources assisting OFCCP with a needless audit.

Electronic submission of AAP statistical data would take full advantage of 21st Century technology to address 21st Century discrimination. OFCCP could learn the technical aspects of electronic filing from the EEOC, which already collects its EEO-1 reports electronically.⁴³ Technology to search electronic EEO data to target potential problems already exists and is ready for OFCCP to adopt.⁴⁴ Most importantly, electronic filing with OFCCP would give employers a greater incentive to engage in the good-faith self-analysis of opportunities for female and minority employees that the program contemplates. The current, rarely-seen, paper-only system does not provide that incentive.

In addition to requiring electronic submission of AAP statistical data, a new Administration should collect data that will enable OFCCP to measure wage inequalities and equal opportunity in promotions, retention, hiring, terminations, and other areas of employment.⁴⁵ In order to focus its enforcement efforts, OFCCP should be armed with data regarding applicant flow, new hires, promotions, terminations, compensation, and tenure by race, ethnicity, and gender. Currently, OFCCP does not collect data that discloses compensation or that tracks applicants, hires, and terminations. Without such data, OFCCP's ability to enforce the law is significantly undermined. An OFCCP that is committed to enforcement could use such data to more efficiently scan all federal contractors to target compliance reviews.

3. Adding Critical Data to EEOC Disclosures

As noted above, private companies with 100 or more employees are required to file EEO-1 Reports with the EEOC describing the demographics of their workforce. Unfortunately, this data does not reveal disparities in salary or other forms of

⁴³ U.S. Equal Employment Opportunity Commission, 2008 EEO-1 Survey, <http://www.eeoc.gov/eo1survey/> (last visited Oct. 8, 2008).

⁴⁴ Marc Bendick, Jr., *How Can the EEOC Effectively Promote Employer Efforts to Hire the Best Employees and Avoid Discrimination?*, Testimony Before the Equal Employment Opportunity Commission's Hearings on the E-RACE (Eliminate Racism and Colorism in Employment) Initiative (Feb. 2007).

⁴⁵ In 2000, OFCCP implemented, on a pilot basis, an Equal Opportunity Survey to collect data along these lines, but discontinued the survey before it was seriously or consistently implemented. *See* Government Contractors, Affirmative Action Requirements, Final Rule, 65 Fed. Reg. 68022 (Nov. 13, 2000) (codified at 41 C.F.R. pt. 60-2.18); Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors: Equal Opportunity Survey, 71 Fed. Reg. 53032 (Sept. 8, 2006) (codified at 41 C.F.R. pt. 60-2.18); MARC BENDICK, JR. ET AL., BENDICK AND EGAN ECONOMIC CONSULTANTS, INC., *THE EQUAL OPPORTUNITY SURVEY: ANALYSIS OF THE FIRST WAVE OF SURVEY RESPONSES* (Sept. 2000); Letter from Marc Bendick, Jr. to Director of Division of Policy, Planning and Program Development, OFCCP (Mar. 2, 2006) (on file with author) (comments on proposed rule making RIN 1215-AB53 Equal Opportunity Survey). The next Administration should, at the very least, collect compensation data by race, ethnicity, and gender, whether or not it revives the discontinued survey.

compensation.⁴⁶ We recommend that the EEOC expand the data collected in the EEO-1 report to include the data outlined in the Diversity Report Card described above. This would equip the EEOC with data that would point to wage disparities,⁴⁷ promotion and retention problems, and other areas of discrimination, instead of merely revealing the underrepresentation of women and minorities.

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The disclosure requirements we recommend target several different types of employers and should be adopted concurrently. To be clear, only publicly traded companies would be required to disclose the Diversity Report Card required by the SEC. The EEOC would collect enhanced EEO-1 disclosures from employers who are already required to submit EEO-1 data—private employers with 100 or more employees. OFCCP would only collect data from federal contractors who meet the contract and employee size thresholds of the Executive Order program. Our proposed new disclosure requirements would complement one another and be consistent with the important business maxim—“What gets measured, gets done.”

B. ENFORCEMENT: FOCUSING ON SYSTEMIC DISCRIMINATION

A new Administration must ensure that each of the federal agencies charged with enforcing the laws against discrimination in the workplace has strong leaders at the helm, committed to the agency’s mission and to effectively using all of the tools at its disposal. It is also critical that the Administration’s budget requests for these agencies reflect the priority that must be given to their important missions and the difficulties the agencies have faced due to budget shortfalls and staffing declines. According to the EEOC’s Inspector General, “The Agency is challenged in accomplishing its mission of promoting equality of opportunity in the workforce and enforcing federal laws prohibiting discrimination due to a reduced workforce and an increasing backlog of pending cases.”⁴⁸ Between 1999 and 2006, the EEOC lost roughly 350 employees.⁴⁹ Meanwhile, EEOC charges are on the rise.⁵⁰ OFCCP, for its part, had a staff in 2004 roughly one-third the size of its workforce in 1980.

⁴⁶ See, e.g., Mary E. Graham & Julie L. Hotchkiss, *A Systemic Assessment of Employer Equal Opportunity Efforts as a Means of Reducing the Wage Earnings Gap*, 12 CORNELL J. L. & PUB. POL’Y 169 (2002) (proposing that the EEOC collect data that would reveal wage gap issues).

⁴⁷ Legislation is pending in Congress that would also require the disclosure of data on wage disparities. One such bill is the Paycheck Fairness Act, which, in addition to strengthening the Equal Pay Act in a number of respects, would require the EEOC to survey pay data that is already available and issue regulations, to the extent necessary to enhance the EEOC’s ability to enforce the equal pay laws, that would require employers to submit additional pay data identified by the race, sex, and national origin of employees. H.R. 1388, 110th Cong. (2007); S. 766 110th Cong. (2007).

⁴⁸ EEOC, FISCAL YEAR 2007 PERFORMANCE AND ACCOUNTABILITY REPORT: INSPECTOR GENERAL’S STATEMENTS (Nov. 15, 2007), http://www.eeoc.gov/abouteeoc/plan/par/2007/inspector_general_statements.html.

⁴⁹ *Id.*

⁵⁰ EEOC charges increased modestly from 1997 (80,680 charges) to 2007 (82,792 charges). Stewart J. Schwab, The Allan R. Tessler Dean Cornell University Law School, Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?, Presentation at the American Constitution Society, at slide 7 (Sept. 18, 2008), available at <http://www.acslaw.org/node/7149>. According to the most recent data available thus far for 2008, the EEOC has experienced a 15% rise in charges compared with 2007. Barriers to Justice: Examining Equal Pay for Equal Work: Hearing Before the U.S. S. Judiciary Comm., 110th Cong. (Sept. 23, 2008) (testimony of Cyrus Mehri), available at http://judiciary.senate.gov/hearings/testimony.cfm?id=3564&wit_id=7439.

Beyond those threshold requirements for success, it is essential that the agencies focus more on systemic discrimination and step up their enforcement activities in systemic cases. Following are our suggestions toward that end.

1. The EEOC Should Enhance Its Enforcement of Systemic Cases

The next Administration must better equip the EEOC to track and challenge systemic discrimination. In 2005, the EEOC created a Systemic Task Force (“the Task Force”) that released a report in 2006, with recommendations for improving systemic enforcement.⁵¹ This effort represents a laudable step in the right direction toward improved systemic enforcement, and the next Administration should build on many of the recommendations in the Task Force’s report, including the proposal that the Agency link charge data with EEO-1 data.⁵²

Systemic discrimination cases are “pattern or practice, policy and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company or geographic location.”⁵³ The agency has recognized that “[i]t is imperative that the Commission make the identification, investigation, and litigation of systemic discrimination a top priority.”⁵⁴ It also has recognized that the EEOC is uniquely positioned to litigate systemic cases because, unlike private litigants, the EEOC need not meet the stringent requirements for certifying a case as a class action under federal rules, and because the agency may be able to bring cases that the private bar is not likely to handle, for example where the monetary relief might be limited, the focus is on injunctive relief, or the victims are in underserved communities.⁵⁵

Yet the EEOC expends the vast majority of its limited resources on processing individual charges,⁵⁶ which makes it difficult for the agency to analyze and challenge systemic employment discrimination. A new Administration must shift the EEOC’s focus to systemic discrimination, and support this shift with additional, appropriately trained staff.

Additionally, at least one of the Task Force’s recommendations must be modified for optimal systemic enforcement. The Task Force recommended that investigation of systemic discrimination should occur in the field in existing field offices, with technical support coming from the Washington, D.C. office. While investigation at multiple sites is desirable, this structure does not address the multi-jurisdictional problem of the district offices and the need to develop expertise for systemic cases. It also does not allow for enough synergy and interaction among attorneys and labor economists/statisticians, nor does it sufficiently account for the inadequate resources of the under-funded and under-staffed agency.

To successfully address systemic discrimination, the EEOC must be restructured so that *all* regions of the country have the expertise to monitor systemic discrimination by employers. In the last four decades, as Administrations have come and gone, the commitment to national resources for addressing systemic discrimination has

⁵¹ EEOC SYSTEMIC TASK FORCE, SYSTEMIC TASK FORCE REPORT TO THE CHAIR OF THE EEOC 1 (Mar. 2006), *available at* http://www.eeoc.gov/abouteeoc/task_reports/systemic.pdf

⁵² *Id.* at 11-12. Improved technology for data sharing between offices and a greater commitment to timely and complete data regarding individual charges would significantly enhance the Agency’s ability to recognize systemic discrimination.

⁵³ *Id.*

⁵⁴ *Id.* at 5.

⁵⁵ *Id.* at 2.

⁵⁶ *Id.* at Executive Report 1.

waxed and waned.⁵⁷ Sometimes, all the systemic discrimination resources have been concentrated in Washington, D.C. At other times, there have been efforts to try to make the EEOC's district or area offices the home for systemic enforcement without providing staff with significant statistical expertise.

Both EEOC models have faced significant challenges in practice. When the systemic enforcement has been concentrated in Washington, D.C., it has been difficult for the office to cover all areas of the country, especially when there has been "virtually no hiring [in the systemic unit] since the early 1990s."⁵⁸ In addition, focusing systemic enforcement in the national office makes it very susceptible to the political whims of each Administration. For instance, the George W. Bush Administration reassigned most of the systemic staff to non-systemic cases, crippling the Agency's enforcement efforts. On the other hand, when the responsibility for systemic enforcement has been spread throughout the district and area offices, the staff often has been overwhelmed with other duties. Another problem with some district offices cover multiple U.S. Courts of Appeals, requiring the attorneys to be experts in the relevant law of multiple circuits. Resources are wasted when more than one office is responsible for the same circuit's law. For example, the New York District Office covers some areas within the First, Second, and Third Circuits and the Philadelphia District Office covers some areas within the Third, Fourth, and Sixth Circuits.⁵⁹ This is very problematic for systemic enforcement as the standards dealing with systemic discrimination vary greatly among the circuits.

Thus, to consolidate the EEOC's limited resources, we recommend that the next Administration create one Systemic Enforcement Team with 12 Regional Systemic Teams (RSTs)—one covering the geographic area of each of the U.S. Courts of Appeals. Each RST should have two well-trained investigators, a labor economist/statistical expert, several trial lawyers with expertise in pattern and practice discrimination, and one appellate/public policy lawyer who monitors trends within the Circuit, files high-impact *amicus* briefs, and intervenes in cases for the public when appropriate. Each RST will become expert on the systemic discrimination case law that is specific to its jurisdiction. Moreover, working together as a team will improve the ability of the whole team—investigators, attorneys, and statisticians—to understand and identify all facets of systemic discrimination. When necessary, EEOC headquarters could lend support and assist with coordination between the teams. These RSTs could have an enormous impact, particularly if all subgroups are well-staffed, well-funded, and have technological capabilities to regularly interact with the entire team and to analyze data from Charges of Discrimination as well as EEO-1 Reports.

2. OFCCP Should Step Up Its Compliance Reviews

A new Administration must revitalize OFCCP's commitment to enforcing the requirements of the Executive Order program discussed above. That means stepping up OFCCP's compliance reviews and invoking the remedies at OFCCP's disposal when contractors fall short—up to and including barring violators from future federal contracts.⁶⁰ In addition, OFCCP could have much greater impact if it collected wage and

⁵⁷ See generally, *id.* at App. C (describing the history of the EEOC's systemic efforts).

⁵⁸ *Id.* at 60.

⁵⁹ EEOC Offices, <http://www.eeoc.gov/offices.html>, (last visited July 15, 2008).

⁶⁰ Though OFCCP claims to have a new focus on systemic discrimination, it has not provided data by which to fully assess its efforts. See, e.g., U.S. DEP'T OF LABOR, *supra* note 44; U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 44 at 25.

applicant flow data as described above. Because this data will reveal discriminatory patterns, it will help the agency target its compliance reviews.

OFCCP will need staff increases as well, especially if new data is to be collected and analyzed and more compliance reviews conducted. In 2004, the OFCCP staff was approximately one-third the size of what it was in 1980; in Fiscal Year 2004, the office had only 663 employees.⁶¹ Statistical experts are especially needed. Equipped with easier access to data and more staff with the expertise to perform statistical analyses, OFCCP can have a significantly greater impact.

C. ACCESS TO THE COURTS AND JUDICIAL EFFICIENCY: FAIR AND STANDARDIZED STATUTES OF LIMITATIONS IN EMPLOYMENT DISCRIMINATION CASES

Even if disclosure and enforcement reforms like those outlined above are adopted, additional measures are needed to ensure that victims of workplace discrimination have access to the courts to vindicate their rights when all else fails. Plaintiffs in employment discrimination cases face many barriers to success, including what new empirical research shows to be a double standard in the federal appellate courts.⁶² The barriers they face include (among many others): (1) the arbitrarily short statutes of limitations that apply in many discrimination cases and (2) a recent Supreme Court decision that unfairly interprets when the limitations period begins for some claims. We therefore recommend standardizing and lengthening, where necessary, the applicable statutes of limitations to four years for plaintiffs in employment discrimination cases. A four-year limitations period would enhance the ability of employees to challenge subtle forms of discrimination, and a standard period would improve judicial efficiency by significantly reducing litigation over the appropriate period.

So that our proposal for a uniform, four-year limitations period can be effectual, Congress must adopt legislation to overrule the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber*,⁶³ which took an unsupportable position on when the limitations period begins to run in equal pay cases under Title VII of the Civil Rights Act of 1964.⁶⁴ In *Ledbetter*, the Supreme Court severely restricted plaintiffs' ability to address pay discrimination by holding that an employer's first discriminatory act triggers the 180-day period for filing a claim under Title VII, even if every subsequent paycheck was discriminatory and even if the employee did not learn about the pay disparity until much later. Because salaries are often confidential and compensation disparities hidden, this ruling effectively means that in many cases, by the time an employee learns that she has been paid less than a co-worker doing equal work, it will simply be too late to file an equal pay claim.

⁶¹ U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 44 at 24. An understaffed OFCCP cannot live up to its mission. In addition to completing fewer compliance reviews, the number of complaints resolved by the OFCCP fell from 802 in 1994 to 219 in 2004. *Id.* at 24-25. In 2007, the OFCCP resolved only 280 complaints. U.S. DEP'T OF LABOR, *supra* note 44.

⁶² A recent study of employment cases in the federal courts produced striking data showing that plaintiffs in these cases fare poorly compared with plaintiffs in other cases, both at trial and on appeal, reflecting what the authors described as an "anti-plaintiff" effect. Stewart J. Schwab & Kevin M. Clermont, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. (forthcoming 2009), available at http://www.hlpronline.com/Vol3.1/Clermont-Schwab_HLPR.pdf.

⁶³ *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S.Ct. 2162 (2007).

⁶⁴ 42 U.S.C. § 2000e *et seq.* Currently, under Title VII's limitations period, an employee has 180 days (or in some circumstances 300 days) to file a charge with the EEOC. 42 U.S.C. § 2000e-5(e)(1).

In response to *Ledbetter*, the Lilly Ledbetter Fair Pay Act of 2007 was introduced in Congress. It would amend Title VII so that the 180-day filing period would start to run each time an employee is affected by compensation tainted by discrimination, *i.e.*, with each unfair paycheck.⁶⁵ The bill was passed by the House on July 31, 2007, and awaits a vote in the Senate.⁶⁶ A new Administration should endorse this legislation and work to ensure its enactment early in the next Congress.

But what has been overlooked in the *Ledbetter* debate is that Title VII's 180-day filing period—even if subject to the “fix” contained in the legislation described above—is grossly inadequate, even absurd. The next Administration should therefore advocate that in addition to a *Ledbetter* fix, Congress should adopt a four-year filing period for federal employment discrimination statutes, including, at a minimum, not only Title VII but also the Equal Pay Act of 1963 (EPA);⁶⁷ the Age Discrimination in Employment Act of 1967 (ADEA);⁶⁸ the Americans with Disabilities Act of 1990 (ADA);⁶⁹ the Civil Rights Act of 1866 (Section 1981);⁷⁰ and the Civil Rights Act of 1871 (Section 1983).⁷¹ A four-year, uniform filing period would recognize that a great deal of discrimination in the workplace is subtle and not easily or immediately detected and would also be consistent with the limitations period that courts now apply to most Section 1981 race discrimination claims, as explained below.

Generally, the purpose of limitations periods is to “provid[e] fairness to the defendant, promot[e] efficiency, and ensur[e] institutional legitimacy.”⁷² Traditionally, courts have adopted exceptions to the statute of limitations under which the limitations period may be tolled. For example, the limitations period may be tolled when a plaintiff is not aware that her rights have been violated (the discovery rule), when misconduct by a defendant prevents a plaintiff from filing a timely claim (equitable estoppel), or when a plaintiff does not have enough information or the ability to file suit during the statutory period (equitable tolling).⁷³

Professor Suzette Malveaux examined the purpose of the statute of limitations in the context of claims for reparations and found that the limitations period can sometimes be a method for courts to restrict disfavored claims. Indeed, courts that strictly adhere to a statute of limitations without broadly interpreting exceptions deprive plaintiffs of their substantive rights, which can be especially harmful to civil rights plaintiffs. As Professor Malveaux notes, “[a]ccess to the courts is particularly important for minorities . . . and other disenfranchised groups who must rely on the legal system for protection of basic human and civil rights.”⁷⁴

⁶⁵ H.R. 2831, 110th Cong. (2007); S. 1843, 110th Cong. (2007).

⁶⁶ On April 23, 2008, an effort was made to bring the bill to a vote in the Senate, but fell three votes short of the 60 needed to close debate and consider the bill. GOVTRACK.US, SENATE VOTE ON CLOTURE MOTION TO PROCEED: H.R. 2831: LILY LEDBETTER FAIR PAY ACT OF 2007, <http://www.govtrack.us/congress/vote.xpd?vote=s2008-110> (last visited Oct. 7, 2008).

⁶⁷ 29 U.S.C. § 206(d) (2008).

⁶⁸ 29 U.S.C. §§ 621-633a (2008).

⁶⁹ 42 U.S.C. § 12101 *et seq.* (2008).

⁷⁰ 42 U.S.C. § 1981 (2008).

⁷¹ 42 U.S.C. § 1983 (2008).

⁷² Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68, 75 (2005). Though Professor Malveaux recognizes that statutes of limitations are a “fixture” of the American legal system, she also notes that little scholarship has questioned the “validity of their underlying purpose.” *Id.*

⁷³ *Id.* at 85-92.

⁷⁴ *Id.* at 84.

Congress and state legislatures exercise discretion in establishing statutes of limitations. Claims that are harder to detect should have longer limitations periods, but legislatures sometimes give disfavored claims shorter limitations periods. Breach of contract claims, which are often utilized by corporate America, tend to have long limitations periods. For example, the statute of limitations for breach of contract in California is four years;⁷⁵ in Florida the limitations period for breach of written contract is five years;⁷⁶ and the statute of limitations for breach of contract in Illinois is ten years for most contracts⁷⁷ and four years for a contract for sale.⁷⁸ The federal government has six to ten years under the False Claims Act to bring fraud claims.⁷⁹

Yet under Title VII, the ADA, and ADEA, which are the primary federal laws addressing discrimination in the workplace, plaintiffs have only 180 (or at most, in some cases, 300) days to file a charge of discrimination with the EEOC, which is required before a claim may be filed in court.⁸⁰ Based on our research, we are aware of no other federal law with such a short limitations period.⁸¹ This is particularly troubling given the subtle but debilitating forms of most 21st Century workplace discrimination. Plaintiffs filing federal employment discrimination cases should be afforded at least a four-year filing period, which is similar to many breach of contract limitations periods. Even Congress has recognized that four years is a fair, standard limitations period by establishing a default four-year limitations period for federal laws enacted after 1990 that do not specify a limitations period.⁸²

Victims of race discrimination in employment have a federal alternative to Title VII: Section 1981, which provides people of all races the same rights to “make and enforce contracts.”⁸³ Section 1981 currently has a four-year statute of limitations for most claims. When Section 1981 was passed, however, no limitations period was specified.⁸⁴ Thus, until recently, federal courts applied the statute of limitations in the state claim considered most analogous to Section 1981 claims.⁸⁵ In 1990, Congress passed 28 U.S.C. § 1658, a new uniform four-year statute of limitations for all federal statutes enacted after 1990 that do not expressly provide another limitations period. In 1991, Congress amended Section 1981 to clarify that “make and enforce contracts” includes “the termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.”⁸⁶ In *Jones v. Donnelley & Sons Co.*, the Supreme Court unanimously held that because Congress amended Section 1981 in 1991, the new federal four-year catch-all limitations period should apply to claims

⁷⁵ Cal. Code Civ. Proc. § 337 (LexisNexis 2008).

⁷⁶ Fla. Stat. § 95.11 (2)(b) (LexisNexis 2008).

⁷⁷ 735 Ill. Comp. Stat. 5/13-206 (LexisNexis 2008).

⁷⁸ 810 Ill. Comp. Stat. 5/2-725 (LexisNexis 2008).

⁷⁹ 31 U.S.C. § 3731 (2006).

⁸⁰ 29 U.S.C. § 626(d) (ADEA); 42 U.S.C. § 12117(a) (ADA).

⁸¹ See, e.g., Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C.L.REV. 859 (2008) (“Title VII’s limitations period remains unusually short when compared to the vast majority of other laws seeking to vindicate personal rights”). *Id.* at 869-70.

⁸² 28 U.S.C. § 1658(a) (2008).

⁸³ 42 U.S.C. § 1981 (2008).

⁸⁴ Section 1983 is another option for victims of race discrimination (as well as sex discrimination) in public employment. Section 1983 also does not specify a limitations period.

⁸⁵ *Jones v. Donnelley & Sons Co.*, 541 U.S. 369, 377 (2004). Courts also apply the most analogous state law limitations period in Section 1983 claims.

⁸⁶ 42 U.S.C. § 1981(b).

under Section 1981 regarding the termination and benefits of contracts, which covers employment claims after hire.⁸⁷

All federal civil rights laws that address employment discrimination should have the benefit of the four-year filing period that is now available in most employment claims involving race discrimination. In addition to basic fairness, another benefit of a uniform filing period for federal employment discrimination statutes is that it would eliminate unnecessary delays caused by extensive motion practice over the applicable statute of limitations.⁸⁸ The Supreme Court in *Donnelley & Sons Co.* described the lack of a uniform statute of limitations for federal laws as a “void [that] has spawned a vast amount of litigation,”⁸⁹ including substantial litigation over the appropriate statute of limitations for Section 1983 and Section 1981 claims.⁹⁰ The Court described the taxing process for determining the statute of limitations for federal law without a limitations period as “generat(ing) a host of issues that required resolution on a statute-by-statute basis.”⁹¹ Moreover, the Court noted that when it has decided cases regarding the most analogous state statute of limitations for Section 1981 and Section 1983 claims, those decisions have “provoked dissent and further litigation.”⁹² Thus, enormous judicial resources would be saved if all federal employment discrimination claims all had a uniform four-year filing period. This would also encourage potential plaintiffs to carefully investigate and narrow claims when appropriate rather than rushing to initiate litigation.

One further modification to the limitations period should be adopted. Under Title VII, the ADA, and the ADEA as noted, plaintiffs must file complaints of discrimination with the EEOC (within 180 days) before proceeding to court. After an employee files her administrative charge, she has several additional obstacles to confront. While the EEOC investigates the charge, the plaintiff is not entitled to traditional discovery, and employers often use this investigation period to comb through company records and marshal one-sided evidence against the employee. At the end of the EEOC’s investigation, it issues a “right to sue letter.” The employee then must overcome another hurdle: she has a mere 90 days to file a complaint in federal court. In that 90-day period, she must move mountains, including: finding and retaining a suitable lawyer and helping the lawyer complete an investigation. Also in the 90-day period, the lawyer must draft, finalize, and file a complaint in court. In other words, many victims of discrimination have a mere 90 days to do what realistically requires several months, if

⁸⁷ *Donnelley & Sons Co.*, 541 U.S., at 383.

⁸⁸ Because of Title VII’s short statute of limitations, there is significant litigation and motions practice over legal principles that might make the claim viable, such as the continuing violation doctrine, the discovery rule, and equitable tolling. For a discussion of these legal principles as applied to Title VII, see Brake & Grossman, *supra* note 85 at 870-79.

⁸⁹ *Donnelley & Sons Co.*, 541 U.S., at 377.

⁹⁰ As discussed above, courts until recently had to rely on the most analogous state law for Section 1981 claims. Courts usually found that tort law was the most analogous statute to Section 1981 and applied tort law statute of limitations. This spurred a difficult analysis because some states had multiple tort statutes of limitations and because the statute of limitations varies from state to state. California, for example, has a two-year statute of limitations for personal injury while Minnesota and Wisconsin have a six-year limitations period. Cal. Civ. Proc. Code § 335.1 (2008); Minn. Stat. § 541.05 (2007); Wis. Stat. § 893.53 (2007).

⁹¹ *Donnelley & Sons Co.*, 541 U.S., at 378.

⁹² *Id.* While *Donnelley* represents a step in the right direction, some lower courts have created further uncertainty in limitations law by refusing to apply the four-year statute of limitations to employment discrimination cases involving hiring decisions, based on the assertion that the portion of Section 1981 that gives rise to hiring claims was not amended in 1991.

not a year or more. As a result of this nearly impossible time frame, scores of valid claims are not pursued. While one can debate the soundness of the public policy that requires plaintiffs to exhaust their remedies with the EEOC before going to court, at the very least, the 90-day deadline for filing a complaint in court should be expanded to 180 days, if not one year. A new Administration should support legislation to implement this change.

III. CONCLUSION

Though much progress has been made toward eliminating discrimination in the workplace, continued efforts are needed to address harmful biases that continue to block full realization of the dream of equal employment opportunity. The next Administration should adopt 21st Century measures suited to the 21st Century workplace, including the set of reforms advanced in this paper. The change we advocate is simple, and the framework is already in place: (1) *sunshine*: disclose Diversity Report Card data in SEC reports that companies already file, electronically collect the Affirmative Action Plans that federal contractors are already required to create, and adopt the other disclosure enhancements measures we propose; (2) *enforcement*: strengthen the government's ability to address systemic discrimination, including reorganizing the EEOC's systemic enforcement teams; and (3) *access to justice*: provide a uniform, four-year statute of limitations for federal employment discrimination claims. These reforms have the potential to dramatically improve the American workplace.

Racial Disparities in Capital Punishment: Blind Justice Requires a Blindfold

Scott Phillips*

Justice is supposed to be blind—meted out according to the legal characteristics of a case rather than the social characteristics of the defendant and victim. But decades of research on race and capital punishment demonstrate that blind justice is a mirage.¹

In this Issue Brief, I describe research I conducted on race and capital punishment in Harris County, Texas. Though the entire state of Texas has earned a reputation for execution, Harris County—home to Houston and surrounding areas—is the capital of capital punishment. Harris County has executed 104 offenders in the modern era (defined as the time from the Supreme Court’s reinstatement of capital punishment in 1976 to the present). That number means Harris County has executed more offenders than all the other major urban counties in Texas, combined. In fact, if Harris County were a state it would rank second in executions in the nation after Texas.²

My findings suggest that the race of the defendant and victim are both pivotal in the capital of capital punishment: death was more likely to be imposed against black defendants than white defendants, and death was more likely to be imposed on behalf of white victims than black victims (no Hispanic-white disparities were observed). Importantly, the disparities originated in the District Attorney’s (DA) office, not the jury’s deliberation room.

The central claim of the research—that racial disparities exist—does not insinuate that judicial actors intend to discriminate. Indeed, the Harris County District Attorney’s office has a long-standing practice of excluding the race of the parties from the memorandum that the DA uses to decide whether to seek the death penalty. Unfortunately, this commendable practice does not eliminate the influence of race.

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¹ See U.S. GOV’T ACCOUNTABILITY OFFICE, GGD-90-57, DEATH PENALTY SENTENCING: RESOURCE INDICATES PATTERN OF RACIAL DISPARITIES (1990), *available at* <http://archive.gao.gov/t2pbat11/140845.pdf>; RAYMOND PATERNOSTER, ROBERT BRAME & SARAH BACON, THE DEATH PENALTY: AMERICA’S EXPERIENCE WITH CAPITAL PUNISHMENT (Oxford Univ. Press 2007); David C. Baldus & George Woodworth, *Race Discrimination and the Death Penalty*, in AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT 501-51 (James R. Acker et al. eds., 2d ed. Carolina Academic Press 2003).

² For data on Texas executions by county see Death Row Home Page, <http://www.tdcj.state.tx.us/stat/deathrow.htm>, (last visited June 24, 2008). For data on United States executions by state see Death Penalty Information Center, <http://www.deathpenaltyinfo.org/> (last visited Sept. 26, 2008).

The issue brief is divided into the following sections: Part I describes how the Supreme Court prompted, and later responded to, social science research on race and capital punishment. Part II describes the methods and findings of the research I conducted on race and capital punishment in Houston. Part III advances a proposal for reducing racial disparities in capital punishment. Finally, Part IV addresses potential objections to the proposal.

I. THE SUPREME COURT, SOCIAL SCIENCE RESEARCH, AND EMPIRICAL PATTERNS

In *Furman v. Georgia*,³ the Supreme Court ruled on a 5-4 vote that capital punishment was administered in an arbitrary manner that constituted cruel and unusual punishment. Most of the justices in the majority used the word “arbitrary” to refer to numerical disparities, arguing that there was no legal basis for distinguishing the handful of defendants who were sentenced to death from the large number of defendants who committed equally reprehensible crimes but were spared. But two justices, Douglas and Marshall, also used the word “arbitrary” to refer to racial disparities in the imposition of capital punishment.

After the Supreme Court’s decision in *Furman*, states began to revise their laws and reinstate capital punishment. Some states eliminated arbitrariness by making the death penalty mandatory for defendants convicted of particular crimes. Other states adopted “guided discretion,” an approach that specified the range of crimes eligible for death, separated the guilt and punishment phases of a capital trial (allowing the prosecution and defense to introduce evidence of aggravating and mitigating circumstances during the punishment phase that could not have been introduced during the guilt phase), and required automatic appellate review. In *Woodson v. North Carolina*⁴ and the companion case *Roberts v. Louisiana*,⁵ the Supreme Court struck down mandatory death statutes arguing that the protection of human dignity required individual consideration of each case. But the Supreme Court upheld guided discretion statutes in *Gregg v. Georgia*⁶ and the companion cases *Proffitt v. Florida*⁷ and *Jurek v. Texas*,⁸ beginning the modern era of capital punishment. Guided discretion statutes soon proliferated as states passed legislation that would comply with the ruling in *Gregg*.

Following the Supreme Court decision in *Gregg* (1976), social scientists began to examine whether guided discretion actually eliminated the influence of race on capital punishment. David Baldus and colleagues’ Procedural Reform Study (PRS) and Charging and Sentencing Study (CSS) remain the most important and rigorous research on the topic.⁹ The authors’ statewide findings in Georgia revealed that the race of the defendant did not influence the chance of being sentenced to death, but the race of the victim did: the odds of a death sentence were 4.3 times higher if the victim was white.

The results of Baldus and colleagues’ research became the basis for the most important Supreme Court decision on race and capital punishment: *McCleskey v.*

³ *Furman v. Georgia*, 408 U.S. 238, 240 (1972).

⁴ *Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976).

⁵ *Roberts v. Louisiana*, 428 U.S. 325, 336 (1976).

⁶ *Gregg v. Georgia*, 428 U.S. 153, 207 (1976).

⁷ *Proffitt v. Florida*, 428 U.S. 242, 260 (1976).

⁸ *Jurek v. Texas*, 428 U.S. 262, 276-77 (1976).

⁹ See DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* (Northeastern Univ. Press 1990).

Kemp.¹⁰ McCleskey argued that racial disparities in the administration of capital punishment rendered the ultimate sanction unconstitutional. The Supreme Court did not contest the empirical patterns, but nonetheless rejected McCleskey's challenge on a 5-4 vote.¹¹ Most centrally, the court argued that statistical evidence of racial disparities alone, without evidence of discrimination in the particular case at hand, does not establish a constitutional violation. The court was also reluctant to open Pandora's box, reasoning that if social science research regarding racial disparities invalidated capital punishment, then social science research could ultimately undermine the entire criminal justice system.

Two comprehensive reviews of research on race and capital punishment have been conducted since the Supreme Court's decision in *McCleskey*. The United States Government Accountability Office¹² reviewed the 28 studies published from 1972 to 1990, and, more recently, Baldus and Woodworth¹³ reviewed the 18 studies published from 1990 to 2003. The comprehensive reviews suggest the following:

- The race of the defendant does not have a consistent influence on capital punishment: some studies suggest that the death penalty is more likely to be imposed against black defendants, but most do not.
- The race of the victim has a consistent influence on capital punishment: almost all studies suggest that the death penalty is more likely to be imposed on behalf of white victims.
- Blacks who kill whites are more likely to be sentenced to death than any other racial combination.

II. FOCUSING ON THE CAPITAL OF CAPITAL PUNISHMENT: QUESTION, METHODS, AND FINDINGS

Though scholars have conducted extensive research on race and capital punishment, no "reasonably well-controlled" study had been done in Texas.¹⁴ Thus, I chose to focus on the following question: Did race influence the DA's decision to seek the death penalty or the jury's decision to impose the death penalty against the 504 adult defendants indicted for capital murder in Harris County, Texas from 1992-1999?

To answer the question, I collected and merged data from multiple archival sources, including: the Harris County District Attorney's Office; the Harris County Justice Information Management System; Harris County Medical Examiner records; the Texas Department of Health's Vital Statistics Mortality File; grand jury indictments; and *The Houston Chronicle*.

The data reveal that the DA during the time period under consideration, John Holmes Jr., was both selective and effective. The DA only sought the death penalty against 129 of the 504 eligible defendants, but secured 98 death sentences. Of the 98 condemned inmates, 34 have been executed to date. In short, once the DA decided to seek the death penalty, the die was essentially cast.

¹⁰ *McCleskey v. Kemp*, 481 U.S. 279 (1987).

¹¹ *Id.* at 319-20.

¹² U.S. GOV'T ACCOUNTABILITY OFFICE, GGD-90-57, DEATH PENALTY SENTENCING: RESOURCE INDICATES PATTERN OF RACIAL DISPARITIES (1990), available at <http://archive.gao.gov/t2pbat11/140845.pdf>.

¹³ BALDUS & WOODWORTH, *supra* note 1.

¹⁴ *Id.* at 519.

The most basic method for investigating potential racial disparities in the administration of capital punishment is to examine raw percentages. The percentages for Harris County suggest that the race of the defendant does not influence case outcomes, though slight disparities emerge based on the race of the victim.

Defendants:

- The DA sought death against 27 percent of white defendants, 25 percent of Hispanic defendants, and 25 percent of black defendants;
- A death sentence was imposed against 21 percent of white defendants, 19 percent of Hispanic defendants, and 19 percent of black defendants.

Victims:

- The DA sought death on behalf of 30 percent of white victims, 26 percent of Hispanic victims, and 23 percent of black victims;
- A death sentence was imposed on behalf of 23 percent of white victims, 21 percent of Hispanic victims, and 18 percent of black victims.

Based on the percentages, some might argue that the investigation is complete—death is administered in the most even-handed manner one could reasonably expect from a human institution doing the important and difficult job of prosecuting hundreds of capital murder cases.

But it is important to delve deeper. To do so, I used standard statistical techniques to examine the impact of race, holding constant the other relevant facts of the case. The multivariate logistic regression models suggest that the truth is more complicated than the percentages suggest.

To begin, consider the impact of defendant race on the odds of the DA seeking the death penalty. The multivariate models indicate that the odds of seeking death are 1.75 times higher against black defendants than white defendants. How did the transformation from percentage parities to multivariate disparities occur? The transformation occurred because black defendants committed murders that were less serious. Specifically, black defendants were less likely than white defendants to:

- Commit the most heinous murders as defined by the aggravating and mitigating circumstances in the case;
- Commit murders in a particularly brutal manner by beating, stabbing, or asphyxiating the victim;
- Commit murders involving a child victim, kidnapping, remuneration, or rape;
- Commit murder as an adult;
- Murder white victims, female victims, and victims who were physically vulnerable due to being especially young or old.

It might seem blasphemous to suggest that murders which include the above circumstances are more serious than those which do not—all murders are horrific. But I use the term “serious” simply because the DA was more apt to seek the death penalty under the above circumstances. The bottom line is straightforward: the DA sought death against black defendants and white defendants at the same rate despite the fact that black defendants committed less serious murders, as defined by the DA’s own track record. Comparing the percentage parities to the multivariate disparities leads to the following conclusion: to impose equal punishment against unequal crimes is to impose unequal punishment. The bar was set lower for seeking death against black defendants.

Now consider the impact of victim race on the odds of the DA seeking the death penalty. The multivariate models indicate that the odds of seeking death are 43 percent lower on behalf of black victims compared to white victims. How did the transformation from small percentage disparities to larger multivariate disparities occur? The transformation occurred because black victims were twice as likely to be killed in murders that had multiple victims. So the DA sought death less on behalf of black victims than white victims despite the fact that black victims were killed in more serious murders. The bar was set higher for seeking death on behalf of black victims.

But there is some good news. The DA decides whether to seek the death penalty, but jurors decide whether to impose the death penalty. Interestingly, the findings suggest that juries partially reversed the racial disparities that originated in the DA's office: the odds of seeking death are 1.75 times higher against black defendants, but the odds of imposing death drop to 1.49 times higher; the odds of seeking death are 43 percent lower on behalf of black victims, but the odds of imposing death drop to 38 percent lower. Presumably, the jurors' behavior is a response to the DA occasionally overreaching against black defendants and on behalf of white victims. The net effect is that juries attenuate but do not eliminate racial disparities.

Although the findings suggest that blacks and whites are not treated the same, the findings suggest that Hispanics and whites are treated the same. More research is needed to understand the mechanisms that produce black-white disparities but Hispanic-white parities.

III. DESOCIALIZATION: A PROPOSAL FOR CHANGE

Racial disparities in capital punishment are often used to call for abolition. But Texas is unlikely to abolish capital punishment in the absence of a Supreme Court mandate, and the Supreme Court demonstrated in *McCleskey v. Kemp* that it is not going to rule capital punishment unconstitutional based on statistical evidence of racial disparities.

Thus, I propose a more plausible plan for reducing racial disparities: desocializing the decision to seek the death penalty. Sociologist Donald Black's concept entitled the "desocialization of law" offers an intriguing idea for reducing the influence of social characteristics on legal proceedings.¹⁵ Drawn from Black's (1976) theory of law,¹⁶ desocialization is based on a simple but powerful notion: social information about defendants and victims cannot influence a legal proceeding if such information is unknown. Black also provides examples of how one could reduce or eliminate the social information available to judicial actors, while still ensuring that judicial actors have all the relevant legal information about a case. Black explains:

Over the centuries, information about social characteristics has been steadily attenuating in all walks of life. In this sense, human life is *desocializing* (italics in original). Once everyone had abundant information about everyone else in their daily lives, but no longer. The telephone operator knew personally those who made calls; the doctor knew the patients; the banker, the grocer, and the tailor knew the customers. But now this is rare. The increased scale, organization, and fluidity of modern life have resulted in a

¹⁵ DONALD BLACK, *SOCIOLOGICAL JUSTICE* (Oxford Univ. Press 1989).

¹⁶ DONALD BLACK, *THE BEHAVIOR OF LAW* (Academic Press 1976).

desocialization of human affairs. So have electronic communications. Transactions of all kinds are increasingly standardized and impersonal. More and more, everyone is treated the same everywhere. The disappearance of social information is reducing discrimination throughout society. Law, however, lags behind. It remains saturated with information about the social characteristics of litigants and others involved in legal affairs. Some cases, such as those resulting in a major criminal trial, are veritable feasts of social information about all concerned—with revelations of financial and family history, personal habits, associations, and improprieties. The abundance of this information, particularly in court, makes legal discrimination possible . . . The more social information, the more discrimination. It follows that a reduction of this information about every case—a desocialization of law—would reduce discrimination in legal life.¹⁷

Black's broad theoretical concept of desocialization could be tailored to any legal setting. To examine how Black's concept of desocialization could be specifically applied to Harris County, it is important to describe the local capital litigation process in more detail. To begin, the intake division prosecutor determines whether a homicide can be charged under the Texas capital murder statute. If a suspect is charged with capital murder, the complaint is assigned to a state district court. The intake prosecutor then forwards the case file to the chief prosecutor in the state district court who continues to build the file by acquiring additional evidence. The case must be presented to a grand jury within 90 days, though the investigation is often ongoing. If the grand jury returns an indictment for capital murder then the DA has the option to seek death. Having secured an indictment, the chief prosecutor and division chief prepare a capital murder summary memorandum that details the facts of the case and recommends whether to seek death. The memorandum is submitted to the bureau chief who also recommends whether to seek death. The DA makes the final decision of whether to seek the death penalty based on the capital murder summary memorandum and subordinates' recommendations.

I propose the following plan to create a genuine race-blind process for deciding whether to seek the death penalty:

1. The case file should be prepared in the traditional manner.
2. The DA's office should hire an assistant to strip the capital murder summary memorandum of all information that might insinuate the race of the defendant and victim, including, but not limited to: the names and addresses of the parties and the location of the crime. Other information might also need to be altered. If, for example, the defendant was found with crack in his pocket, a drug that is thought to be more commonly used by blacks than whites, then the report could be changed to note that the defendant was found with drugs in his pocket. The report might even use some ranking to delineate the seriousness of the drug without mentioning the name of the drug (Schedule 1 drugs, Schedule 2 drugs, etc). Or if the report mentioned that the victim was a 10th grade student in a high school that was known to be predominantly

¹⁷ *Id.* at 66-68.

black, then the report could be changed to note that the victim was simply a 10th grade student. Pictures of the defendant and victim would also need to be removed. Indeed, the pieces of information that might provide clues about the race of the parties would change from case to case, and are impossible to enumerate in advance. The assistant would need to be vigilant in recognizing the racial markers that are unique to each case. To be clear, the assistant would not alter relevant legal information about the case.

3. The chief prosecutor, division chief, and bureau chief who might be aware of the race of the parties should not provide a recommendation to the DA regarding whether to seek death.
4. The DA should make a concerted effort to avoid learning the race of the parties through media coverage, conversations with others in the office, or other channels. To sequester the DA from media coverage the assistant could provide the DA with newspapers and tapes of the local news that have been stripped of stories about pending capital murder cases. Though sequestering the DA from media coverage of pending capital murder cases might seem extreme, it is exactly what is asked of jurors.
5. If the DA inadvertently learns the race of the parties then he/she should allow a designated alternate to decide whether to seek death (perhaps a DA from another jurisdiction). In sum, the DA alone should decide whether to seek the death penalty based on the race-blind memorandum.

IV. ADDRESSING POTENTIAL OBJECTIONS

Having proposed a plan for change, I believe that it is important to respond to two potential objections: (1) that racial disparities do not exist and (2) that the proposed plan is impractical and places an unreasonable burden on the DA's office.

If statements made to the media are an accurate indicator, then the Harris County District Attorney's office does not seem to be convinced that racial disparities exist. In a *New York Times* article about my research, Scott Durfee, Chief Counsel to the Harris County DA, noted: "To the extent Professor Phillips indicates otherwise, all we can say is that you would have to look at each individual case. If you do that, I'm fairly sure that you would see that the decision was rational and reasonable." Durfee's response demonstrates that lawyers and social scientists often speak different languages. Lawyers tend to see each case as a unique set of facts that must be considered in isolation. Social scientists tend to examine broad patterns across numerous cases. The result is often miscommunication. The purpose of my research is not to investigate whether each decision can be justified. Given that all murders are an abomination, one could make a persuasive case for death against any defendant. Instead, the purpose of my research is to investigate whether a pattern of racial disparities emerges across hundreds of cases considered simultaneously. The question of racial disparities is, by definition, comparative.

Durfee also commented in a *Houston Chronicle* article that if there were ever "definitive evidence" of racial disparities the DA's office would take steps to address the problem.¹⁸ Durfee is correct that the research I conducted does not provide definitive evidence of racial disparities—no social science research could meet such a standard. But the research is strong. In fact, the research is as strong as possible given the fact

¹⁸ Lisa Falkenberg, *Remedying Unequal Punishment*, HOUSTON CHRONICLE, May 1, 2008, at B1.

that I was denied access to the capital murder memorandum for each case.¹⁹ If the DA's office had provided access to these memorandums then the research would have approached the unattainable standard of definitive proof—I would have had the same exact information the DA had when he decided whether to seek death. Thus, I could have controlled for all potential confounders. The DA's office denied access because the memorandum is a confidential work product. Yet there is nothing stopping the DA's office from using the memorandums to conduct an internal investigation. Therefore, I suggest that the DA's office hire a team of independent experts to replicate the research I conducted using the memorandums. The research team should be comprised of independent experts who have not conducted prior research on capital punishment in Texas. That means I am excluded. In the social sciences, there are three main organizations with members who study capital punishment: the American Society of Criminology, the Academy of Criminal Justice Sciences, and the Law and Society Association.²⁰ The leaders of the organizations could provide lists of people who are experts in capital punishment, research methods, and statistics. Because prosecutors would be advising and guiding the social scientists, the investigation could be done in a manner that guarantees that the DA's office is satisfied with the research protocol. To be sure, I am not suggesting that the research I conducted is an insufficient basis for action. Instead, I am arguing that if the DA's office does not find my research compelling then the burden shifts to the DA's office to conduct a rigorous internal investigation that would provide the strongest possible evidence of whether racial disparities exist.

But even those who concede that racial disparities exist might argue that desocialization is unrealistic and places too high a burden on the DA's office. I submit that desocialization is realistic for five reasons:

1. Most importantly, the Harris County DA's office is committed to equal justice, and therefore the current administration of capital punishment must be changed. The office's website includes a letter to the public stating that all staff are expected to demonstrate "... an absolute commitment to the ends of securing justice without regard to status, race, gender, or national origin, or the prominence of either the victims of crime or those charged with crimes."²¹ The existence of racial disparities does not suggest that the statement is insincere. Instead, disparities demonstrate that capital punishment is a microcosm of a society in which race continues to shape life chances. Desocialization provides a concrete plan for realizing a goal that the DA's office is already attempting to achieve—removing race from the decision-making process.
2. Desocialization builds on existing practices. As mentioned earlier, the Harris County District Attorney's office already takes commendable steps to remove

¹⁹ Scott Durfee, Chief Counsel to the Harris County District Attorney, provided archival documents that were used to verify the list of defendants generated by the Harris County Justice Information Management System and determine if the DA sought the death penalty. But the DA's office denied access to the capital murder memorandums.

²⁰ See The American Society of Criminology, <http://www.asc41.com/> (last visited Sept. 26, 2008); Academy of Criminal Justice Sciences, <http://www.acjs.org/> (last visited Sept. 26, 2008); Law and Society Association, <http://www.lawandsociety.org/> (last visited Sept. 26, 2008).

²¹ Welcome to the Harris County District Attorney's Office, <http://app.dao.hctx.net> (last visited Sept. 26, 2008).

race from the decision-making process of whether to seek the death penalty. The proposed plan merely expands existing practices to create a genuine race-blind procedure.

3. Desocialization is affordable. The Harris County DA's office would probably only need about \$50,000 a year to hire an additional assistant.
4. Desocialization builds on an existing ethical framework. The DA is bound to a code of conduct that could be expanded to include the obligation to make all reasonable efforts to avoid learning the race of the parties in a capital case.
5. Desocialization includes contingencies. If the DA happens to learn the race of the parties then a designated alternate can decide whether to seek the death penalty.

In the world of potential public policies, desocialization is procedural rather than revolutionary, logistical rather than utopian, affordable rather than exorbitant. Desocialization could be implemented if the DA in Harris County became committed to the idea and used the weight of his/her office to force change. Whether the current DA, or either of the two candidates currently running for the post, would choose to do so is impossible to predict. Desocialization could also be implemented in other jurisdictions if local officials are willing to think creatively about how to apply the broad concept to the concrete case.

The potential merit of desocialization should be evaluated according to three standards: (1) Does the proposed plan have the potential to reduce racial disparities? To be sure, desocialization is imperfect. But the plan has potential: if all information that might insinuate the race of the parties is removed from the decision to seek the death penalty then the impact of race would surely attenuate if not disappear. (2) How do objections to the proposed plan compare to the problem of racial disparities? The critical issue is not whether legitimate objections can be made—legitimate objections can always be raised in response to calls for change. The critical issue is whether the objections are so compelling as to reject a plan that might reduce the fundamental injustice of disparate treatment. (3) Is desocialization more realistic than alternative ideas? The only alternative idea is to abolish capital punishment. Desocialization is clearly an uphill climb—progress would be slow and uneven until standard procedures could be established—but desocialization is not as inconceivable as abolition in Texas at the present time.

V. CONCLUSION

My research suggests that the race of the defendant and victim are both pivotal in the capital of capital punishment: death was more likely to be imposed against black defendants than white defendants, and death was more likely to be imposed on behalf of white victims than black victims. The disparities arise in the DA's decision to seek the death penalty. In fact, juries provide a partial correction to the initial disparities. Presumably, the jurors' behavior is a response to the DA occasionally overreaching. Nonetheless, disparities remain.

The disparities do not suggest that the DA intends to treat people differently. The DA's office has a long-standing and laudable policy of not including the race of the parties in the memorandum used to decide whether to seek the death penalty. To reduce racial disparities, the existing policy should be expanded to create a genuine race-blind decision-making process. Desocialization would not impede the work of the DA's office—it would simply strip the capital murder memorandum of irrelevant

information. Indeed, how can one object to removing information that is not supposed to matter anyway? Put simply, blind justice requires a blindfold.

The State-by-State Assault on Equal Opportunity

Melissa Hart*

For more than four decades, equal opportunity initiatives have been an essential component of efforts to foster true equality and ensure civil rights for women and people of color. Outreach, recruiting, training and mentoring programs that target underrepresented groups have been indispensable to tearing down barriers to opportunity and giving long-excluded communities a fair chance to achieve their full potential. Systemic discrimination remains a significant impediment to full equality, but without affirmative efforts to address persistent barriers, progress would be even more limited.

Affirmative action programs, however, have become a hotly contested aspect of civil rights law. The controversy turns on a core dispute over the meaning of equality. To some, the Constitution and civil rights laws guarantee merely a formal equality. This conception of equality demands treating every person identically and ignoring the ways in which people are situated differently. For others, the equality to which we are committed is a more substantive value. This vision recognizes a shared responsibility for the circumstances that have left some communities behind, and sees that our common fate rests in acknowledging those circumstances and ensuring equality of opportunity—not just a formality, but a true opportunity for contribution and participation in the community.

The debate between these two ideas of equality and their implications for the reach of civil rights laws has played itself out in the United States Supreme Court for the past three decades. It is one of the most closely watched areas of the Court's jurisprudence and a central focus of battles over judicial nominations. Each time the Court takes a case that calls the legitimacy of equal opportunity policies into question, the civil rights community fears the triumph of formal over substantive equality. But, thus far, the Court has taken a relatively measured middle-ground, limiting the permissible scope of affirmative action significantly, but retaining a core that acknowledges the need to remedy discrimination and the value of diversity.

A small group of well-funded opponents of equal opportunity, frustrated with the Court's continued rejection of their radical vision of formal equality, has been steadily attempting to shift the debate into the political arena. This November, voters in Colorado and Nebraska are all but certain to face ballot initiatives seeking to make affirmative action illegal under those states' constitutions. These initiatives are substantially identical to laws that have already passed in California, Washington and Michigan.¹ Each prohibits "preferential treatment" on the basis of race or gender in

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¹ CAL. CONST. art. I, § 31 (passed as Proposition 209); WASH. REV. CODE § 49.60.400 (1998) (passed as Initiative 200); MICH. CONST. art. I § 26 (passed as Proposal 2).

public education, employment or contracting. The term preferential treatment is not defined in the proposed initiatives, but the identical language has been interpreted to prohibit *any* consideration of race or gender in the covered areas. In states where these initiatives pass, it has become effectively irrelevant what the Supreme Court says about affirmative action.

The consequence of eliminating equal opportunity programs in California—the state with the longest history under the restrictive law—has been a significant reduction in opportunities for minorities and women in education and contracting. Washington and Michigan have faced similar challenges, and in the states targeted this year, opponents of the anti-equal opportunity initiative already have identified myriad ways in which communities in each state will be harmed if the measure becomes law. Moreover, Ward Connerly, the California millionaire who started this effort twelve years ago and has bankrolled it around the country since, has said he will continue to push these ballot measures in other states in future election cycles.² The damage done by the anti-affirmative action initiative language is, of course, most significant for those states in which these laws are passed. But the impact of the initiative on public and judicial discourse about equal opportunity already has gone far beyond any single state's boundaries.

This issue brief is primarily an effort to shed some light on the state-by-state assault on equal opportunity, to challenge the flawed assumptions on which its supporters rely and to briefly describe opposition efforts in states targeted for this election year. I conclude with some thoughts about the broader impact this effort is having on the national conversation.

I. THE DECEPTIVE LANGUAGE AND CHARACTERIZATIONS OF THE ANTI-EQUAL OPPORTUNITY INITIATIVE

The anti-equal opportunity initiative being shopped around the country by conservative activists provides that “The State shall not discriminate against or grant preferential treatment to any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education or public contracting.”³ The sole purpose of the initiative is contained in the five words “or grant preferential treatment to,” which have been consistently interpreted to eliminate a state's ability to maintain even the very limited equal opportunity efforts that are permissible under Supreme Court equal protection jurisprudence.

The initiative was first proposed as a constitutional amendment in California by Connerly, a protégé of then-governor Pete Wilson. After the passage of what was known as “Proposition 209” in 1996, Connerly created an organization called the American Civil Rights Institute (ACRI) to monitor compliance with the new law in California and to support the passage of identical laws in other states.⁴ The ACRI receives its funding from prominent conservative foundations and its other founders

² See, e.g., Leslie Fulbright, *Connerly Gearing Up for Wider Crusade*, SAN FRANCISCO CHRON., December 14, 2006, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2006/12/14/MNGR2MV3I51.DTL>.

³ See, e.g., CAL. CONST. art. I, § 31(a). The initiative includes several additional clauses, but the primary substantive provision is this single sentence. The language proposed for the ballots in the five states targeted in 2008 is identical to this language. Throughout this issue brief, I will refer to “the initiative” in the singular, given that it is the same language being pushed in different states.

⁴ See American Civil Rights Institute, *Welcome to ACRI!*, <http://www.acri.org> (last visited Sept. 5, 2008) (describing the mission of the ACRI).

and board members include conservative activists Clint Bolick, Grover Norquist, and *National Review* president Thomas L. (Dusty) Rhodes.⁵

Since 1996, the ACRI and the related American Civil Rights Coalition (ACRC) have taken nearly identical language to Washington State and Michigan. These groups also made an unsuccessful bid to include their language on the ballot in Florida,⁶ and in 2007 announced that they were exploring 10 states as possible targets for the next round of initiative efforts.⁷ Ultimately, ACRI decided that it would target Arizona, Colorado, Missouri, Nebraska, and Oklahoma for the 2008 election.⁸ The ACRI and ACRC have as their goal to achieve what litigation in the Supreme Court has not accomplished—the elimination of all equal opportunity programming—by amending state constitutions.⁹

The ACRI, and the state analogs it creates and funds to run these initiative campaigns, have been successful in their efforts to garner votes in large part by fostering confusion both about the purpose and the effects of the initiative and by hijacking the language and message of the civil rights movement. In each state where the initiative is proposed it is called the “Civil Rights Initiative,” and spokespeople for the initiative repeatedly link it to the Civil Rights Act of 1964.¹⁰ When asked about the purpose of the measure, signature collectors and spokespeople consistently say simply that it is intended to end discrimination. In Colorado, many citizens reported that, even when pressed, signature collectors denied that the measure was intended to end affirmative action.¹¹ Similar reports have come out of Nebraska and Arizona.¹² And after the Michigan campaign, a federal district court found that proponents of the Michigan Civil Rights Initiative had “engaged in a pattern of voter fraud by deceiving voters into believing that the petition supported affirmative action.”¹³

⁵ Phil Wilayto, *Ward Connerly and the American Civil Rights Institute* (2000), <http://www.mediatransparency.org/personprofile.php?personID=13>.

⁶ See Wilayto, *supra* note 5. The ACRI initiative did not make it to the ballot in Florida because the Florida Supreme Court concluded that the language did not meet the state’s “single-subject” requirements. *Id.*

⁷ See, e.g., Super Tuesday for Equal Rights, <http://www.supertuesday2008.org/about.html> (last visited Sept. 5, 2008) (noting that proponents of the anti-equal opportunity initiative were considering pushing initiatives in Arizona, Colorado, Missouri, Nebraska, Nevada, Oklahoma, Oregon, South Dakota, Utah, and Wyoming).

⁸ See, e.g., Bill Berkowitz, *Ward Connerly’s ‘Equal Rights’ Con*, Sept. 7, 2007, <http://www.mediatransparency.org/story.php?storyID=210>.

⁹ See, e.g., American Civil Rights Coalition, <http://www.acrc1.org/> (last visited Sept. 5, 2008) (“[W]e focus on the political influence needed to effect the elimination of preferences and classifications.”); Fulbright, *supra* note 2.

¹⁰ See, e.g., Super Tuesday for Equal Rights, *supra* note 7; Colorado Civil Rights Initiative, <http://coloradocri.org/> (last visited Sept. 5, 2008); Michigan Civil Rights Initiative, <http://www.michigancivilrights.org/> (last visited Sept. 5, 2008); Arizona Civil Rights Initiative, <http://arizonacri.org/> (last visited Sept. 5, 2008); Nebraska Civil Rights Initiative, <http://www.nebraskacri.org/> (last visited Sept. 5, 2008); Missouri Civil Rights Initiative, <http://www.missouricri.org/> (last visited Sept. 5, 2008).

¹¹ See, e.g., Cara DeGette, *Fighting Misleading Petitioners Isn’t Easy*, COLORADO INDEPENDENT, Feb. 21, 2008, <http://www.coloradoconfidential.com/showDiary.do?diaryId=3477>.

¹² See, e.g., Carrie Watters, *Woman Wants Name Off Ballot Petition*, THE ARIZ. REPUBLIC, June 30, 2008, available at <http://www.azcentral.com/community/glendale/articles/2008/06/30/20080630gl-initiative0630-ON.html>; Editorial, *Petition Drive Off to a Misleading Start*, LINCOLN JOURNAL STAR, June 10, 2008, at B5, available at <http://www.journalstar.com/articles/2008/06/10/opinion/editorial/doc484da801e03dc740239896.txt>.

¹³ *Operation King’s Dream v. Connerly*, No. 06-12773, 2006 WL 2514115, at *11 (E.D. Mich. Aug. 29, 2006).

II. THE FLAWED PREMISES THAT UNDERLIE THE INITIATIVE

While proponents of the anti-affirmative initiative have been successful in large part because of the misleading language and deceptive campaign strategies they have employed, they also have gained support through reliance on a set of simplistic, and very troubling, premises. First, opponents of all affirmative action argue that any consideration of race or gender aimed at opening opportunities is as offensive to the Constitution's Equal Protection Clause as invidious discrimination. If refusing to hire a woman because of her gender is sexist, they argue, then so are summer camps designed to encourage girls to pursue careers in engineering and math. The formal equality ideal that this belief rests on demands that the state be "color-blind" and "gender-blind," and insists that this is the best way to achieve equality.

This notion of equality is fundamentally flawed in its blindness to the real circumstances in which women and people of color live their lives. In America today, women still make an average of 77 cents for every dollar men make; for women of color that number drops to 67 cents.¹⁴ The median income for white families in 2006 was \$52,375; for Hispanic families \$38,747; and for African-American families \$32,372.¹⁵ Educational opportunities and employment opportunities are simply not the same for people of color as they are for whites in our society; nor do women of any color have the same opportunities that men do.

Myriad studies demonstrate the persistence of subtle discrimination in our society. In one study, for example, researchers simulated an interview process in which job candidates ranged along a spectrum from unqualified to very qualified and included both black and white applicants. When participants were asked to rank two marginally qualified candidates—one white and one black—they consistently gave the black candidate much lower rankings.¹⁶ In studies of attitudes about working mothers, the same patterns emerge: faced with identical application materials from mothers and non-mothers, the mothers were ranked as less qualified, less competent and less committed.¹⁷ Women and minorities continue to have limited access to the kinds of training programs, informal networks and mentoring opportunities that are the surest guarantors of success. Equal opportunity programs provide a check against these persistent inequalities.

Studies also increasingly point to the benefits that diversity brings to the table. A recent book by a University of Michigan professor of economics and political science, Scott E. Page, shows how organizations with diverse staffing will be stronger than homogeneous firms.¹⁸ As Professor Page explained in a recent interview:

The problems we face in the world are very complicated. Any one of us can get stuck. If we're in an organization where everyone thinks in the same way, everyone will get stuck in the same place.

¹⁴ BRUCE H. WEBSTER, JR. & ALEMAYEHU BISHAW, U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY REPORTS, ACS-02, INCOME, EARNINGS AND POVERTY DATA FROM THE 2006 AMERICAN COMMUNITY SURVEY, 13-16 (2006).

¹⁵ *Id.* at 3.

¹⁶ See John F. Dovidio & Samuel L. Gaertner, *Aversive Racism and Selections Decisions: 1989 and 1999*, 11 PSYCHOL. SCI. 315, 316-17 (2000).

¹⁷ See Laura T. Kessler, *Keeping Discrimination Theory Front and Center in the Discourse over Work and Family Conflict*, 34 PEPP. L. REV. 313, 318-319 (2007).

¹⁸ See generally SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS AND SOCIETIES* (Princeton Univ. Press 2007).

But if we have people with diverse tools, they'll get stuck in different places... There's a lot of empirical data to show that diverse cities are more productive, diverse boards of directors make better decisions, the most innovative companies are diverse.¹⁹

While race and gender are only pieces of a larger world of "diversity," eliminating them from consideration in composing classrooms and workplaces artificially and detrimentally ignores these important facets of diversity.

Furthermore, ignoring real differences—for example in the way that young girls are socialized about the legitimacy of careers in science and math—is not a path to equality, but a guarantee of continued inequalities. Proponents of the anti-affirmative action measure explain that the initiative will not eliminate programs for girls in science, but will simply require those programs to be open to boys as well. In this area, and in others targeted by equal opportunity outreach, training and mentoring programs, gender-neutrality defeats the very purpose of the programs, which is to acknowledge and address the ways that girls and boys are socialized to learn differently.

A second flawed premise underlying the anti-affirmative action initiative is a conviction that certain groups of people "deserve" things—particularly positions in schools and jobs—that they are being denied because some less-deserving people are getting them. The website for the Colorado Civil Rights Initiative (the group touting the ACRI initiative in Colorado) uses a startling picture at the top of its home page that illustrates this vision. In the photograph a cherubic little white boy wearing a shirt emblazoned with a lion and the word "roar" clutches an ice cream cone. Next to him, a little black girl with a ring of ice cream around her open mouth and her empty fists clenched stretches out to take another bite from his cone.²⁰

This assumption—that opportunity is a zero sum game, where the deserving might lose out to the undeserving—fundamentally misunderstands the range of factors that go into hiring and admissions decisions. In schools and workplaces around the country, decision-makers are not simply drawing lines at some numerical cut-off, with the deserving on one side of the line and the undeserving on another. Decisions about the composition and dynamics of a classroom or office are much more complicated and nuanced than this vision presumes.

The assumption also misunderstands (or misconstrues) the very limited nature of currently permissible equal opportunity programming. The Supreme Court has considered the constitutionality of race-based affirmative action plans in public education,²¹ employment,²² and contracting.²³ In each area, a race-based affirmative action program will survive constitutional scrutiny only if it is supported by a compelling governmental interest and is narrowly tailored to meet its goals.²⁴ The

¹⁹ Claudia Dreifus, *In Professor's Model, Diversity = Productivity: A Conversation with Scott E. Page*, N.Y. TIMES, January 8, 2008, at F2, available at <http://www.nytimes.com/2008/01/08/science/08conv.html>.

²⁰ See Colorado Civil Rights Coalition, *supra* note 10. The same picture is used on the identical websites for each of the states in which the initiative has been proposed. See, e.g., Michigan Civil Rights Initiative, <http://www.michigancivilrights.org>; Arizona Civil Rights Initiative, <http://www.arizonacri.org>; Nebraska Civil Rights Initiative, <http://www.nebraskacri.org>; Missouri Civil Rights Initiative, <http://www.missouricri.org>.

²¹ See *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

²² See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

²³ *Adarand v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. Croson*, 488 U.S. 469 (1989).

²⁴ See, e.g., *Adarand*, 515 U.S. at 227.

standards for gender-based affirmative action are not as clearly developed, but gender-based classifications are also subject to heightened scrutiny.²⁵ Thus, while some limited affirmative action is constitutionally permissible, many more specific plans have been found unconstitutional than have survived the strict scrutiny applied by the Court.

Schools, employers and government contractors today are not rejecting more qualified applicants in favor of unqualified women and people of color. However, in times of economic uncertainty, the ACRI initiative has garnered considerable support by playing to fears that they might be.

III. THE NEGATIVE IMPACT OF THE INITIATIVE

The most obvious and harmful impact of the initiative has been in the context of public higher education. In the first year after the passage of Proposition 209 in California, the number of black students offered admission at the University of California (UC) at Berkeley dropped from 562 to 191.²⁶ The number of Hispanic students offered admission that year went from 1,266 to 600.²⁷

A decade later, California's flagship schools saw one of the worst years in their history for enrollment of African-American students. At UCLA, in the fall of 2006, only 96 African-American students enrolled in the freshman class—2% of the 4,802 students entering that year. That was the smallest number of black entrants in 30 years.²⁸ At the University of California at San Diego that same year, only 1% of the entering class was African-American,²⁹ and at UC Berkeley, African-American students accounted for only 3.3% of the new freshmen.³⁰ From 1996 to 2006, the number of underrepresented minority freshman in the entering class at Berkeley fell 65%.³¹ At UCLA, the drop in minority enrollment in the freshman class during that same decade was 45%. The declining rates come at the same time that the population of the state is increasingly diverse.

For school administrators in California, 2006 was a wake-up call. In the following year, for example, UCLA shifted to a “holistic” or “comprehensive” review to try to address the negative effect that an over-adherence to statistical success measures was having on the diversity of admits.³² At Berkeley, Chancellor Robert J. Birgenau announced in August 2006 the creation of a vice chancellor position for equity and

²⁵ Gender-based classifications, while subject to “skeptical scrutiny,” *United States v. Virginia Military Institute*, 518 U.S. 515, 523-24 (1996), have not been held subject to the highest level of court review, strict scrutiny. As a practical matter, however, if race-conscious affirmative action programs are eliminated, gender-conscious programs are likely to fall by the wayside, even if they are subject to a more lenient standard of review.

²⁶ See UC Berkeley News Center, *New Freshman Total Admits by Ethnicity, 2006–07 Through 2008–09 Academic Year*, http://www.berkeley.edu/news/media/releases/2008/04/admits_archival.shtml (last visited Sept. 5, 2008).

²⁷ *Id.*

²⁸ Carmina Ocampo, *Prop 209: Ten Long Years*, THE NATION, Nov. 22, 2006, at 8, available at <http://www.thenation.com/doc/20061211/ocamp>.

²⁹ Eleanor Yang Su, *UC Ethnic Shift Revives Prop 209 Debate*, SAN DIEGO TRIB., Nov. 27, 2006, at A1, available at http://www.signonsandiego.com/uniontrib/20061127/news_1n27prop209.html.

³⁰ See Ocampo, *supra* note 28.

³¹ Office of Student Research, Univ. of Cal. Berkeley, *New Freshman Registrants by Ethnicity, Fall 1996-2006*, <https://osr2.berkeley.edu/newfroshtrend.html> (last visited Sept. 5, 2008).

³² Lauren Bartlett, *New UCLA Admissions Data Show High Academic Quality for Students Admitted for Fall 2007 Freshman Class*, Apr. 5, 2007, <http://newsroom.ucla.edu/portal/ucla/New-UCLA-Admissions-Data-Show-High-7826.aspx?RelNum=7826>.

inclusion.³³ The new position was created to address the need for oversight of university efforts to recruit, retain, and create a welcome environment for diverse students and faculty.³⁴ Birgenau conceived the position in part as a response to the poor climate that shrinking numbers and consequent isolation had wrought for underrepresented minorities at Berkeley.³⁵ In the past two years, minority admissions have improved somewhat at both UCLA and Berkeley. Whether the schools will be permitted to maintain their renewed efforts at cultivating a diverse climate remains to be seen.

In response to the passage of Proposal 2 in Michigan, the University of Michigan increased its admissions staff, expanded weekend and evening hours in some offices and used geodemographic research to target underrepresented groups. Despite these efforts, in a year in which the University saw the highest number of applications in its history, the number of applications from underrepresented minorities declined.³⁶ This trend is consistent with patterns in California, where the hostile message sent by the anti-affirmative action initiative encouraged students of color to apply and attend elsewhere. Through their considerable and costly efforts, however, the University of Michigan was able to keep the number of underrepresented minorities in the projected freshman class at rates only slightly lower than previous years. At Michigan Law School, the percentage of minority students in the class of 2010 dropped to 25% from 31% in the class of 2008.³⁷ The admissions cycle during which Proposal 2 was first effective shows a dramatic impact from the new law; the percentage of minority applicants admitted before December 28, 2006 was 39.6%, but after the law went into effect the next business day, the percentage of admitted minority applicants dropped to 5.5%.³⁸

The impact of the ACRI initiative on education has gone well beyond the admissions numbers. The initiative has prompted the elimination of many educational opportunities, including programs designed to encourage girls interested in math and science to pursue careers in those fields and scholarships targeted to encouraging people of color to enter medical careers in underserved communities, or to become K-12 teachers.³⁹ The Michigan Civil Rights Commission conducted a study evaluating measures in the state that might be the subject of post-Proposal 2 challenges, including programs such as tutoring for at-risk elementary school girls.⁴⁰

³³ Robert Birgenau, Chancellor, Univ. of Cal., Berkeley, Remarks on Diversity Initiatives (Aug. 23, 2006), available at http://berkeley.edu/news/media/releases/2006/08/23_press_rjb.shtml.

³⁴ Janet Gilmore, *Gibor Basri Selected as New Vice Chancellor for Equity and Inclusion*, July 19, 2007, http://www.berkeley.edu/news/media/releases/2007/07/19_basri.shtml.

³⁵ Birgenau, *supra* note 33.

³⁶ Univ. of Mich. News Service, *Applications to U-M Ann Arbor Reach Historic High*, June 12, 2008, <http://www.ns.umich.edu/htdocs/releases/story.php?id=6609>. While total applications increased 8.5%, minority applications decreased by 2%. *Id.*

³⁷ Univ. of Mich. Law School, *Law School Facts*, <http://www.law.umich.edu/newsandinfo/Pages/facts.aspx#students> (last visited Sept. 5, 2008).

³⁸ Inside Higher Ed., *Now and then: Minorities and Michigan*, June 19, 2007, <http://www.insidehighered.com/news/2007/06/19/michigan>. These numbers are likely particularly dramatic because of public awareness about Proposal 2. The Law School encouraged students to apply before the law's effective date, and tried to get as much of its admissions cycle completed before that date as it could. *Id.*

³⁹ See, e.g., Press Release, Governor's Office, *Wilson Unveils List of 30 Offending Statutes* (Sept. 9, 1997) (released by former Cal. Governor Pete Wilson), available at <http://aad.english.ucsb.edu/docs/wilson.9-97.html>.

⁴⁰ MICH. CIVIL RIGHTS COMM'N, "ONE MICHIGAN" AT THE CROSSROADS: AN ASSESSMENT OF THE IMPACT OF PROPOSAL 06-02 (2007), http://www.michigan.gov/documents/mdcrFinalCommissionReport3-07_1_189266_7.pdf.

It is more difficult to assess the impact of the anti-affirmative action amendment on contracting opportunities for women and minorities, but the minimal data that is available suggests significant harm. For example, the city of Grand Rapids, Michigan is one of the few cities in the state that maintains documentation of city projects awarded to minority- or women-owned businesses. Data from Grand Rapids show startling effects from Proposal 2. In the year and a half after its passage, the dollar volume of construction projects in the city increased by 45%, or more than \$20 million. Construction project dollars going to minority-owned business enterprises (MBEs) declined by 45%, or \$1.18 million and the amount going to women-owned business enterprises (WBEs) dropped by 70%, or \$582,118.⁴¹ Moreover, in Washington state, following the passage of I-200, public contracts awarded to minorities and women decreased by more than 25% in Seattle.⁴² The share of minority contracts awarded in the state fell from 10.8% to 3.1%. A California study showed a 25% drop in the dollar value of public transportation contracts awarded to minority-owned businesses between 1996 and 2006.

Many of the programs potentially at risk from the anti-affirmative action initiative are outside of the areas traditionally considered subjects of affirmative action. For example, in the wake of the passage of Proposal 2, a report by the Michigan Civil Rights Commission identified 18 different programs that “may not violate proposal 2” and nine that “appear to violate proposal 2.”⁴³ Among the many programs at risk in Michigan are community health programs like a smoking prevention program that gives priority to pregnant women and women with young children; certain foster care and adoption programs that provide special incentives and benefits based on the ethnicity of the child; and programs that offer grants to minority college students planning to go into K-12 teaching careers or to minority medical school students who commit to work in underserved communities.⁴⁴

To a significant extent, the effect of the anti-affirmative action initiative in a particular state will be dependent on the responses of government actors in that state. In California, for example, Proposition 209’s effects were extremely far-reaching because then-governor Pete Wilson was himself dedicated to ending affirmative action. He therefore took steps in the wake of the amendment’s passage to eliminate many programs that another governor might have made efforts to preserve.⁴⁵ That different approach is apparent in Michigan, where passage of Proposal 2 led Governor Jennifer Granholm to direct the Michigan Civil Rights Commission to undertake a comprehensive examination of state programs with the twin goals of faithfully executing the new law while continuing to promote the compelling state interest of diversity.⁴⁶

Even when state or local government officials have remained committed to maintaining diversity as a compelling goal, regular litigation by the ACRI and others has led to relatively expansive interpretation of the initiative’s language, making implementation of any effective equal opportunity programming extremely difficult. The

⁴¹ B. Candace Beeke, *Construction Contracts up in G.R., but not for Minorities*, BUS. REV. W. MICH., April 23, 2008, http://blog.mlive.com/wmbr/2008/04/construction_contracts_up_in_g.html.

⁴² Alex Fryer, *Private Jobs Elude Black Contractors*, SEATTLE TIMES, Aug. 13, 2002, at A1, available at <http://community.seattletimes.nwsources.com/archive/?date=20020813&slug=contractor13m>.

⁴³ MICH. CIVIL RIGHTS COMM’N, *supra* note 40.

⁴⁴ *Id.*

⁴⁵ Press Release, Governor’s Office, *supra* note 39.

⁴⁶ MICH. CIVIL RIGHTS COMM’N, *supra* note 40.

California Supreme Court's decision striking down the City of San Jose's public contracting regulations provides a good example.⁴⁷

The San Jose program required contractors bidding on city construction projects to demonstrate that they had not discriminated against or given preference to any subcontractors based on race, sex, color, age, religion, sexual orientation, disability, ethnicity, or national origin. For each contract, a potential contractor could use one of two alternate methods to make this demonstration.⁴⁸ Under the first method, labeled "Documentation of Outreach," the contractor would have to send written notices, personally follow up with, and negotiate in good faith with four minority or women-owned businesses for each trade identified for the project. The contractor did not have to hire an MBE or WBE, but had to make some showing that they were not excluded from the process.⁴⁹ Under the second, alternative method, identified as "Documentation of Participation," the contractor could invoke an "evidentiary presumption" of non-discrimination by including in its bid a sufficient number of minority or women-owned participants in its bid. "Sufficiency" in this context was determined by an assessment, given the available, qualified subcontractors, of the number of minority or women-owned businesses that would be expected as part of the bid "in the absence of discrimination."⁵⁰

In 1997, Hi-Voltage Wire Works, the apparent low bidder on a construction project, declined to satisfy the conditions set forth in the city's program, instead challenging the program as a violation of the state's new constitutional provision.⁵¹ When the case reached the California Supreme Court, that court concluded that the city's Documentation of Participation rule violated Proposition 209 because it effectively operated to grant "preferential treatment" to subcontractors on the basis of race or gender. The court also concluded that the Documentation of Outreach component of the city's program was invalid under Proposition 209, finding that requiring outreach to women and people of color was a form of preferential treatment.⁵²

In a more recent case, the Sacramento Municipal Utility District sought to justify its affirmative action plan as required by federal agencies from which the District received funding.⁵³ Because the ACRI initiative includes an exception for instances where affirmative action is required as a condition for the receipt of federal funds, the District argued that its plan did not violate Proposition 209.⁵⁴ The District pointed out that it received federal funding from the Department of Transportation, the Department of Energy and the Department of Defense, all of which include non-discrimination obligations in their regulations, and include language that a fund recipient has an obligation to remedy effects of past discrimination.⁵⁵ Based on this language, the District argued that its affirmative action plans fell within the exception to

⁴⁷ *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068 (Cal. 2000).

⁴⁸ *Id.* at 1071

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 1084.

⁵³ *C & C Const., Inc. v. Sacramento Mun. Util. Dist.*, 18 Cal. Rptr. 3d 715, 717–18 (Cal. Ct. App. 2004).

⁵⁴ *Id.* The relevant provision of the ACRI initiative, as enacted in the California constitution, provides that "Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state." CAL. CONST. art. I, § 31

⁵⁵ *C & C Const.*, 18 Cal. Rptr. 3d at 728–23.

Proposition 209's ban. The California Court of Appeals rejected that argument, concluding that a state or local government would have to meet a strict standard for demonstrating that the plan was "necessary" for federal funding.⁵⁶

This kind of expansive interpretation of the anti-affirmative action initiative by the courts leaves little room for the kind of balance that, for example, Governor Granholm hopes to achieve in Michigan. If the initiative is interpreted to eliminate outreach programs, and to include only the narrowest of exceptions for federally funded state programs, the space for creative efforts to maintain diversity and counter the continued pervasive effects of discrimination begins to look quite small.

IV. FIGHTING BACK AGAINST THE INITIATIVE

Opponents of the ACRI efforts in Michigan in 2006 put on a strong campaign against the initiative. Opinion leaders in the state spoke out against the harmful effects the law could have on the state educational system and economy and supporters of equal opportunity worked tirelessly to educate voters about the proposed law. Despite these efforts, the ACRI campaign, which a federal judge described as "best characterized by the use of deception and connivance to confuse the issues,"⁵⁷ was successful. In the states targeted for the initiative this year, opponents started fighting back as soon as rumors surfaced that they might face this challenge. In Oklahoma and Missouri, vigorous efforts to raise awareness about the real purpose of the initiative, and to challenge the ACRI's signature collection efforts, kept the initiative off the ballot entirely.⁵⁸ In Arizona and Nebraska, anti-affirmative action groups submitted the necessary signatures for ballot consideration on July 3. Opponents filed challenges, arguing that up to 40% of the signatures submitted were invalid. In Arizona, the Secretary of State announced on August 21 that the ACRI initiative would not be on the ballot because the number of valid signatures collected was insufficient.⁵⁹ The ACRI initiative was certified for the ballot in Nebraska in late August.⁶⁰

In Colorado, opponents of the anti-equal opportunity initiative have launched challenges on several fronts. The initiative was introduced in Colorado in July 2007. Opponents of the measure challenged it before the Title Board, the administrative agency whose initial approval is necessary before any initiative can start the process of submission to the ballot. Their challenge focused on the deceptive nature of the undefined term "preferential treatment."⁶¹ Despite proponents' refusal to define the term, the Title Board concluded that it was not unclear, and set a title for the initiative, giving

⁵⁶ *Id.*

⁵⁷ *Operation King's Dream v. Connerly*, No. 06-12773, 2006 WL 2514115, at *11 (E.D. Mich. Aug. 29, 2006).

⁵⁸ See, e.g., Sarah Hebel, *Measure to Ban Affirmative Action in Oklahoma Fails to Make it Onto the Ballot*, CHRON. OF HIGHER EDUC., Apr. 7, 2008, <http://chronicle.com/news/article/4265/measure-to-ban-affirmative-action-in-oklahoma-fails-to-make-it-onto-the-ballot>; Sylvia Maria Gross, *Affirmative Action Ban Misses Deadline to Hand in Signatures*, May 5, 2008, http://www.publicbroadcasting.net/kcur/news.newsmain?action=article&ARTICLE_ID=1272226§ionID=1.

⁵⁹ Howard Fisher, *Anti-affirmative Action Initiative Fails, Shy Valid Signatures for Ballot*, ARIZ. DAILY STAR, Aug. 22, 2008, available at <http://www.azstarnet.com/metro/254008>.

⁶⁰ See Melissa Lee, *Affirmative Action Likely on Ballot in Nebraska*, LINCOLN-JOURNAL STAR, Aug. 26, 2008, available at http://www.hispanicbusiness.com/politics/2008/8/26/affirmative_action_likely_on_ballot_in.htm.

⁶¹ See Opening Brief of Petitioner at 26-27, *In re Title, Ballot Title and Submission Clause and Summary for 2007-2008 #31*, No. 07SA197 (Colo. July 16, 2007), available at http://www.courts.state.co.us/userfiles/File/Court_Probation/Supreme_Court/initiatives/2008/31/07-16-07OpeningBriefPetitioners Part1of2.pdf.

its proponents the green light to start collecting the approximately 76,000 signatures they would need to have the initiative placed on the November 2008 ballot.

The signature collection process undertaken by supporters of the anti-affirmative action measure was rife with fraud and deception. Several Colorado citizens complained to the Secretary of State that they were lied to about the meaning of the proposal when they asked signature collectors for an explanation. While these individuals pursued the available administrative remedies, the “Vote No on 46” campaign filed suit in the Denver District Court, challenging the validity of over 60% of the signatures collected in support of the initiative.⁶² The suit pointed to consistent violations of Colorado’s election law, including use of out-of-state petition circulators, and called into question whether the initiative actually received a sufficient number of valid signatures to be on the ballot. In late July, 2008, this litigation was dealt a near-fatal blow when the district court ruled that it did not have jurisdiction to consider claims of circulator fraud, but only challenges to the validity of individual signatures. The case has been stayed pending resolution of a similar question in a challenge to another Colorado ballot initiative.

Recognizing that challenges to the kind of misconduct engaged in by Connerly’s supporters are hard to win, opponents of the initiative in Colorado also decided to propose an alternative measure for inclusion on the November ballot. An alternative measure might have several benefits. First, by offering voters two different approaches to the same perceived problem, an alternative initiative could force voters to think about the difference between the two, and to really consider the impact the anti-affirmative action measure would have. Second, an alternative could be drafted such that, if both measures passed, the harm done by the ACRI initiative could be mitigated by language in the alternative.

With these thoughts in mind, a group of Colorado citizens ultimately proposed a counter-initiative, Initiative #82, that read:

(1) The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting. “Preferential treatment” means adopting quotas or awarding points solely on the basis of race, sex, color, ethnicity, or national origin.⁶³

This language, by using an identical first sentence to the ACRI measure, but then defining “preferential treatment” specifically and narrowly, succeeds in forcing supporters of the anti-equal opportunity measure to be much more specific about the kinds of programs their measure would outlaw. Given the role that confusion played

⁶² David Montero, *Suit Filed over Amendment 46*, ROCKY MOUNTAIN NEWS, Apr. 24, 2008, available at <http://www.rockymountainnews.com/news/2008/apr/24/suit-filed-over-amendment-46/>.

⁶³ Initiative #82 also included subsections providing that: (2) Nothing in this section shall be interpreted as prohibiting action taken to establish or maintain eligibility for any federal program and (3) Nothing in this section shall be interpreted as invalidating or prohibiting any court-ordered remedy or consent decree in a civil rights case. This initiative was actually the *second* effort by opponents of the Connerly initiative to put a counter-measure on the ballot. An earlier proposed counter-initiative was denied a title by the Title Board. The Board decision was appealed to the Colorado Supreme Court, which ultimately ordered a title set for the original counter-measure. By the time that decision came down, however, opponents of the Connerly initiative had decided to pursue Initiative #82 instead of the earlier proposed initiative.

in securing the initiative's passage in California and Michigan, the hope was that this strategy might derail the ACRI Colorado effort.

Unfortunately, on September 3, 2008, the Colorado Secretary of State's office announced that Initiative #82 had not garnered enough valid signatures to be on the November ballot.⁶⁴ The effort to get an alternative initiative on the ballot was hard-fought, in no small part because ACRI lawyers fought the alternative through each step of the administrative process, including in two different appeals to the Colorado Supreme Court. The delay that ACRI was able to create through this litigation put the alternative initiative in the precarious position of needing to collect more than 76,000 signatures in less than two months. Colorado opponents of the ACRI initiative are still evaluating whether next steps in the effort to oppose the measure will involve a lawsuit challenging the Secretary of State's determination on the alternative.

V. CONCLUSION

The anti-affirmative action initiative being shopped around the country by the ACRI is a serious threat to the continued vitality of equal opportunity programs. This is certainly true in the specific states in which the initiative has passed or passes in the future. But the scope of the harm done by this effort reaches beyond these states' borders in important ways.

First, even in states where the initiative does not pass, its introduction risks changing the tone and nature of the discussion about affirmative action. Media coverage of the anti-affirmative action initiative introduces simplistic statements about race and gender relations into public discourse. For example, Connerly himself recently wrote an op-ed arguing that Barack Obama's candidacy for the presidency was proof that affirmative action was no longer needed.⁶⁵ This notion has been repeated in news magazines and other popular media venues,⁶⁶ with little attention paid to the difference between one man running for president and the tens of thousands of people of color denied opportunities every day because of the color of their skin. And on a recent television debate, the Colorado spokesperson for the anti-affirmative action initiative, Jessica Peck Corry, asserted as her parting shot that the very fact that she and I were on television debating demonstrated that women had "made it" and that gender-based equal opportunity efforts were now unnecessary.⁶⁷ Again, this rhetoric seeks to substitute the experiences of a very small group with the reality of the glass ceiling.

Second, in many judicial opinions discussing the anti-affirmative action initiative, the text and intent of that amendment is discussed in parallel with the language and purpose of the Equal Protection Clause and federal civil rights laws. Both the California Court of Appeals and that state's Supreme Court, in decisions interpreting Proposition 209, intertwined equal protection principles with the language and analysis of Proposition 209.⁶⁸ Given the way precedent develops in American jurisprudence,

⁶⁴ Kevin Flynn, *One Less Initiative on Hefty Colorado Ballot*, ROCKY MOUNTAIN NEWS, Sept. 3, 2008, available at <http://www.rockymountainnews.com/news/2008/sep/03/affirmative-action-protection-measure-falls-short/?partner=RSS>.

⁶⁵ Ward Connerly, Obama and Dr. Livingston, MONTECITO J., Feb. 1, 2007, <http://www.montecitojournal.net/archive/13/5/706/>.

⁶⁶ See, e.g., Bonnie Erbe, *Barack Obama's Election Would Kill Affirmative Action*, July 16, 2008, <http://www.usnews.com/blogs/erbe/2008/7/16/barack-obamas-election-would-kill-affirmative-action.html>.

⁶⁷ See *Your Show: Oil and gas industry and Amendment 46* (www.9news.com broadcast June 29, 2008), http://www.9news.com/yourshow/article_archive.aspx?storyid=94748&catid=363.

⁶⁸ Connerly v. State Pers. Bd., 112 Cal. Rptr. 2d 5 (Cal. Ct. App. 2001).

the risk of merging the discussion of these two very different legal standards is that future opinions will increasingly blur the distinction, allowing the anti-opportunity philosophy of the ACRI initiative subtly to infect the jurisprudence of equal protection. While this concern may seem remote, the California Supreme Court's first decision interpreting Proposition 209 offers a concrete example. In *Hi-Voltage Wireworks*, the court's majority gave what it called an "extended perspective" on the history of legal thinking "as to the appropriate role of government concerning questions of race."⁶⁹ The several-page history incorporates the ACRI initiative as a logical step in the development of United States race law and accepts wholesale the reinterpretation of civil rights law put forward by anti-affirmative action advocates. By adopting this revisionist tale of our nation's civil rights history, the courts risk a shift in the meaning and importance of these well-established rights.

Perhaps the most disconcerting development in the battle over equal opportunity this year has been the sense of inevitability that the ACRI initiative has been greeted with in many quarters. Citizens in states targeted by this effort are opposed to its objectives, but they have seen it pass now in both California and Michigan. Rather than fight back, making themselves the targets of ACRI's litigation machine, some of those who will be most affected if the initiative passes are choosing to remain relatively silent, and to start planning now for the best way to mitigate the harm when it passes. It is too early for this surrender. Connerly and the ACRI announced in 2007 that they would target up to 10 states for November 2008 ballot initiatives. They ended up pursuing their agenda in only five, and they already have failed in three.⁷⁰ This demonstrates that with concerted political and educational efforts, supporters of equal opportunity can prevail against this misleading and destructive campaign. It will require focus and a sense of urgency, but success is eminently possible—and well worth the effort.

⁶⁹ *Hi-Voltage Wire Works, Inc v. City of San Jose*, 12 P.3d 1068, 1072 (Cal. 2000).

⁷⁰ See *supra* notes 59-62.

Just Cause in Montana: Did the Big Sky Fall?

Barry D. Roseman*

I. INTRODUCTION

For more than 130 years, the default rule in employment in the United States has been the rule of employment at will. Persons who are employed at will can be fired for a good reason, a bad reason or no reason at all—even a totally arbitrary or irrational reason—as long as that decision is not unlawful as a result of a specific law, such as the National Labor Relations Act or federal, state or local antidiscrimination statutes and ordinances. In contrast, most unionized employees in the United States can be fired only if the employer has a good reason, or just cause, for that decision.

This issue brief summarizes the common-law doctrine of employment at will in the United States and its impact, including the unfair results it has produced for many employees. It then examines the experience of Montana, the only one of the 50 states that has adopted an alternative approach—one requiring that private-sector employers have just cause to dismiss employees even if they do not have contractual just-cause protections.

One of the arguments for employment at will is an economic one, that just cause for termination of employment leads to higher unemployment rates and lower job growth rates. As this paper shows, in Montana this is not true. Montana now has one of the lowest unemployment rates in the United States. Its economy over the last three decades has been driven by factors that have nothing to do with the fact that it has abolished employment at will.

An examination of this issue is especially timely right now, because a ballot measure that would amend the Colorado constitution to adopt the just cause standard is slated to appear on the ballot in that state this fall if its proponents collect enough valid signatures.¹ The Colorado measure would prohibit the discharge or suspension of an employee except for “just cause,” as that term is defined in that proposal, and would provide for resolution of disputes through hearings before private mediators. Those in Colorado and elsewhere interested in learning more about just cause employment thus would do well to consider the Montana experience.

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¹ The final text of the proposed initiative can be found on the Colorado State Board of Elections website, Proposed Initiative 2007–2008 #76: Final Text, http://www.elections.colorado.gov/WWW/default/Initiatives/Title%20Board%20Filings/2007-2008%20Filings/Final%20Text/final_text_76.pdf (last visited Sept. 11, 2008). On August 4, 2008, the initiative’s proponents submitted petitions containing over 130,000 signatures, far more than the number required for certification under Colorado law. Andy Vuong, *Signatures Turned in for Labor Initiatives*, THE DENVER POST, Aug. 4, 2008, http://www.denverpost.com/business/ci_10097679 (last visited August 5, 2008). On August 21, 2008, the Colorado Secretary of State certified that the proponents of that initiative had submitted more than the number of petition signatures needed for it to be placed on the November 2008 ballot. Statement of Sufficiency, Aug. 21, 2008, http://www.elections.colorado.gov/WWW/default/Initiatives/Title%20Board%20Filings/2007-2008%20Filings/Statement%20of%20Sufficiency/76_statement_of_sufficiency.pdf (last visited Sept. 2, 2008).

II. EMPLOYMENT AT WILL: THE DOCTRINE

A. THE ORIGINS OF THE RULE

In a treatise published in 1877, Horace G. Wood proclaimed an “inflexible” rule “that a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof.”² This was a substantial departure from the common law, at least in England. Under the English common law, an indefinite hiring was presumed to create an employment relationship or contract for one year, which could not be terminated at will during that term.³ The Tennessee Supreme Court provided a succinct summary of Wood’s rule in an 1884 opinion: “All may dismiss their employment at-will, be they for many or few, for good cause, for no cause or even for cause morally wrong, without thereby being guilty of legal wrong.”⁴

The doctrine of employment at will soon became the default rule in the United States.⁵ It is the law in every state except Montana. It is common law in most states and codified in a few.⁶ The United States is, however, alone among industrialized countries in following the general rule of employment at will. Established industrial powers such as France, Germany, Japan and the United Kingdom, and new democracies such as the post-apartheid Republic of South Africa, require that employers have just cause to dismiss non-probationary employees.⁷

B. THE EVOLUTION OF THE DOCTRINE AND ITS CONTINUED IMPORTANCE

Employment at will no longer is an inflexible rule. Anti-discrimination statutes prohibit private employers from terminating a worker’s employment because of that person’s race, sex, national origin, religion, age or disability.⁸ In addition, in 1912, Congress enacted the Lloyd-LaFollette Act,⁹ generally prohibiting the federal government from discharging federal employees except for cause. Over time, the vast majority of public employees in the United States also were granted protection, through statutes and ordinances, against dismissal without cause.¹⁰

A variety of federal statutes prohibit employers from discharging employees because they have engaged in conduct protected by those statutes. The National Labor

² HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT CONCERNING THE RELATION, DUTIES AND LIABILITIES OF EMPLOYERS AND EMPLOYEES 272 (1877).

³ WILLIAM BLACKSTONE, 1 COMMENTARIES 425 (“If the hiring be general, without any particular time limited, the law construes it to be a hiring for a year, upon a principle natural equity, that the servant shall serve and the master maintain him, throughout all the revolutions of the respective seasons, as well when there is work to be done as when there is not.”).

⁴ *Payne v. Western & A.R.R.*, 81 Tenn. 507, 519-20 (1884), *overruled on other grounds by* *Hutton v. Walter*, 179 S.W. 134 (Tenn. 1915).

⁵ *See, e.g.,* *Martin v. New York Life Ins. Co.*, 148 N.Y. 117, 42 N.E. 416, 417 (1895).

⁶ Cal. Labor Code § 2922; Ga. Code Ann. § 34-7-1; La. Civ. Code arts. 2024, 2747; N.D. Cent. Code § 34-03-01; S.D. Codified Laws Ann. § 60-4-4.

⁷ *See generally* WILLIAM L. KELLER AND TIMOTHY J. DARBY, INTERNATIONAL AND EMPLOYMENT LAWS (2d ed. 2004).

⁸ The major federal statutes barring employment discrimination are Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. §§ 2000e-2(a); the Age Discrimination in Employment Act of 1967 (“ADEA”), 29 U.S.C. §§ 623(a); the Rehabilitation Act of 1973, 29 U.S.C. §§ 791, *et seq.*; and Title I of the Americans with Disabilities Act of 1990 (“ADA”), 42 U.S.C. § 12112. Every state and many local governments also have enacted antidiscrimination statutes and ordinances. *See infra* at note 15.

⁹ 37 Stat. 539, 555, § 6 (1912).

¹⁰ *See generally* Note, *Developments in the Law-Public Employment*, 97 HARV. L. REV. 1611, 1619-68 (1984).

Relations Act prohibits termination of employment for an employee's participation in protected concerted activity.¹¹ The principal federal anti-discrimination statutes prohibit employers from retaliating against employees for having participated in proceedings under those statutes or for having opposed what they believe in good faith to have been unlawful employment discrimination.¹² Other federal statutes also prohibit termination of employment for retaliatory reasons.¹³ For example, the Family and Medical Leave Act¹⁴ prohibits employers from interfering with rights protected by the FMLA through termination of employment for having used leave authorized by that statute.

Most states also have enacted statutes that prohibit employers from discharging or otherwise taking any adverse employment actions against employees because of race, sex, national origin, religion, age, disability, or other protected characteristics.¹⁵ Those and other states have enacted statutes that prohibit the discharge of employees who have engaged in statutorily protected conduct or for other reasons.¹⁶

In addition, the development of common-law claims in most of the states has contributed to what some have characterized as the erosion of the employment at will doctrine.¹⁷ The three principal categories of these common-law claims are: (1) claims for breach of contract based on the employer's representations in personnel policies, employee handbooks, other documents and oral statements;¹⁸ (2) claims sounding in tort for wrongful discharge in violation of public policy;¹⁹ and (3) breach of an implied covenant of good faith and fair dealing.²⁰ A 2001 survey found that 38 states had recognized the implied-contract exception to the doctrine of employment at will, 43 states had recognized the public-policy exception and 11 states had adopted the implied covenant of good faith and fair dealing in the context of employment.²¹

Some commentators have suggested that, in light of these developments, every decision to dismiss an employee should be based on a good, documented reason.²² But while it may be the perception of most employees that they can be dismissed only for

¹¹ 29 U.S.C. § 158(a)(1).

¹² 42 U.S.C. § 2000e-3(a) (Title VII); 29 U.S.C. § 623(d) (ADEA); 42 U.S.C. § 12203 (ADA). The Supreme Court this last Term held that two statutes prohibited retaliation despite the fact that they were silent on that issue for some or all employees. *Gomez-Perez v. Potter*, ___ U.S. ___, 128 S.Ct. 1931 (May 27, 2008) (federal-sector provisions of ADEA); *CBOCS West, Inc. v. Humphries*, ___ U.S. ___, 128 S.Ct. 1951 (May 27, 2008) (42 U.S.C. § 1981).

¹³ See, e.g., 29 U.S.C. § 215(a)(3) (Fair Labor Standards Act); 29 U.S.C. § 660(c)(1) (Occupational Safety and Health Act of 1970); 30 U.S.C. § 820b(1) (Mine Safety and Health Act); 42 U.S.C. § 7622(a) (Clear Air Act); 33 U.S.C. § 1367 (Clean Water Act); 42 U.S.C. § 6971 (Resource Conservation and Recovery Act); 15 U.S.C. § 2622 (Toxic Substances Control Act); 49 U.S.C. § 2305 (Surface Transportation Assistance Act); 18 U.S.C. § 1514A(a) (Sarbanes Oxley Act of 2002); 31 U.S.C. § 3730(h) (False Claims Act).

¹⁴ 29 U.S.C. §§ 2601, *et seq.*

¹⁵ The EEOC lists dozens of state and local agencies that administer statutes and ordinances which prohibit employment discrimination. See 29 C.F.R. § 1601.74.

¹⁶ See generally LEX K. LARSON, UNJUST DISMISSAL, ch. 5 (1984 & 2007 Cum. Supp.).

¹⁷ See, e.g., Amy M. Carlson, *States Are Eroding At-Will Employment Doctrines: Will Pennsylvania Join the Crowd?*, 42 DUQ. L. REV. 511 (2004).

¹⁸ See, e.g., *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 292 N.W.2d 880 (1980).

¹⁹ See, e.g., *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975).

²⁰ See, e.g., *Fortune v. National Cash Register, Co.*, 373 Mass. 96, 104, 364 N.E.2d 1251, 1257 (1977).

²¹ Charles J. Muhl, *The Employment-at-Will Doctrine: Three Major Exceptions*, 124 MONTHLY LAB. R. 3, 4 (2001).

²² SEAN R. GALLAGHER & KATHY MILLER, THE PRACTITIONER'S GUIDE TO COLORADO EMPLOYMENT LAW, at 2-2 (2006 ed.).

just cause,²³ that is not the law. In reality, unless an employee has entered into or is the beneficiary of a contract of employment that requires just cause for termination by the employer,²⁴ the employment relationship is presumed to be at will. As a result, the statutory, contract and tort claims available to some employees are viewed as exceptions to the general rule,²⁵ and many judges treat these statutory and common-law claims as aberrational claims that should be interpreted narrowly.²⁶

III. THE IMPACT OF EMPLOYMENT AT WILL

The presumption of employment at will makes it more difficult for employees to prevail on claims that have been adopted legislatively and by the courts. Court frequently have stated that, in determining whether employers' proffered reasons for adverse employment actions are a pretext for employment discrimination or retaliation, they do not sit as "super-personnel departments, evaluating the correctness or wisdom of those employers' decisions."²⁷ Some courts have gone even further, concluding that it is not sufficient for a plaintiff to establish that a reason proffered by an employer is not accurate; rather, the plaintiff must establish that the employer lacked a good-faith belief in the accuracy of that reason.²⁸ Since it is generally difficult to rebut an employer's claim that it acted in good faith,²⁹ plaintiffs have a correspondingly more difficult task in convincing trial courts that there exists a genuine issue of material fact sufficient to defeat a motion for summary judgment.

These proof problems make it more difficult for employees to establish a discriminatory or retaliatory motive, either through direct evidence or by showing that the proffered reason was a pretext for an impermissible one. The predictable result is fewer verdicts for plaintiffs and fewer pro-plaintiff appellate decisions.

The doctrine of employment at will also creates grossly unfair results. Three cases illustrate this:

- Judge Andrew N. Frye, Jr., a circuit judge in West Virginia, dismissed Mary Lou Smith, a magistrate court clerk, because her son filed as a candidate against the incumbent circuit court clerk. The Fourth Circuit affirmed the

²³ Mark V. Roehling, *The "Good Cause Norm" in Employee Relations: Empirical Evidence and Policy Implications*, 14 EMP. RESP. & ARTS J. 91 (2002).

²⁴ Such contracts are not uncommon for highly compensated executives, athletes, coaches and persons who work in entertainment or in broadcast journalism. See David Yermack, *Golden Handshakes: Rewards for CEOs Who Leave*, at 2 (2005), <http://www.nber.org/~confer/2005/cgs05/yermack.pdf>, (last visited March 25, 2008) (84% of CEOs in sample who were dismissed received severance packages, with mean present value of \$7.11 million). In addition, most collective bargaining agreements require just cause for termination of employment. *Sanders v. Parker Drilling Co.*, 911 F.2d 191, 196 (9th Cir. 1990) (Reinhardt, J., concurring). However, only 7.9% percent of private-sector employees in the United States were represented by a labor union in 2003. Jelle Visser, *Union Membership Statistics in 24 Countries*, 129 MONTHLY LABOR REVIEW 38, 46 (Jan. 2006).

²⁵ See, e.g., *Benders v. Bellows & Bellows*, 515 F.3d 757, 766 (7th Cir. 2008); *Kamaka v. Goodsill Anderson Quinn & Stifel*, 117 Haw. 92, 111, 176 P.3d 91, 110 (2008).

²⁶ See, e.g., *Kassem v. Washington Hosp. Ctr.*, 513 F.3d 251, 254 (D.C. Cir. 2008); *Addis v. Exelon Generation Co., L.L.C.*, 880 N.E.2d 685, 693 (Ill. App. 2007); *Miracle v. Bell County Emergency Med. Servs.*, 237 S.W.3d 555, 558 (Ky. App. 2007).

²⁷ See, e.g., *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464 (7th Cir. 1986); *Verniero v. Air Force Acad. Sch. Dist. No. 20*, 705 F.2d 388, 390 (10th Cir. 1983).

²⁸ See, e.g., *Johnson v. Ready Mixed Concrete Co.*, 424 F.3d 806, 811 (8th Cir. 2005); *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1091 (5th Cir. 1995).

²⁹ Cf. *Pena v. State*, 166 S.W.3d 274, 279 (Tex. App. 2005); *Prod. and Maint. Employees' Local 504 v. Roadmaster Corp.*, 954 F.2d 1397, 1405 (7th Cir. 1992).

dismissal of Ms. Smith's complaint.³⁰ Judge Motz, in a concurring opinion, noted that this "may be an unfair reason for firing Ms. Smith but, because she was an at-will employee, Judge Frye could fire her for no reason or any reason at all—except an unlawful reason."³¹

- Karen King, a ten-year Marriott International employee who worked in the company's employee benefits department, was discharged on the ground that she didn't get along with other employees after she had complained about the company's proposed transfer of funds from an employee medical plan to a general corporate account. The Maryland Court of Special Appeals affirmed the dismissal of her complaint, holding that the public policy exception in Maryland to the doctrine of at-will employment did not support a claim based on those facts.³²
- Don's Super Valu, Inc. in Menomonie, Wisconsin, terminated the employment of Karen Bammert because her husband, a Menomonie police officer, had arrested the store owner's wife for drunk driving. The Wisconsin Supreme Court affirmed the dismissal of Ms. Bammert's complaint on the ground that the public policy exception in that state did not extend to retaliation for the conduct of an employee's spouse.³³

The at-will framework that produced these results is not only a problem for employees. Employers, their attorneys and counsel for employees must become familiar with a patchwork quilt of employment statutes, ordinances and common-law principles for any given jurisdiction. That increases the complexity of the legal environment in which employers in that jurisdiction must operate. In addition, since many of the claims and defenses are relatively new and are evolving, this legal regime is less predictable and less easy to manage than one in which the basic principles are clear and well established. The fact that these rules differ from state to state only adds to that complexity.³⁴ This can lead to difficult choice of law questions in cases involving multiple jurisdictions.³⁵

In addition, the doctrine of employment at will can exacerbate racial, gender and other tensions in the workplace. That is because workers who do not fall into a category protected by an anti-discrimination statute may feel less protected by the law than co-workers who are covered by those laws, and more vulnerable to an unfair termination.

IV. THE ALTERNATIVE—"JUST CAUSE"

The alternative to employment at will is a simple one, a requirement that an employer have just cause to discharge a nonprobationary employee. That is the law in

³⁰ Smith v. Frye, 488 F.3d 263 (4th Cir. 2007).

³¹ *Id.* at 277 (Motz, J., concurring).

³² King v. Marriott Inter. Inc., 160 Md. App. 689, 866 A.2d 895 (2005).

³³ Bammert v. Don's Super Valu, Inc., 254 Wis.2d 347, 646 N.W.2d 365 (2002).

³⁴ *Compare, e.g.,* Preston v. Claridge Hotel & Casino, 231 N.J. Super 81, 555 A.2d 12 (1989) (recognizing claim for breach of implied in fact contract based on employee handbook) *with* Murphy v. American Home Prods. Corp., 58 N.Y. 2d 293, 305, 448 N.E.2d 86, 91 (1983) ("absent a constitutionally impermissible purpose, a statutory proscription, or an express limitation in the individual contract of employment, an employer's right at any time to terminate an employee at will remains unimpaired").

³⁵ *See, e.g.,* Waddoups v. Amalgamated Sugar Co., 54 P.3d 1054 (Utah 2002) (applying Utah choice of law rules in determining that Idaho law established that plaintiff's claim sounded in tort and therefore was preempted by Labor Management Relations Act).

other advanced industrialized countries.³⁶ Highly compensated corporate executives, athletes, persons who work in broadcast journalism and others with highly specialized skills often enjoy the protection of just-cause protections in their individual employment contracts.³⁷ So do the majority of unionized employees, in their collective bargaining agreements.³⁸ A number of academic commentators have proposed that the federal government or state governments adopt just-cause statutes.³⁹

Of course, arguments have been offered in favor of the doctrine of employment at will. Professor Richard A. Epstein, for example, has argued that employment at will benefits both employers and employees.⁴⁰ The ability of both employers and employees to terminate their relationship at will, he contends, enables each side to monitor the other's behavior and to terminate that relationship whenever the net value of the contract turns negative.⁴¹ Employer abuses are minimized because of the reputation costs of unfair dismissals.⁴² Both employers and employees can diversify their risks and correct mistakes resulting from erroneous information at the initiation of the contract by terminating their relationships and seeking alternative opportunities.⁴³ In addition, according to Professor Epstein, employment at will is much cheaper to administer than a just-cause dismissal scheme.⁴⁴

This analysis is fundamentally flawed, most significantly because it does not take into account inequality in the bargaining relationship between employers and employees. Most employees simply lack the bargaining power to reject at-will status if the employer insists on it.⁴⁵ This is especially true in an economy in which employees have few alternative places to turn, since there are relatively few jobs available that provide just-cause protection.⁴⁶ Moreover, most employees erroneously believe that they can be discharged only for just cause.⁴⁷

The more frequent objection to just-cause statutes, however, is that at-will employment relationships are more economically efficient and therefore increase societal wealth and employees' earnings.⁴⁸ In a 1990 paper, Professor Edward P. Lazear, now the Chairman of the White House's Council of Economic Advisors, concluded that job security protections increase the unemployment rate.⁴⁹ That argument can be

³⁶ See INTERNATIONAL AND EMPLOYMENT LAWS, *supra* note 7.

³⁷ See *supra* note 24.

³⁸ *Id.*

³⁹ See, e.g., Steiber & Murray, *Protection Against Unjust Discharge: The Need for a Federal Statute*, 16 U. MICH. J.L. REFORM 319 (1983); Note, *Reforming At-Will Employment Law: A Model Statute*, 16 U. MICH. J.L. REFORM 389 (1983).

⁴⁰ Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 946, 956-57 (1984).

⁴¹ *Id.* at 963-67.

⁴² *Id.* at 967-68.

⁴³ *Id.* at 968-69.

⁴⁴ *Id.* at 970-72.

⁴⁵ The fact that just-cause protections are much more prevalent for employees with significant bargaining power strongly suggests that employees who currently lack such power would obtain these protections if they could.

⁴⁶ Unionized private-and public-sector jobs in the United States declined from 23.5% to 12.4% between 1970 and 2003. Visser, *supra* note 24, at 45.

⁴⁷ See James Robert Ward, III, *The Endowment Effect and the Empirical Case for Changing the Default Employment Contract from Termination "At-Will" to "For-Cause" Discharge*, 28 LAW & PSYCHOL. REV. 205, 207 (2004).

⁴⁸ See Epstein, *supra* note 40, at 951, 977-78.

⁴⁹ Edward P. Lazear, *Job Security Provisions and Employment*, 105 Q.J. ECON. 699 (1990). Other economists disagree with that conclusion. See, e.g., Katherine G. Abraham and Susan N. Houseman, Does

highly persuasive to legislators. Fortunately, it is possible to determine whether there is any empirical basis for the claim that just-cause arrangements result in reduced job growth and higher unemployment rates, to the detriment of both employers and employees. That answer can be found in Montana.

V. THE STORY FROM MONTANA—THE BIG SKY DID NOT FALL

A. WHAT HAPPENED IN MONTANA

In 1987, the Montana legislature enacted the first and, to date, the only state statute in the United States requiring that private-sector employers have just cause to discharge their employees.⁵⁰ The history of that statute, however, had its origins in more than five years of judicial decisions before the law's enactment.

On January 4, 1982, the Montana Supreme Court recognized, for the first time, an implied covenant of good faith and fair dealing for an employment contract that was terminable at will.⁵¹ The scope of that initial decision, known as "*Gates I*," was relatively limited, since the court held that the covenant was implied in the employment contract resulting from representations in an employee handbook stating that a written warning would be given to an employee prior to dismissal for unsatisfactory performance.⁵²

In later decisions, the Montana Supreme Court substantially expanded employers' liability and employees' possible damages for breach of that implied covenant. In an appeal after remand of *Gates I*, the court held, in a 4-3 decision, that breach of the covenant of good faith and fair dealing was a tort for which a plaintiff could recover not only economic damages, but also compensatory and punitive damages.⁵³

That court then recognized a claim for breach of the covenant where an employer had not adopted an employment handbook.⁵⁴ It held that whether a covenant of good faith and fair dealing would be implied "depends upon objective manifestations by the employer giving rise to the employee's reasonable belief that he or she has job security and will be treated fairly."⁵⁵ The court held that there were genuine issues of material fact precluding summary judgment on that claim, which included the plaintiff's allegation that she was given a pay raise after three months and promised another pay raise in an additional three months; that her supervisor told her he wanted her to learn to do his company's bookkeeping; that she was told she was doing a good job; and that her employer had a written policy that employees who demonstrated independence and initiative were most likely to become station managers.⁵⁶

Employment Protection Inhibit Labor Market Flexibility? Lessons from Germany, France and Belgium, in *SOCIAL PROTECTION VS. ECONOMIC FLEXIBILITY: IS THERE A TRADE-OFF?* (1994)

⁵⁰ In addition, both Puerto Rico and the U.S. Virgin Islands have enacted legislation requiring just cause for termination of employment. The Puerto Rican statute requires compensation for any employee, working without a contract for a definite term, who is discharged without good cause. 29 P.R. Laws Ann. §§ 185a-m. The Virgin Islands Wrongful Discharge Act sets forth the permissible grounds for termination of employment and provides the remedies of reinstatement and back pay for termination of employment in violation of that statute. 24 V.I. Code Ann. §§ 76, *et seq.*

⁵¹ *Gates v. Life of Montana Ins. Co.*, 196 Mont. 178, 184-85, 638 P.2d 1063, 1066-67 (1982) ("*Gates I*").

⁵² 196 Mont. at 184, 638 P.2d at 1067.

⁵³ *Gates v. Life of Montana Ins. Co.*, 205 Mont. 304, 307, 668 P.2d 213, 215 (1983) ("*Gates II*").

⁵⁴ *Dare v. Montana Petroleum Mktg. Co.*, 212 Mont. 274, 282, 687 P.2d 1015, 1020 (1984).

⁵⁵ *Id.*

⁵⁶ *Id.* at 283, 687 P.2d at 1020.

In a third decision, the Montana Supreme Court held that probationary employees were owed a duty of good faith and fair dealing.⁵⁷ The court found that there was evidence of objective manifestations by the employer supporting the employee's belief that she had job security, based in part on her earlier employment by an independent contractor that was acquired by the defendant; the defendant's failure to hold an evaluation meeting at the end of her 500-hour probationary period, as required by its personnel policy; and the defendant's failure to refer to her probationary status in the discharge memorandum or in an internal decisions sustaining the discharge.⁵⁸

Not all judicial decisions in the five years following *Gates I* resulted in an expansion of employees' rights and remedies. A federal district court granted summary judgment in favor of an employer on an implied-covenant claim because the plaintiff had not shown that the employer had breached his employment contract.⁵⁹ The Montana Supreme Court created exceptions to the implied covenant of good faith and fair dealing based on judicial immunity, First Amendment protections for the free exercise of religion, and preemption by the grievance procedures in a collective bargaining agreement.⁶⁰ Other decisions used a more deferential approach than the Montana Supreme Court had applied earlier to employers' performance standards and to employers' justifications for discharge decisions.⁶¹

This movement toward a more restrictive interpretation of the implied covenant of good faith and fair dealing in the employment context may have been the result of the accession of more conservative judges to the Montana Supreme Court.⁶² Whatever the cause of that trend, it was settled by 1987 that the implied covenant would provide meaningful relief for at least some Montana employees.

Gates I and its progeny nevertheless caused many employers and insurance carriers to look to the state legislature for relief from the tort damages available under the implied covenant. Pro-business legislators, working with lobbyists from the Montana Association of Defense Counsel, drafted a bill that eventually was enacted as the Montana Wrongful Discharge Act of 1987 ("MWDA").⁶³

The MWDA, which went into effect on July 1, 1987,⁶⁴ provides that an employer's decision to discharge an employee, or the constructive discharge of an employee,⁶⁵ is unlawful where (a) "it was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy"; (b) "the discharge was not for

⁵⁷ *Crenshaw v. Bozeman Deaconess Hosp.*, 213 Mont. 488, 498, 687 P.2d 487, 492 (1984).

⁵⁸ *Id.* at 497, 693 P.2d at 491-92.

⁵⁹ *Maxwell v. Sisters of Charity of Providence of Montana*, 645 F.Supp. 937, 939 (D. Mont. 1986).

⁶⁰ *Mead v. McKittrick*, 223 Mont. 428, 431, 727 P.2d 517, 519 (implied covenant claim by court secretary against district court judge); *Miller v. Catholic Diocese of Great Falls*, 224 Mont. 113, 116-17, 728 P.2d 794, 796 (1986) (claim by parochial school teacher); *Brinkman v. State*, 224 Mont. 238, 250, 729 P.2d 1301, 1309 (1986) (claim by State employee who was covered by a collective bargaining agreement).

⁶¹ *Belcher v. Dept. of State Lands*, 228 Mont. 352, 358-59, 742 P.2d 475, 479 (1987) ("This Court will not interfere with the Department of State Lands' right to manage its affairs and hire employees who will perform their jobs as long as there is a standard and the Department has abided by it"); *Coombs v. Gamer Shoe Co.*, 239 Mont. 20, 24, 778 P.2d 885, 887 (1989) ("[A]bsent any evidence of dishonesty or pretext [the employer's] actions would be appropriate given an employer's discretion to make personnel decisions it feels are in its best interests").

⁶² An empirical study of that trend appears in Schramm, *Montana Employment Law and the 1987 Wrongful Discharge from Employment Act: A New Order Begins*, 51 MONT. L. REV. 94, 107-08 n. 79 (1990).

⁶³ See *id.*, 108-110, for a brief synopsis of the legislative history of that statute.

⁶⁴ See Schramm, *supra* note 62, at 113.

⁶⁵ MONT. CODE ANN. § 39-2-903(2).

good cause and the employee had completed the employer's probationary period of employment"; or (c) "the employer violated the express provisions of its own written personnel policy."⁶⁶ The statute defines the term "public policy" to mean "a policy in effect at the time of the discharge concerning the public health, safety, or welfare established by constitutional provision, statute, or administrative rule."⁶⁷ It defines "good cause," the basis for the second ground for a wrongful discharge claim, as "reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason."⁶⁸

Although the substantive protections provided by the MWDA are far more extensive than those under any other state's statutes, the limitations period and the remedies are limited. A claim under the Montana statute must be filed within one year of the date of discharge, and an employer can require an employee to exhaust its written internal procedures for a period of no more than 120 days.⁶⁹ The statute preempts common-law claims "for discharge" arising "from tort or express or implied contract."⁷⁰ A plaintiff who establishes a wrongful discharge can be awarded damages for lost wages and fringe benefits for a period of four years from the date of discharge, less the amount of the plaintiff's interim earnings (less job-search expenses) or the amount the plaintiff could have earned with reasonable diligence, plus interest.⁷¹

A plaintiff can recover punitive damages only by establishing by clear and convincing evidence that the employer engaged in actual fraud or actual malice in a wrongful discharge.⁷² A plaintiff cannot recover damages for pain and suffering, emotional distress, compensatory damages, punitive damages (with the exception outlined above) or any other form of damages.⁷³

Either party to a dispute under the MWDA can make an offer to arbitrate that dispute within 60 days after service of the complaint, and the offer must be accepted, if at all, within 30 days after it is made.⁷⁴ If the discharged employee makes an offer to arbitrate that his or her ex-employer accepts and if that employee prevails in arbitration, that plaintiff will recover the arbitrator's fee and all costs of arbitration.⁷⁵ But if either party rejects a valid offer to arbitrate and loses, the prevailing party is entitled to recover attorney fees incurred after the date of the offer.⁷⁶

⁶⁶ MONT. CODE ANN. § 39-2-904.

⁶⁷ MONT. CODE ANN. § 39-2-903(7).

⁶⁸ MONT. CODE ANN. § 39-2-903(5). In an apparent concession to the tobacco lobby, the statute expressly provides that the "legal use of a lawful product by an individual off the employer's premises during nonworking hours is not a legitimate business reason," *id.*, unless the employer acts within the provisions of a separate statute that allows employers to restrict their employees' use of food, beverages or tobacco under certain circumstances. MONT. CODE ANN. §§ 39-3-313(3) and (4). Those circumstances include an employee's use of a lawful product that affects in any manner an individual's ability to perform job-related employment responsibilities or the safety of other employees or that conflicts with a bona fide occupational qualification that is reasonably related to the individual's employment.

⁶⁹ MONT. CODE ANN. §§ 39-2-911(1) and (2).

⁷⁰ MONT. CODE ANN. § 39-2-913. However, the MWDA does not apply to the discharge of an employee who is covered by a written collective bargaining agreement or a written contract of employment for a specific term. MONT. CODE ANN. § 39-2-912(2).

⁷¹ MONT. CODE ANN. § 39-2-905(1).

⁷² MONT. CODE ANN. § 39-2-905(2).

⁷³ MONT. CODE ANN. § 39-2-905(3).

⁷⁴ MONT. CODE ANN. § 39-2-914(3).

⁷⁵ MONT. CODE ANN. § 39-2-914(4).

⁷⁶ MONT. CODE ANN. § 39-2-915.

In 1989, the Montana Supreme Court, in a 4-3 decision, held that the MWDA did not violate the legal redress provision in the Montana Constitution,⁷⁷ overruling earlier decisions of that court⁷⁸ that had held that the Montana Constitution provides substantive protections against legislation that abolished common-law rights and remedies. The majority opinion also rejected the argument that the MWDA was unconstitutional because it failed to provide an adequate substitute for the common-law claims it abrogated, concluding that that statute was “an adequate substitute” for those common-law claims and remedies.⁷⁹

The MDWA, with all its limitations, still provides far greater rights than Montana employees had before the Montana Supreme Court, in *Gates I*, first recognized implied covenant of good faith and fair dealing claims in the employment context. Employment at will in Montana has not been the law in that state for the last 26 years, the last 21 of which was the result of a state statute with no parallel in any other state.

B. THE ECONOMIC IMPACT OF THE MONTANA WRONGFUL DISCHARGE ACT

As noted earlier, some have argued that greater worker protections lead to higher unemployment and reduced job growth.⁸⁰ The logic of that position is that if it is more difficult and expensive for employers to fire employees, they will be more reluctant to hire them. For example, the conservative columnist Thomas Sowell, writing in March 2006, claimed that French students, protesting a proposed law that would have made it easier to fire younger employees, ignored “elementary economics that adding to the costs, including risks, of hiring workers tends to reduce the number of workers hired.”⁸¹ Of course, a simple comparison of French and American employment laws and unemployment rates would ignore the potential impact of other factors, such as the very different unemployment and welfare benefits in the two countries, comparative wage rates, international competition, international trade policy and the outsourcing of jobs to firms based in other countries. The profound differences between the French and American legal systems also would make it difficult to determine what economic consequences, if any, those two countries’ laws on employees’ rights have on unemployment rates and employment growth in those countries.

The Montana Wrongful Discharge Act, however, does provide an opportunity to analyze the economic impact of a just-cause employment regime. Montana employers are subject to the same federal laws as employers in other states. Its legal system is the same, and its unemployment and welfare benefits are very similar to those of other states, including the states that border it. The same market forces that affect hiring decisions of employers in Montana also affect the hiring decisions of employers in the same or similar industries in other states, including neighboring states. And economic reports by the Bureau of Labor Statistics (“BLS”) of the U.S. Department of Labor use the same assumptions and methodology on a national basis.

⁷⁷ *Meech v. Hillhaven West, Inc.*, 238 Mont. 21, 776 P.2d 488 (1989). The Montana Constitution provides that the courts of that state “shall be open to every person, and speedy remedy afforded for every injury of person, property or character,” and that “[n]o person shall be deprived of this full legal redress.” Mont. Const., Art. II, Sec. 16.

⁷⁸ *White v. State*, 203 Mont. 363, 661 P.2d 1272 (1983); *Pfost v. State*, 219 Mont. 206, 218-22, 713 P.2d 495, 502-05 (1985).

⁷⁹ *Meech*, 238 Mont. at 43, 776 P.2d at 501.

⁸⁰ See *supra* note 49 and accompanying text.

⁸¹ Thomas Sowell, *French Student Riots*, THE POST CHRONICLE, March 18, 2006, http://www.postchronicle.com/commentary/article_21210928.shtml (last visited June 16, 2007).

I have compared the seasonally adjusted unemployment rates in Montana with those in neighboring states—Idaho, North Dakota, South Dakota and Wyoming—during three periods of time. If the legal developments in Montana had affected unemployment rates, one would expect to see differences between those rates in Montana and those in surrounding states. The first period, from January 1976 through December 1981, preceded *Gates I*. During the second period, from January 1982 through June 1987, Montana employees could bring claims under *Gates I* and its progeny for breach of the implied covenant of good faith and fair dealing. The third period, from July 1987 through December 2007, is the one in which Montana employers have been required to comply with the Montana Wrongful Discharge Act.

Between January 1976 and December 1981, Montana employment rates followed the same general trends as those in neighboring states and in the United States, generally, although the Montana unemployment rate in December 1981 was higher than that in any of the states that border it other than Idaho (see Figure 1).⁸²

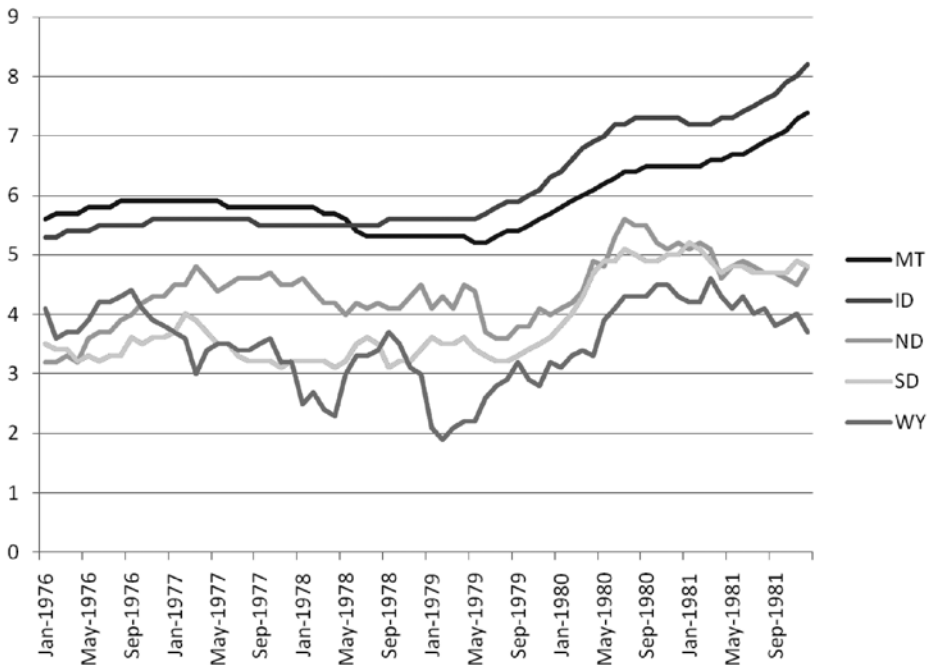


FIGURE 1:
SEASONALLY ADJUSTED UNEMPLOYMENT RATES, JAN. 1976-DEC. 1981

What happened after the Montana Supreme Court handed down its decision in *Gates I*? In two words, not much (see Figure 2).

⁸² The information in the following graphs all is derived from data on the Bureau of Labor Statistics' Web site, <http://www.bls.gov/>.

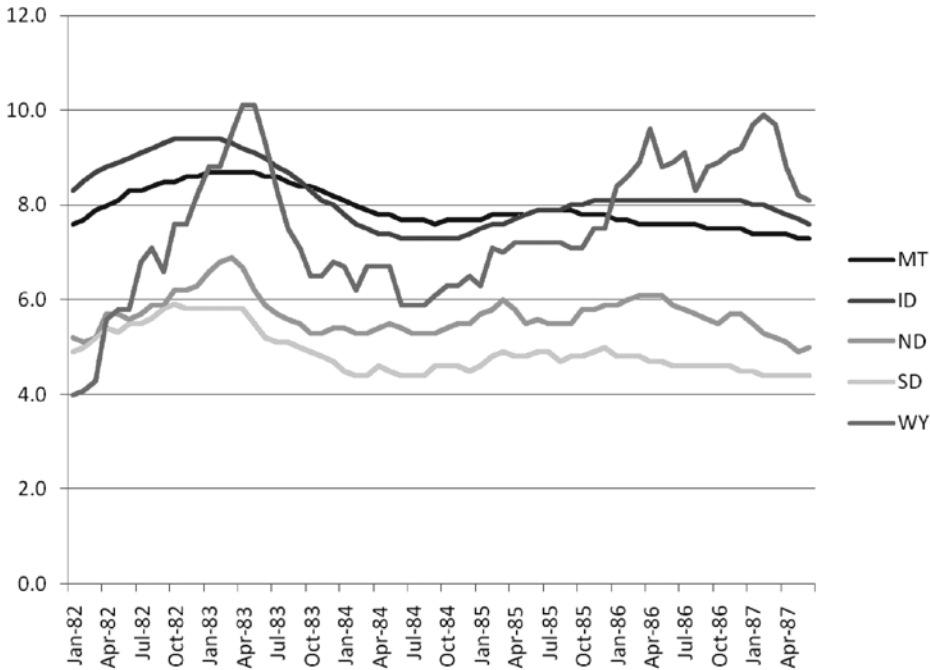


FIGURE 2
SEASONALLY ADJUSTED UNEMPLOYMENT RATES, JAN. 1982-JUNE 1987

The unemployment rates in both Montana and Idaho, after remaining in the 5-6% range during the latter 1970s, began increasing in July 1979 and reached 7.4% and 8.2%, respectively, by December 1982. The unemployment rates for North Dakota, South Dakota and Wyoming were more volatile and generally were lower than the unemployment rates in Montana and Idaho during that same period of time.

The unemployment rates for Montana and Idaho continued to move in tandem with each other after *Gates I* and before enactment of the MWDA. The unemployment rates in North Dakota and South Dakota also continued to move in tandem with each other and were significantly lower than the unemployment rates in Montana and Idaho during that same time period. Wyoming's unemployment rate became much more volatile. It jumped from 3.7%, the lowest rate among these five states in December 1981, to 8.1%, the highest rate among the five, in June 1987.

What happened after the MWDA was enacted? The Montana unemployment moved in the opposite direction from what Professor Lazear and others predict based on their view of elementary economics (see Figure 3):

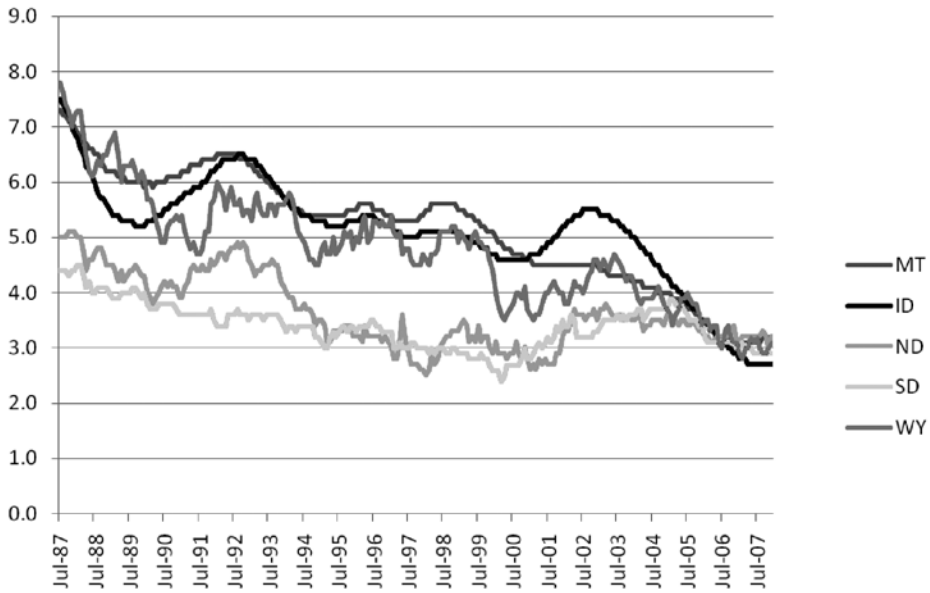


FIGURE 3
SEASONALLY ADJUSTED UNEMPLOYMENT RATES, JULY 1987-DEC. 2007

During this third period of time, the unemployment rates in three states—Montana, Idaho and Wyoming—moved in tandem with each other. The unemployment rates in North Dakota and South Dakota also moved in tandem with each other, but by 2004-06, were no longer consistently lower than the rates in the other three states. By December 2007, the unemployment rate in Montana was only 3.2%, no higher than the unemployment rates in any of the four states that border it.

The unemployment rate does not directly measure job growth or job losses at any given moment or over time. The BLS also provides information about the number of nonfarm jobs nationally, in each state and in local labor markets. What I have done is to measure the annual changes in nonfarm employment for each of these five states and for the United States from January 1970 through December 2007. In other words, I calculated the change in the number of jobs in Montana between January 1970 and January 1971, February 1970 and February 1972, and so on. The use of nonfarm employment figures tends to reduce the impact of drought, which varies geographically and from year to year and which, of course, has nothing to do with the Montana Wrongful Discharge Act.⁸³

⁸³ This measure does not totally eliminate the impact of weather and climactic conditions on these states' economies, since economic distress in agriculture typically causes job losses in businesses that supply farmers and in small towns in general.

The first comparison is job growth or losses in Montana and in the United States as a whole during these 36 years (*see* Figure 4):

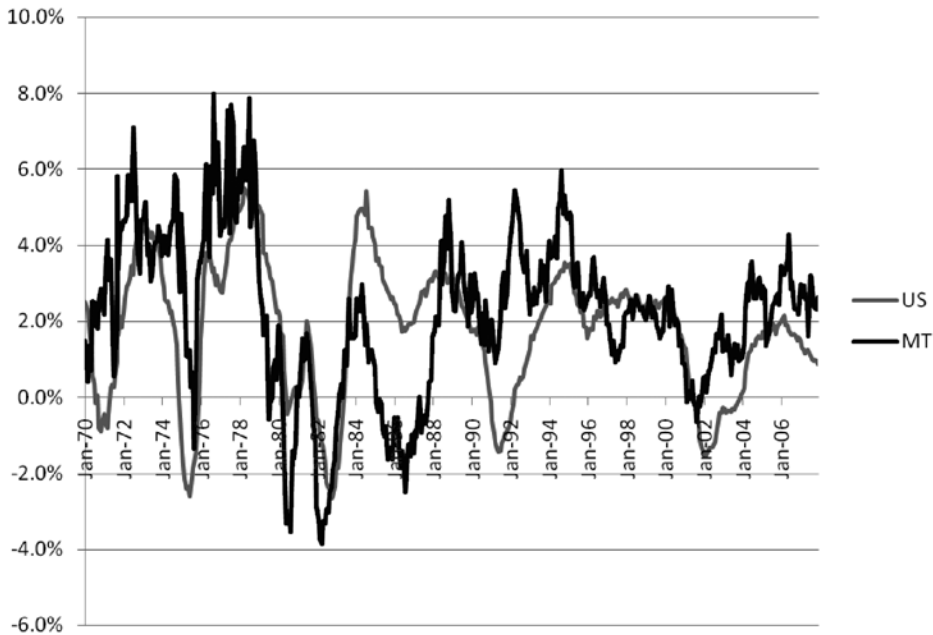


FIGURE 4
ANNUAL PERCENTAGE CHANGES IN NONFARM EMPLOYMENT
MONTANA AND U.S., 1970-2007

The national and Montana job-growth figures closely matched each other with a number of notable exceptions. Between August 1978 and September 1988, the national economy consistently outpaced Montana in terms of job growth. Montana experienced net job losses, as measured on a year-to-year basis, repeatedly between July 1979 and October 1987. The national economy dipped into negative job-growth territory during that time only between July 1982 and February 1983. However, between January 1991 and December 1996 and again between December 2001 and December 2007, the Montana economy consistently outpaced the national economy in terms of nonfarm job growth.

The job-growth comparisons between Montana and each of its neighbors also are illuminating (*see* Figures 5-8):

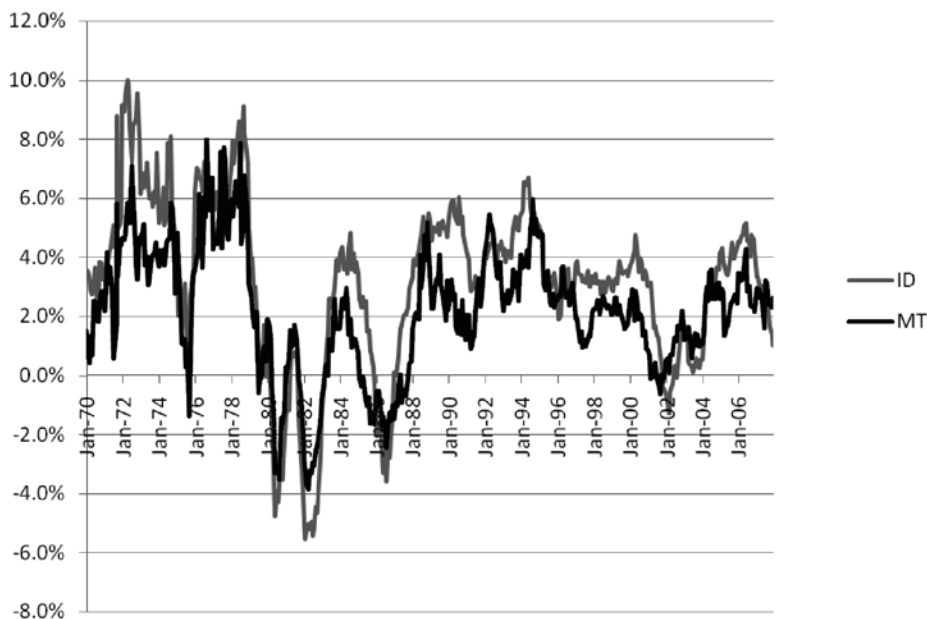


FIGURE 5
ANNUAL PERCENTAGE CHANGES IN NONFARM EMPLOYMENT
MONTANA AND IDAHO, 1970-2007

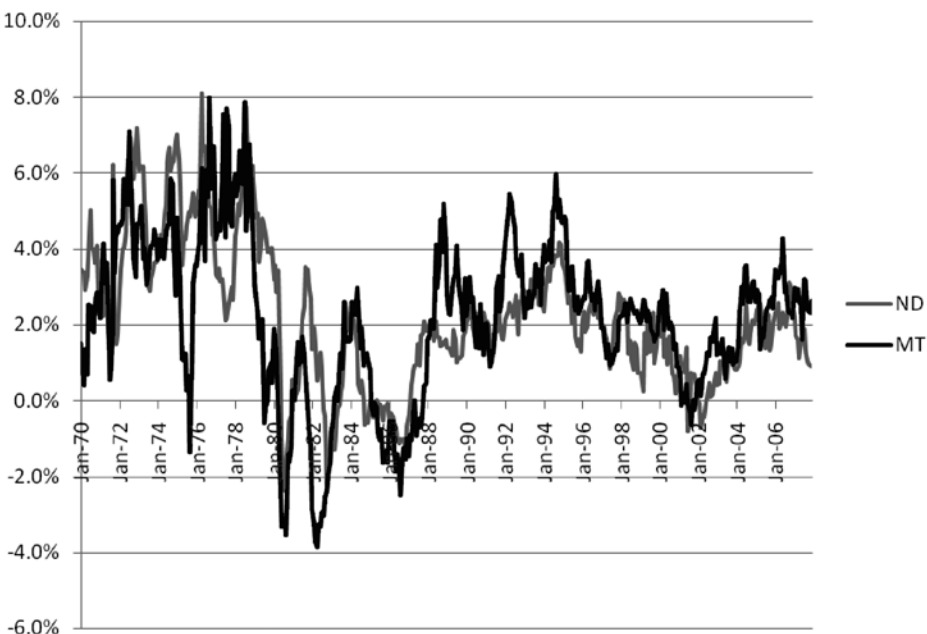


FIGURE 6
ANNUAL PERCENTAGE CHANGES IN NONFARM EMPLOYMENT
MONTANA AND NORTH DAKOTA, 1970-2007

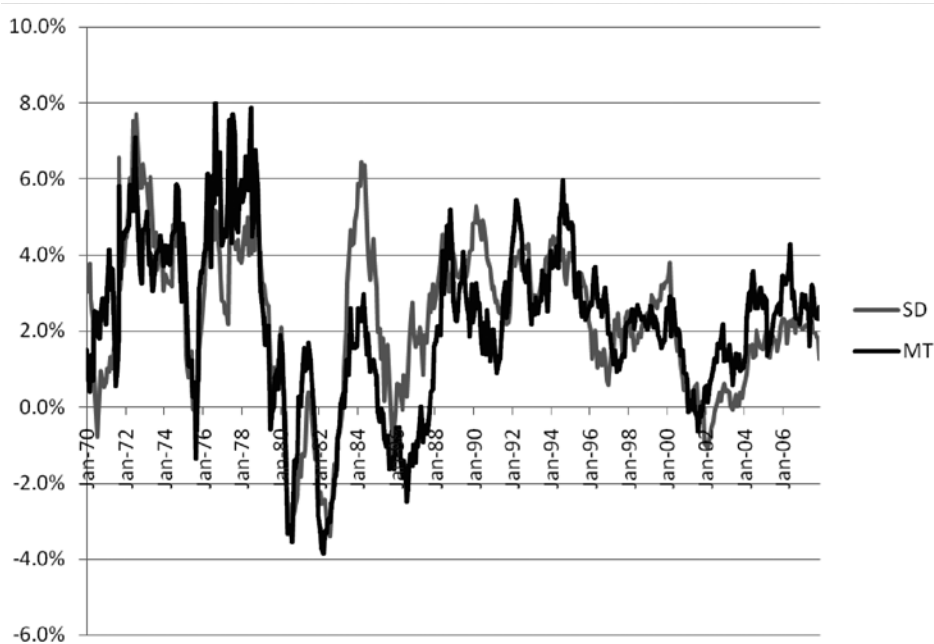


FIGURE 7
ANNUAL PERCENTAGE CHANGES IN NONFARM EMPLOYMENT
MONTANA AND SOUTH DAKOTA, 1970-2007

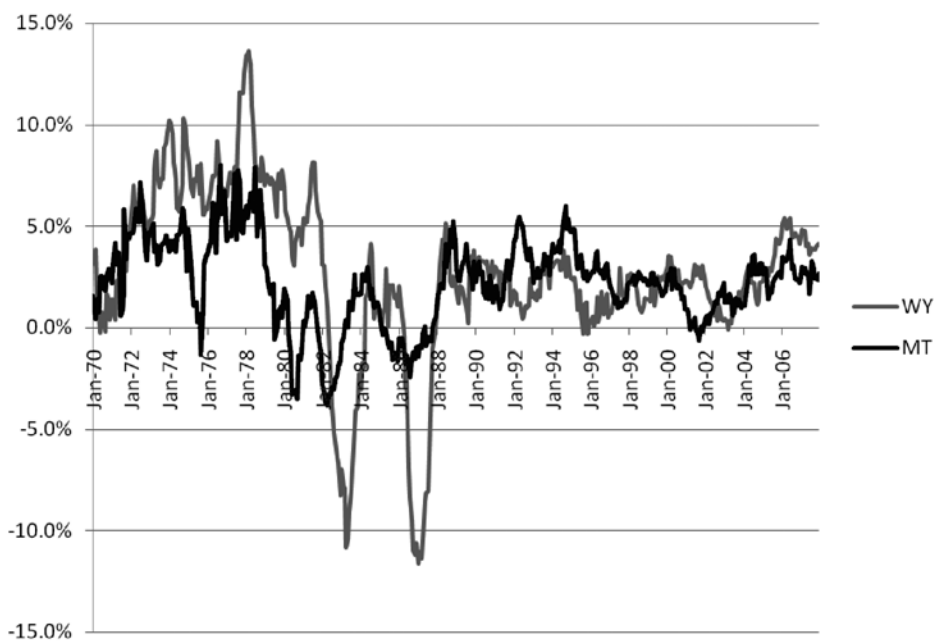


FIGURE 8
ANNUAL PERCENTAGE CHANGES IN NONFARM EMPLOYMENT
MONTANA AND WYOMING, 1970-2007

Montana's and Idaho's job-growth figures closely parallel each other, although Idaho generally has done better than Montana in this area since June 1983. The same general trend also applies to Montana and North Dakota, with Montana having better job-growth percentages since April 1988. Montana and South Dakota's numbers similarly have moved in tandem with each, with each state periodically outperforming the other. The greatest variance is between Montana and Wyoming; the latter state had significantly better employment increases between January 1977 and December 1981, dropped precipitously in this area in 1982, generally had much worse job-growth figures (including periods in which annual losses exceeded 10%) through the end of 1987, and since then has closely matched Montana's performance in employment growth.

In very broad terms, the Montana economy was anemic in the 1980s and has done very well since then. What accounts for those trends? Paul E. Polson, Director of the Bureau of Business and Economic Research and professor at the School of Business Administration of the University of Montana, attributes Montana's economic problems in the 1980s to specific economic hits it took during that decade.⁸⁴ First, there was a bust in oil exploration in Montana and Wyoming in the early 1980s and a bust in natural gas exploration in the last part of the 1980s.⁸⁵ Second, high interest rates between 1980 and 1982 caused a sharp decrease in construction activity and job losses in the wood products industry, which in turn increased mechanization, causing further job losses.⁸⁶

Third, the Anaconda Company closed its copper mine in Butte and closed its refineries in Anaconda and Great Falls in the 1980s.⁸⁷ Fourth, Montana had four or five very bad farm years in the 1980s as a result of drought and generally very poor agricultural conditions.⁸⁸

The turnaround in the Montana economy since then has been the result of several factors. During the 1990s, 96% of the state's economic and income growth centered in and around seven regional centers, and much if not most of that growth occurred in health care; business, engineering, and management services; finance, insurance, and real estate; and construction.⁸⁹ More recently, the prolonged major boom in the economies of China, India and other Asian countries has increased demand for oil, natural gas, copper, lead and zinc, increasing employment in Montana in those industries; and those and other industries have undergone the structural changes that contributed to mass layoffs in the 1980s.⁹⁰ The result has been economic exuberance in Montana, which does not appear to be irrational.⁹¹

⁸⁴ Telephone Interview with Paul E. Polson, March 15, 2007.

⁸⁵ See also William W. Ballard, *Montana's oil and gas industry*, MONT. BUS. Q., Spring 1991.

⁸⁶ See also Charles E. Keegan, III, *Montana's forest products industry*, MONT. BUS. Q., Spring 1991.

⁸⁷ See also George Everett, *A Peek at Butte's Economy*, <http://www.butteamerica.com/peek.htm> (last visited June 17, 2007).

⁸⁸ See also <http://www.montana.edu/msuhistory/1980.html> (last visited June 17, 2007).

⁸⁹ MONTANA'S AGENDA: ISSUES SHAPING OUR STATE, 4-5 (Winter 2005), www.umn.edu/urelations/Agenda/Winter2004-05.pdf, (last visited June 17, 2007).

⁹⁰ See *supra* note 88.

⁹¹ See Paul E. Polzin, *U.S. Economy Slows Slightly: Will Montanans Even Notice?*, 2007 ECONOMIC OUTLOOK SEMINAR, p. 5.

VI. THE BIG SKY DID NOT FALL

It is difficult to find economic data showing that the Montana Supreme Court's decision to apply the implied covenant of good faith and fair dealing to employment relations, and that state's adoption of the Montana Wrongful Discharge Act, affected hiring decisions in that state. The market forces that led to major layoffs in the extractive industries began before 1982. The unemployment rate in Montana declined in the five and one-years after *Gates I* and continued to decline after enactment of the MWDA. Unemployment and job growth increased and decreased as the result of the national and global business cycles, boom-and-bust cycles in petroleum and natural gas exploration, weather and climactic conditions, mechanization, changes in the import and export markets, the development of high-tech jobs, and other developments. Those economic trends affected Montana and the states that surround it.

Those neighboring states are affected by the same market forces and by the same corporate job-growth or job-reduction decisions, often in the same industries, as Montana. None of those states has abrogated the doctrine of employment at will.⁹² Yet, as a general rule, those states' economies have had unemployment rates and changes in nonfarm economic growth that are remarkably similar to those in Montana. The differences between those states' economic figures and those in Montana are most likely the result of the greater concentration of oil and gas exploration in Wyoming,⁹³ or the greater role played by agriculture in North Dakota and South Dakota, in comparison to more economically diverse Montana.

VII. CONCLUSION

It is time—many believe, long past time—for the federal government and the states to enact laws to require just cause for termination of employment. The economy of the United States, the global economy and the state of labor relations are vastly different than they were in the first year of the administration of Rutherford B. Hayes, the year in Horace Wood first announced the doctrine of employment at will. The mere fact that this has become the default rule for the common law of employment does not mean that it is based on sound policy, if that ever was the case.

The burden should be placed on the opponents of just-cause legislation to present empirical data demonstrating that there is a positive correlation between the adoption of just-cause legislation and unemployment rates or that there is a negative correlation between the enactment of such legislation and job growth. The data outlined in this issue brief do not show that. What they show is an absence of a correlation between these legal and economic trends.

Employees do not risk losing their jobs as a result of gaining greater job protections. Employers do not put themselves at a competitive disadvantage by legislation that protects their employees from arbitrary and unfair discharge decisions. The twin bogeymen of higher unemployment and lower job-growth rates should not shape the public policy debate on the abolition of the doctrine of employment at will.

⁹² North Dakota and South Dakota have enacted statutes that provide, in virtually identical language, that an "employment having no specified term may be terminated at the will of either party on notice to the other," unless otherwise provided by statute. N.D. Cent. Code § 34-03-01; S.D. Codified Laws Ann. § 60-4-4. Judicial decisions in Idaho and Wyoming continue to recognize employment at will as the default rule. *Jackson v. Minidoka Irrigation Dist.*, 98 Idaho 330, 333, 563 P.2d 54, 57 (1977); *Davis v. Wyoming Medical Ctr., Inc.*, 934 P.2d 1246, 1249 (Wyo. 1997).

⁹³ See Sherry Wen, *Oil and Gas Production and the Relationship Between Prices and Employment in Wyoming*, 42 WYO. LABOR FORCE TRENDS 5 (2005).

Prosecuting Worker Endangerment: The Need for Stronger Criminal Penalties for Violations of the Occupational Safety and Health Act

David M. Uhlmann*

A recent spate of construction deaths in New York City, similar incidents in Las Vegas, and scores of fatalities in recent years at mines and industrial facilities across the country have highlighted the need for greater commitment to worker safety in the United States and stronger penalties for violators of the worker safety laws. Approximately 6,000 workers are killed on the job each year¹—and thousands more suffer grievous injuries—yet penalties for worker safety violations remain appallingly small, and criminal prosecutions are almost non-existent.

In recent years, most of the criminal prosecutions for worker safety violations have been brought by the Justice Department's Environmental Crimes Section, which began a worker endangerment initiative in 2005 to highlight the fact that environmental crimes frequently place America's workers at risk of death or serious bodily injury, and to prosecute companies that systematically violate both the environmental laws and the worker safety laws.²

The Justice Department's worker endangerment initiative has produced a number of high-profile prosecutions involving companies such as BP Products North America, McWane, Inc., Motiva Enterprises, LLC, and W.R. Grace & Co. The worker endangerment initiative has focused on companies that allowed profits to take precedence over compliance with the law and treated workers as if they were expendable. Criminal

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¹ BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, CENSUS OF FATAL OCCUPATIONAL INJURIES CHARTS, 1992-2006, (rev. 2008). From 1992 to 2006, workplace deaths ranged from a high of 6,632 in 1994 to a low of 5,534 in 2002. During 2006, the last year for which data currently is available, 5,840 work-related fatalities were reported to the Department of Labor.

² David Barstow & Lowell Bergman, *With Little Fanfare, a New Effort to Prosecute Employers That Flout Safety Laws*, N.Y. TIMES, May 2, 2005, at A17. See also Daniel Reisel & Dan Chorost, *When Regulatory Universes Collide: Environmental Regulation in the Workplace*, 13 N.Y.U. ENVTL L.J. 613, 638-643 (2005).

prosecution of those companies protects American workers, upholds the rule of law, and ensures that corporate violators do not have a competitive advantage over companies that make compliance a priority.

The success of the Justice Department's worker endangerment initiative, however, has highlighted the inadequacy of the criminal provisions of our worker safety laws. Most of the cases brought by the Environmental Crimes Section charged violations of the endangerment provisions of the environmental protection statutes³ and the general criminal provisions of Title 18 of the United States Code, which makes it a crime to make false statements,⁴ obstruct justice,⁵ and commit conspiracy to defraud the United States by impeding the effective implementation of government regulatory programs.⁶ Typically, the crimes charged were felonies, punishable by up to 15 years in jail for knowing endangerment and 20 years in jail for some forms of obstruction of justice.

Only one case brought to date under the worker endangerment initiative, the prosecution of McWane for a worker death at its Union Foundry plant, has utilized the criminal provisions of the Occupational Safety and Health Act (the "OSH Act").⁷ Prosecution under the OSH Act is rare, because the only substantive criminal provision of the Act is limited to (1) willful violations of worker safety regulations that (2) result in worker death. Even if a willful violation causes death, the crime is only a Class B misdemeanor, with a maximum sentence of six months in jail.⁸

The criminal provisions of our worker safety laws are so weak that they do little to protect America's workers. Misdemeanor violations provide little deterrence and minimal incentive for prosecutors and law enforcement personnel, who reserve their limited resources for the crimes that Congress has deemed most egregious by making them felonies (with significant maximum penalties). Focusing exclusively on violations involving worker deaths ignores the pain and anguish that results from serious injuries, which also may warrant criminal remedies. Limiting prosecution to willful violations may make ignorance of the law a defense, contrary to the time-honored maxim of American jurisprudence that ignorance of the law is not a defense. Finally, only "employers" can be prosecuted for criminal violations of the OSH Act, which means that the mid-level managers who have the greatest day-to-day responsibility for unsafe working conditions often are immune from criminal prosecution under the Act.

This Issue Brief argues that Congress should pass legislation to strengthen the criminal provisions of the OSH Act early in the next Administration. First, the article describes one of the cases that led to the Justice Department's worker endangerment initiative and exposed the inadequacy of the criminal provisions of our worker safety laws. Second, the article explains why a stronger criminal program under the OSH Act would promote greater compliance with our worker safety laws. Third, the article

³ See, e.g., 33 U.S.C. § 1319(c)(3) (knowing endangerment under the Clean Water Act); 42 U.S.C. § 6928(e) (knowing endangerment under the Resource Conservation and Recovery Act); 42 U.S.C. § 7413(c)(4) (negligent endangerment under the Clean Air Act); and 42 U.S.C. § 7413(c)(5) (knowing endangerment under the Clean Air Act).

⁴ 18 U.S.C. § 1001.

⁵ 18 U.S.C. §§ 1503, 1505, 1512 & 1519.

⁶ 18 U.S.C. § 371.

⁷ 29 U.S.C. § 666(e). McWane pleaded guilty in September 2005 to an information charging that willful violations of the OSH Act caused the death of one of its employees. The federal district court imposed a \$4.25 million fine on McWane. This case is discussed in more detail in Sec. II of this article.

⁸ The OSH Act also criminalizes giving advanced notice of an inspection and making false statements in records or documents required under the Act. See 29 U.S.C. § 666(f) (advanced notice of inspections) and 29 U.S.C. § 666(g) (false statements). Both are Class B misdemeanors.

recommends changes to the criminal provisions of the OSH Act that would provide a more effective criminal enforcement scheme.

I. THE CYANIDE CANARY⁹

In August 1996, Scott Dominguez collapsed and nearly died inside a 25,000 gallon steel storage tank while working at Evergreen Resources, a fertilizer manufacturing facility in Soda Springs, Idaho. The owner of Evergreen Resources was Allan Elias, a Wharton graduate and attorney who had a long history of environmental and worker safety violations. Elias previously used the 25,000 gallon tank for a cyanide leaching operation and to store phosphoric acid. Cyanide and phosphoric acid react to form deadly hydrogen cyanide gas; expert testimony at trial established that there was enough cyanide in the storage tank to kill thousands of people.¹⁰

Elias nonetheless ordered Dominguez and his co-workers to clean out the cyanide-laced sludge from the bottom of the tank. Elias ignored the pleas of his workers for safety equipment and for tests to determine whether it was safe to go inside the tank. Elias refused to prepare a “confined space entry permit” that was required under OSH Act regulations.¹¹ Elias ordered his workers to conduct the tank-cleaning operation even though he had been warned for years by the Occupational Safety and Health Administration (“OSHA”) about the dangers of sending workers into confined spaces like the tank without safety equipment and appropriate testing. When the workers complained of sore throats and difficulty breathing, Elias told them he would see if he could locate safety equipment, but directed them to continue the tank-cleaning project in the interim.

Dominguez, a recent high school graduate without significant work experience, felt like he did not have any choice. Wearing just jeans and a t-shirt, Dominguez used a ladder to climb to the top of the tank, and then used the same ladder to enter the tank through a 22-inch wide manhole on the top of the tank. Within an hour, Dominguez had collapsed. He could not be rescued for 45 minutes, after firefighters donned protective gear, tested the air for explosives, and cut a hole in the side of the tank. By then, Dominguez was comatose and non-responsive.

In the frantic minutes before paramedics rescued Dominguez, firefighters asked Elias whether there was anything in the tank that could explain what had happened to Dominguez or put the rescuers at risk. Elias lied and said there was nothing but mud inside the tank. After the ambulance rushed Dominguez to the hospital, the emergency room doctor, John Wayne Obray, called Elias twice to ask what was inside the tank. On the second call, Dr. Obray asked Elias whether there was any possibility that cyanide was in the tank. Elias lied again and said no.

The next day OSHA inspectors interviewed Elias, who falsely represented that he had a confined space entry permit for the tank cleaning operation. Later that

⁹ Joseph Hildorfer & Robert Dugoni, *THE CYANIDE CANARY: A STORY OF INJUSTICE* (2004). Former EPA Special Agent Hildorfer and co-author Dugoni provide a first-hand account of the prosecution of *United States v. Elias*, 269 F.3d 1003 (9th Cir. 2001), for environmental crimes that left the victim permanently brain-damaged. Multiple worker safety violations occurred, but no worker safety crime, because of the deficiencies of the OSH Act. The description of the case provided in this article, unless otherwise noted, is based on the background in the Ninth Circuit opinion, 269 F.3d at 1007-1008, and the author’s recollection from his role as one of the lead prosecutors.

¹⁰ Trial Transcript at 3320 (Testimony of Dr. Joe Lowry), *United States v. Allan Elias*, CR No. 98-00070-E-BLW (D. Idaho May 3, 1999).

¹¹ 29 C.F.R. § 1910.146. A confined space entry permit would have detailed the steps that were being taken to protect the workers and enable them to be rescued if someone were injured.

morning, Elias went to a neighboring facility operated by Kerr McGee Chemical Corporation and borrowed a safety manual, which included instructions about how to prepare a confined space entry permit. He then prepared and backdated a confined space entry permit for the tank cleaning operation and submitted the false permit to OSHA, claiming it had been prepared before Dominguez was hurt.

The United States charged Elias with three felony counts under the environmental laws, including knowing endangerment under the Resource Conservation and Recovery Act ("RCRA"), which carries a maximum penalty of 15 years in prison. In addition, the United States charged Elias with one felony count under Title 18 of the United States Code for submitting the fabricated confined space entry permit to OSHA.¹²

During the 3½-week trial, expert witnesses testified that Elias had committed egregious violations of the OSH Act and that his actions had placed Dominguez and others in imminent danger of death or serious bodily injury.¹³ OSHA inspectors testified about earlier inspections and how they had warned Elias about the dangers associated with confined space entries.¹⁴ Dominguez testified that he did not know there was cyanide in the tank, and that he entered the tank without safety equipment because "I really, really, really did, really did trust Allan."¹⁵

After less than six hours of deliberations, the jury convicted Elias on all counts on May 7, 1999. United States District Court Judge B. Lynn Winmill sentenced Elias to 17 years in prison, which until recently was the longest sentence ever imposed for an environmental crime.

The Justice Department hailed the Elias conviction and the resulting sentence, because it demonstrated that "environmental crimes are real crimes, and that those who flout our environmental laws will go to prison for a long time."¹⁶ The proof of knowing endangerment in the Elias case, however, was based as much upon evidence that Elias violated OSHA regulations governing confined space entries as it was on the unpermitted disposal of hazardous waste in violation of RCRA. Indeed, the case was a worker safety case as much as it was an environmental case.

Yet Elias did not commit a criminal violation of the worker safety laws. Elias did not commit a worker safety crime, even though OSHA cited Elias for willful violations of worker safety regulations and even though the jury found unanimously that Elias knew he was placing his workers in imminent danger of death or serious bodily injury. Elias did not commit a worker safety crime, because Dominguez, although he was permanently brain-damaged, did not die.

¹² The United States charged the falsified permit as a violation of 18 U.S.C. § 1001, instead of the OSH Act's false statement provision, 29 U.S.C. § 666(g), because a false statement under Title 18 is a felony punishable by up to five years in jail. Elias was convicted and sentenced to the statutory maximum penalty of five years on the Title 18 false statement charge. A fifth and unrelated count, charging the illegal disposal of hazardous treater dust in violation of RCRA, was dismissed without prejudice at the government's request prior to the trial.

¹³ Trial Transcript at 2353-2354, 2360 (Testimony of Gregory Boothe, Apr. 27, 1999) and 3522-3523 (Testimony of Dr. Daniel Teitelbaum, May 4, 1999), *United States v. Allan Elias*, *supra* note 10.

¹⁴ Trial Transcript at 2012-2034 (Testimony of David Mahlum, April. 26, 1999), *United States v. Allan Elias*, *supra* note 10.

¹⁵ Trial Transcript at 3499 (Testimony of Scott Dominguez, May 3, 1999), *United States v. Allan Elias*, *supra* note 10.

¹⁶ Press Release, Office of Public Affairs, U.S. Dep't of Justice, Idaho Man Given Longest-Ever Sentence for Environmental Crime (Apr. 29, 2000) (Statement of Assistant Attorney General for the Environment and Natural Resources Division Lois J. Schiffer).

Elias committed egregious crimes and deserved the 17-year prison sentence imposed by Judge Winmill. The Elias case provides a stark contrast, however, between the strength of the criminal provisions of the environmental laws and the weakness of the criminal provisions of the worker safety laws. It is appropriate that endangering workers during a hazardous waste violation carries a 15 year maximum sentence per count; it is illogical that the same conduct during a worker safety violation is not a crime unless a worker dies—and even then is only a six-month misdemeanor per count.

Nor are the criminal provisions of the environmental laws an effective antidote for the weakness of the criminal provisions of the worker safety laws. Most environmental crime occurs in a workplace setting and involves the mishandling of hazardous substances or pollutants, which can place workers at risk. However, many cases involving danger to workers cannot be prosecuted under the environmental laws, because they do not involve mishandling of hazardous wastes, or unlawful releases of hazardous air pollutants into the ambient air, or illegal discharges of pollutants into waters of the United States. Relying on the environmental laws to protect America's workers means that, in many cases, America's workers will be unprotected.¹⁷

Moreover, even when environmental laws apply, their enforcement can raise complicated regulatory issues. Elias challenged his convictions on the grounds that the applicable definition of hazardous waste was too vague to be criminally enforced. He also raised jurisdictional issues post-trial that nearly resulted in the dismissal of several of the charges. While the Ninth Circuit did not agree with Elias,¹⁸ his ability to make such arguments shows the limits of environmental criminal enforcement as the primary method of addressing worker endangerment cases.

II. THE NEED FOR A STRONG CRIMINAL PROGRAM

Most companies in the United States comply with the law and care about protecting their workers. For those companies, worker safety is more than a legal requirement; it is a moral obligation. But experience teaches that there always will be companies that take a different approach, companies with owners like Allan Elias who think that the law does not apply to them or that, if they get caught, they can either avoid penalties or simply pay a modest fine.

Sadly, under the existing OSH Act, the companies that think there are not significant penalties for violating OSHA regulations probably are correct. Willful or repeated violations carry a maximum administrative penalty of \$70,000 per violation, a number which has not been increased in nearly two decades¹⁹ and pales in comparison to the cost of an effective compliance program.

Criminal penalties can be much higher than administrative penalties under the OSH Act, because Title 18 sets a maximum penalty of \$500,000 for misdemeanors that are committed by organizational defendants and result in death²⁰ or twice the

¹⁷ See Lynn K. Rhinehart, *Would Workers Be Better Protected If They Were Declared an Endangered Species? A Comparison of Criminal Enforcement Under the Federal Workplace Safety and Environmental Protection Laws*, 31 AM. CRIM. L. REV. 351, 362-373 (1994); Robert G. Schwartz, Jr., *Criminalizing Occupational Safety Violations: The Use of "Knowing Endangerment" Statutes to Punish Employers Who Maintain Toxic Working Conditions*, 14 HARV. ENVTL L. REV. 487, 508 (1990).

¹⁸ *Elias*, 269 F.3d at 1009-13 (jurisdictional issues) and 1014-17 (regulatory vagueness claims).

¹⁹ 29 U.S.C. § 666(a). The penalty for willful violations was increased from \$10,000 to \$70,000 in 1990. Pub. L. 101-508, 104 Stat. 1388.

²⁰ 18 U.S.C. § 3571(c)(4).

gain or loss associated with the offense (whichever is greater).²¹ As discussed above, however, the substantive criminal provision of the OSH Act applies only if a willful violation results in worker death. Moreover, even if the criminal provisions apply, most United States Attorney's Offices—faced with the challenge of prosecuting cases across a wide range of federal regulatory programs, in addition to drug and gun crimes—focus on felony cases and do not devote their limited prosecutorial resources to misdemeanor cases involving regulatory crime.²²

The net result is a worker safety program in which most violators—even willful violators—will face only administrative violations and relatively modest penalties if they are cited.²³ That makes it easy for companies to put profits before compliance and to view any penalties that may result as a cost of doing business. A company that epitomized that approach was McWane.

McWane is a privately owned company that operates pipe manufacturing facilities across the United States. Although pipe manufacturing is inherently dangerous, because it involves heavy equipment and the melting of steel at extremely high temperatures, McWane facilities were particularly hazardous places to work. From 1995 to 2003, at least 4,600 workers were injured at McWane plants,²⁴ giving McWane one of the worst safety records in the United States.

Yet, despite McWane's alarming record of worker injuries and deaths, the company's only criminal conviction prior to 2005 was a single misdemeanor count in July 2002 under the OSH Act for willful violations of the worker safety laws. These violations resulted in a worker being crushed to death at McWane's Tyler Pipe facility in Tyler, Texas. McWane paid a fine of \$250,000.

In January 2003, as a pilot project for the worker endangerment initiative, the Justice Department and the United States Environmental Protection Agency ("EPA") began a criminal investigation of environmental and worker safety violations at five McWane facilities: Atlantic States Cast Iron Pipe Company in New Jersey; McWane Cast Iron Pipe Company in Alabama; Pacific States Cast Iron Pipe Company in Utah; Tyler Pipe in Texas; and Union Foundry in Alabama. The investigations revealed a company that was a persistent violator of worker safety and environmental laws, and which made it a practice to lie to OSHA inspectors and federal and state environmental officials to conceal its illegal activity.

²¹ 18 U.S.C. § 3571(d).

²² See David M. Uhlmann, *The Working Wounded*, N.Y. TIMES, May 27, 2008, at A23 ("In the 38 years since Congress enacted the Occupational Safety and Health Act, only 68 criminal cases have been prosecuted, or less than two per year, with defendants serving a total of just 42 months in jail. During that same time period, approximately 341,000 people have died at work, according to data compiled from the National Safety Council and the Bureau of Labor Statistics by the AFL-CIO."); see also When a Worker is Killed: Do OSHA Penalties Enhance Workplace Safety?: Hearing Before the S. Comm. on Health, Educ., Labor & Pensions, 110th Cong. 8 (2008) (testimony of Peg Seminario, Director of Safety and Health, AFL-CIO).

²³ There is evidence that OSHA has begun taking a more aggressive approach to administrative penalties, notwithstanding the limits of the OSH Act's penalty scheme. On July 25, 2008, OSHA announced that it would seek \$8.7 million in administrative penalties against Imperial Sugar for violations that resulted in 14 deaths at a Georgia refinery. See Shaila Dewan, *OSHA Seeks \$8.7 Million Fine Against Sugar Company*, N.Y. TIMES, July 26, 2008, at A11 (since the article was written a fourteenth worker died as a result of injuries at the refinery). Average penalties, however, remain alarmingly low. According to a recent Senate Committee report, the median penalty imposed by OSHA for fatality cases was \$3,675 during fiscal year 2007. MAJORITY STAFF OF S. COMM. ON HEALTH, EDUC., LABOR & PENSIONS, 110TH CONG., DISCOUNTING DEATH: OSHA'S FAILURE TO PUNISH SAFETY VIOLATIONS THAT KILL WORKERS 5 (2008).

²⁴ David Barstow & Lowell Bergman, *A Dangerous Business: At a Texas Foundry, an Indifference to Life*, N.Y. TIMES, Jan. 8, 2003, A1.

McWane eventually pleaded guilty in September 2005 to criminal charges under the OSH Act at its Union Foundry facility, and received a criminal sentence of \$4.25 million.²⁵ McWane also pleaded guilty to Clean Air Act crimes at Pacific States, with a criminal sentence of \$3 million, and at Tyler Pipe, with a criminal sentence of \$4.5 million. McWane challenged the charges for violations committed at its Atlantic States and McWane Cast Iron Pipe facilities, where multiple McWane officials were indicted. After lengthy trials, McWane and most of the individual defendants were convicted, although the cases are still pending.²⁶

While the criminal cases against McWane have not ended, the multi-million dollar criminal fines imposed against McWane and the years of adverse publicity resulting from the criminal investigations and prosecutions may have changed McWane's approach to worker safety. In a follow-up piece to the exposé that launched the McWane investigations,²⁷ *Frontline* interviewed dozens of McWane employees who describe a "new McWane" where worker safety and environmental compliance are now a priority. Former OSHA Administrators and senior Justice Department officials now advise McWane about its regulatory compliance programs.

Only time will tell whether there is a new corporate attitude at McWane. It is revealing, however, that the company ignored worker safety in the face of years of worker injuries and deaths, and accompanying administrative penalty actions (and a single criminal conviction with a modest fine). McWane only began to make changes when the United States launched a concerted, national investigation and prosecution effort, with multiple indictments for felony violations and multi-million dollar criminal penalties for those crimes. The McWane prosecutions therefore speak volumes about the role of a strong criminal program in promoting worker safety and compliance.

A strong criminal program, particularly one where individual corporate officials may face significant jail time if they commit criminal violations, sends a message to the regulated community about the need to make compliance with worker safety laws a priority. Companies that do not care about worker safety for its own sake will pay far more attention to worker protection if they fear criminal sanctions and possible jail time for their corporate officials.

Criminal enforcement also provides benefits beyond punishment and deterrence of criminal activity. In regulatory programs where there is a credible criminal enforcement threat, companies are quicker to resolve administrative penalty actions and respond more productively to regulatory inspections. The OSHA inspectors trained as part of the Justice Department's worker endangerment initiative describe many companies that are indifferent or hostile to OSHA compliance officers. That would not be the case if the OSHA enforcement scheme included a more significant criminal enforcement threat than the current OSH Act provides.

²⁵ The federal district court imposed a substantial fine in the Union Foundry case because McWane agreed to be sentenced under the loss-doubling provisions of the Alternative Fines Act, 18 U.S.C. § 3571(d), with the fine calculated based on what a wrongful death award might have been in a civil case. In a contested sentencing proceeding, however, that approach might not be successful, which underscores the need for the OSH Act to provide larger criminal penalties.

²⁶ Sentencing in the Atlantic States case has not occurred more than two years after the completion of the trial, which lasted seven months and was the longest environmental crimes trial ever in the United States. A new trial may be necessary in the McWane Cast Iron Pipe case after the United States Court of Appeals for the Eleventh Circuit reversed the convictions on Clean Water Act jurisdictional grounds, *United States v. Robison*, 505 F.3d 1208 (11th Cir. 2007), *reh'g en banc denied*, 521 F.3d 1319 (2008). In August, 2008, the United States petitioned the Supreme Court for review of the Eleventh Circuit's decision.

²⁷ *Frontline: A dangerous Business Revisited* (PBS television broadcast Feb. 5, 2008).

Companies that make worker safety a priority should not feel threatened by a stronger criminal enforcement program. Stronger criminal provisions would not be used to criminalize accidents, which can happen despite the best efforts of employers and employees. Criminal enforcement would occur only in situations involving knowing conduct that violated a worker safety requirement. As a practical matter, only companies that routinely violate worker safety laws would be at risk. Those companies should not have a competitive advantage over companies that devote the necessary resources to worker safety. We want companies that are chronic violators to be worried about criminal prosecution, so that they are more likely to comply with the law.

III. RECOMMENDATIONS FOR STRENGTHENING THE CRIMINAL PROVISIONS OF THE OSH ACT

The criminal provisions of the OSH Act should be strengthened to reflect the Act's emphasis on public health and safety, to provide the credible criminal deterrent that is needed to ensure greater compliance with worker safety laws, and to provide consistency with other federal regulatory crimes. New legislation should (1) make criminal violations of the Act felonies and provide enhanced penalties for violators; (2) expand the criminal provisions to include cases involving serious bodily injury and knowing endangerment; (3) modify the mental state requirements so that ignorance of the law is not a defense; (4) expand the scope of individual liability to include supervisors who knowingly expose their workers to unsafe conditions; and (5) provide resources to investigate and prosecute criminal violations of the OSH Act effectively.²⁸

A. FELONIES AND ENHANCED PENALTIES

Criminal violations of the OSH Act should be felonies. It is a felony to commit most criminal violations of environmental laws, hazardous materials transportation laws, and many wildlife protection laws. Insider trading, customs violations, tax crimes, antitrust violations, food and drug violations, and transportation of stolen vehicles are felonies. False statements, mail and wire fraud, obstruction of justice, perjury, false declarations, and conspiracy in violation of Title 18 are all felonies. The list goes on, but the point is simple: when criminal worker safety violations occur, they too should be eligible for felony prosecution.

Upgrading OSH Act violations to felony status is also essential for meaningful criminal enforcement to occur. From 2003 to 2008, only ten criminal cases were brought for violations of the OSH Act, despite the fact that OSHA conducted 9,838 fatality investigations during that time period,²⁹ and thousands of workers died on the job each year. Absent action by Congress, criminal cases will remain infrequent, because federal prosecutors will not devote significant resources to cases that Congress relegates to misdemeanor status. Prosecutors occasionally will accept plea agreements

²⁸ Senator Edward M. Kennedy has introduced the Protecting America's Workers Act of 2007, S. 1244, 110th Cong. (2007), which would be a substantial improvement over existing law. First, the Protecting America's Workers Act makes most criminal violations of the OSH Act felonies and would increase the maximum penalty for a willful violation of the worker safety laws that results in death from six months to ten years (and from one year to 20 years in the event of a second conviction for the same offense). Second, the Protecting America's Workers Act expands the criminal provisions to reach violations that cause serious bodily injury but not death. The Protecting America's Workers Act could be strengthened if it addressed knowing endangerment, mental state requirements, individual liability, and law enforcement resources, but the legislation appears likely to suffer the same fate as similar bills introduced by Senator Kennedy during the 108th Congress and the 109th Congress, which never received a vote at the committee level.

²⁹ MAJORITY STAFF REPORT, *supra* note 23, 10.

to lesser included misdemeanor charges, but they rarely will initiate complex prosecutions if the most serious, readily provable offense is a misdemeanor.

Enhanced penalties also are necessary to ensure adequate punishment for criminal violations of the OSH Act and to provide meaningful deterrence against future violations. When a worker dies because of a knowing violation of the worker safety laws (or, as argued below, is seriously injured or knowingly endangered) the maximum sentence should be measured in years, not months. Anything less sends the wrong message about the value of a worker's life. The environmental laws carry maximum penalties of three to five years per substantive count—and 15 years for crimes involving knowing endangerment (regardless of whether any injury occurs). The OSH Act should be amended to provide similar penalties for worker safety crime.

B. SERIOUS BODILY INJURY AND KNOWING ENDANGERMENT

The criminal provisions of the OSH Act should be expanded to reach violations that cause serious bodily injury but not death. Serious bodily injury includes injuries that involve a substantial risk of death, or protracted unconsciousness, protracted and obvious physical disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.³⁰ Given the devastation and suffering that can result from serious injuries, criminal prosecution under the OSH Act should be possible even in cases where death does not occur.

The Elias case is a classic example of a situation where death did not occur but a criminal prosecution under the OSH Act should have been possible. The fact that the emergency room doctors were able to save Dominguez's life had no bearing on the extent to which Elias violated the worker safety laws or his mental state when he committed those violations. While the fact that a worker dies may be relevant to the sentence that is imposed, it should have no effect on whether a criminal violation has occurred.

In addition, the OSH Act would promote worker safety more effectively if it were expanded to cover violations that endanger workers. As noted above, there is no difference in the nature of the violation committed by a defendant or the defendant's mental state if a particular outcome occurs, whether that outcome is death, serious bodily injury, or the intervention of some good fortune that prevents any harm. Criminal culpability should be determined based on the risk associated with a defendant's misconduct and the degree to which the defendant is aware of that risk, not whether the risk becomes a reality.

The environmental laws again are instructive, since they make knowing endangerment a crime whenever a defendant commits a Clean Water Act, RCRA, or Clean Air Act violation and "knows at the time that he [or she] thereby places another person in imminent danger of death or serious bodily injury."³¹ If a similar provision were added to the OSH Act, the law would do more to prevent violations that put American workers at risk of death or serious bodily injury.

C. MENTAL STATE REQUIREMENTS

The OSH Act also would provide greater protection for workers if the Act criminalized "knowing" violations of the worker safety laws that caused death or serious

³⁰ See, e.g., 33 U.S.C. § (c)(3)(B)(iv) (Clean Water Act definition of "serious bodily injury"); 42 U.S.C. § 6928(f)(6) (RCRA definition); 42 U.S.C. § 7413(c)(5)(F) (Clean Air Act definition).

³¹ 33 U.S.C. § 1319(c)(3)(A) (the Clean Water Act); 42 U.S.C. § 6928(e) (RCRA); and 42 U.S.C. § 7413(c)(5)(A) (the Clean Air Act). The Clean Air Act also contains a negligent endangerment provision. 42 U.S.C. § 7413(c)(4).

bodily injury or endangered workers. Most federal environmental crimes and most federal regulatory crimes address knowing violations of the law, which require that the defendants knowingly engage in the conduct that is proscribed. In other words, knowledge of the facts is required (e.g., that a confined space entry is occurring without appropriate testing and/or safety equipment), but knowledge of the law is not (e.g., that OSHA rules require appropriate testing and/or safety equipment).³²

The problem with the current version of the OSH Act is that it is limited to “willful” violations. The use of willfulness places the worker safety laws outside the mainstream of federal criminal law and makes ignorance of the law a defense. It is a long-standing principle of American jurisprudence that ignorance of the law is not a defense,³³ and ignorance of the law should not be a defense where the health and safety of America’s workers are involved. Employers who are covered by the OSH Act have a duty to know the law. Employers should not be able to escape criminal liability for knowing violations that harm workers or place workers at risk by claiming that they did not know what safety measures were required.

D. INDIVIDUAL LIABILITY

The scope of individual liability for criminal violations of the OSH Act should be clarified to promote greater compliance and provide better deterrence. As noted above, individual liability plays a central role in any criminal enforcement scheme, since the threat of jail time is arguably the single greatest deterrent provided by criminal law. Unfortunately, the current version of the OSH Act applies only to “employers,” which are defined under the Act as “a person engaged in a business affecting commerce who has employees. . . .”³⁴ The OSH Act’s definition of employers may absolve most mid-level managers of criminal responsibility, even though they often have the greatest first-hand knowledge of worker safety violations and supervise the conduct or conditions that constitute violations.³⁵

A better approach to individual liability would be to allow criminal prosecution of the corporate officials who are responsible for the violations, which can occur in two ways. First, all corporate officials who are directly involved or order that misconduct occur should be criminally liable, which is standard in federal criminal cases. Second, corporate officials who (1) know that the conduct is occurring; (2) have the authority to prevent the conduct from occurring; and (3) fail to prevent the conduct should be held responsible under the “responsible corporate officer” doctrine. The scope of the doctrine extends beyond individuals with corporate titles to include all corporate officials who meet the three elements of the doctrine. The responsible corporate officer doctrine also is widely used in federal criminal prosecutions, including cases under the environmental laws.³⁶

³² *Bryan v. United States*, 524 U.S. 184, 191-199 (1998) (knowing violations require “proof of knowledge of the facts that constitute the offense” whereas willful violations require proof “that the defendant acted with knowledge that his conduct was unlawful”) (internal quotation marks omitted).

³³ *United States v. International Minerals and Chem. Corp.*, 402 U.S. 558, 563 (1971).

³⁴ 29 U.S.C. § 652(5).

³⁵ See Rhinehart, *supra* note 17, at 358 n.38 (citing cases); see also Kathleen F. Brickey, *Death in the Workplace: Corporate Liability for Criminal Homicide*, 2 NOTRE DAME J.L. ETHICS & PUB. POL’Y 753, 781-82 (1987).

³⁶ The “responsible corporate officer” doctrine originated in a Supreme Court case interpreting the Federal Food, Drug, and Cosmetic Act. *United States v. Dotterweich*, 320 U.S. 277 (1943). Its use in the environmental crimes context has been considered by a number of courts, most notably in *United States v. Iverson*, 162 F.3d 1015, 1022-25 (9th Cir. 1998).

E. LAW ENFORCEMENT RESOURCES

A final issue with the criminal provisions of the OSH Act is the need for law enforcement resources to investigate and prosecute worker safety crimes. Most OSHA compliance officers do an excellent job investigating worker safety violations. They are not criminal investigators, however, and Fourth Amendment concerns would be raised if they obtained evidence for purposes of a criminal investigation. Moreover, once a criminal investigation begins, witnesses must be interviewed, evidence reviewed, subpoenas issued, and, in some cases, search warrants executed, all of which must be done by law enforcement officials.

During the Justice Department's worker endangerment initiative, criminal investigators from the EPA and prosecutors from the Department's Environmental Crimes Section handled the cases. In cases that are not environmental crimes, however, other investigators and prosecutors would be necessary. Prosecutorial resources could be provided by United States Attorney's Offices, although they have significant demands on their budgets and may not have the expertise to handle worker safety prosecutions. It may be appropriate to create a new office, most likely within the Criminal Division of the Justice Department, which would specialize in the prosecution of worker safety crimes.

Similarly, investigative resources could be provided by the Federal Bureau of Investigation ("FBI"), which has the investigative expertise and geographical coverage to assist in worker endangerment cases. Historically, the FBI has provided significant support for the environmental crimes program and other law enforcement programs involving regulatory crime. Today, however, the FBI has limited resources for crimes other than counterterrorism. It therefore may be necessary to create a criminal investigation division within OSHA and hire criminal investigators, with full law enforcement training and authority, to investigate worker safety crimes. While resource issues take time and political will to address, an effective criminal enforcement program under the OSH Act will require sufficient investigative and prosecutorial resources.

IV. CONCLUSION

The criminal provisions of the environmental laws and the OSH Act were enacted during the 1970's, when much of the modern regulatory state was created. Within a decade, Congress had changed the environmental laws—the violations of which also began as misdemeanors—because federal prosecution resources generally are reserved for felony cases and Congress recognized that the benefits of a strong environmental crimes program would be lost without felonies.

It has been 20 years since Congress amended the environmental laws, and it is long past time for Congress to take the same approach to our worker safety laws. Some workers do not have choices about where they work, either because jobs are scarce or because they have not had the educational opportunities that would enable them to seek higher-paying and safer jobs. But everyone deserves a safe place to work and the ability to come home to their families in good health each night.

We can do more to protect workers and ensure that all companies in the United States honor our best traditions of caring for and protecting workers. By strengthening the criminal provisions of the worker safety laws, Congress can make good on the promise of a safe workplace made 30 years ago when Congress enacted the Occupational Safety and Health Act.

“A Hungry Child Knows No Politics:” A Proposal for Reform of the Laws Governing Humanitarian Relief and “Material Support” of Terrorism

Ahilan T. Arulanantham*

It was the late President Ronald Reagan who courageously declared that “a hungry child knows no politics,” in order to justify his decision to send food aid to the Communist dictatorship in Ethiopia at the height of the Cold War. Although he no doubt believed that defeating the communist regime in that country was important to our national security, he was not willing to forego feeding starving civilians on that basis.¹

Like most Americans, President Reagan would probably be quite shocked to learn that our current government has cast aside his teaching and actually criminalized humanitarian relief to victims of war and natural disaster in the name of the war on terror. As I learned first-hand while doing tsunami relief work in Sri Lanka, that is exactly what has happened under the so-called “material support of terrorism” laws.² The material support laws are a constellation of statutes found in the federal criminal code, immigration code, and elsewhere, whose ostensible purpose is to enhance our national security by stopping aid to terrorist groups. However, because of the enormous breadth of these laws, humanitarian organizations and volunteers operating throughout the world in conflict zones and natural disaster sites have scaled back and in some cases, simply abandoned their efforts to aid those in greatest need of help. While advocates have spoken out from time to time about the pernicious unintended consequences of

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¹ Although the phrase is now uniformly attributed to Reagan, it appears to have first been used by United States Agency for International Development (U.S. AID) personnel working in his administration. See Kathleen Teltsch, *U.S. Presses for Increased Relief Aid for Famine-Stricken Ethiopia*, N.Y. TIMES, Aug. 19, 1983, at A4. I discuss the provenance of the idea behind the phrase in more detail below.

² See generally 18 U.S.C. § 2339A; 18 U.S.C. § 2339B (criminal liability for material support to designated terrorist organizations); 8 U.S.C. § 1182(a)(3)(B)(iv)(VI); 8 U.S.C. § 1227(a)(4)(B) (authorizing exclusion and deportation of non-citizens who provide material support to designated organizations, and to certain organizations even if not designated); 50 U.S.C. § 1701 (general statute pursuant to which government has exercised authority to freeze all assets of designated organizations).

these laws, their calls have gone entirely un-heeded in the current political climate.³ Legal challenges to the laws have met with only slightly greater success.⁴

In Part I of this article I describe the humanitarian crisis I witnessed first-hand in Sri Lanka and explain how that crisis has evolved over the last three years. In Part II, I describe how the material support laws undermine critical humanitarian relief efforts through the lens of my experiences in Sri Lanka both in the immediate aftermath of the tsunami and more recently. In Part III, I discuss the view taken by the federal government on the issue and explain why that view is fundamentally misguided. Finally, in Part IV, I put forth several proposals for reforming the material support laws to allow for vital humanitarian assistance to go to those who need it most.

I. THE TSUNAMI AND ITS AFTERMATH

My understanding of the grave problems created by the material support laws has been shaped by my experiences in Sri Lanka. I was born and raised in the United States, but my parents and extended family are from Sri Lanka. I was on a plane to visit relatives there in December 2004, in the air between Los Angeles and Singapore, when the tsunami struck—killing over 30,000 people in Sri Lanka alone.⁵ I landed there a day later and spent the next three weeks doing relief work with several different humanitarian organizations.

The suffering and devastation I saw was nearly unimaginable. My first mission was to a displaced persons camp in eastern Sri Lanka, with a relief team from the Hospital Christian Fellowship. At that camp we treated about 200 people. Every person I spoke with had lost at least one family member to the tsunami. I spoke with mothers and fathers who had been unable to keep hold of their children as they were sucked away

³ Journalists and scholars have written about the problems that humanitarian organizations have faced because of the material support laws since at least 2003. See, e.g., Stephanie Strom, *Small Charities Abroad Feel Pinch of U.S. War on Terror*, N.Y. TIMES, Aug. 5, 2003, at A8; Nina J. Crimm, *High Alert: the Government's War on the Financing of Terrorism and its Implications for Donors, Domestic Charitable Organizations, and Global Philanthropy*, 45 WM. & MARY L. REV. 1341 (2004). Humanitarian organizations themselves have also spoken out to some degree. After the Treasury Department published a set of extremely onerous "Voluntary Best Practices" for humanitarian organizations to follow in keeping with the material support laws, a number of advocacy groups led by the Council on Foundations published a set of "Principles of International Charity" designed to govern the conduct of charitable organizations so as to allow them to continue doing vital humanitarian work while simultaneously ensuring that their efforts did not support terrorism. While the Principles did not explicitly criticize the material support laws, their language suggests that the groups believed that the Treasury Department's efforts to ensure compliance with those laws had undermined important humanitarian efforts. THE TREASURY GUIDELINES WORKING GROUP OF CHARITABLE SECTOR ORGS. AND ADVISORS, PRINCIPLES OF INTERNATIONAL CHARITY (2005), available at http://www.usig.org/PDFs/Principles_Final.pdf.

⁴ The most significant legal challenge to the material support laws was brought by the Humanitarian Law Project and several smaller humanitarian organizations and individuals, and litigated by a team of lawyers from the Center for Constitutional Rights, led by Professor David Cole of Georgetown University's Law Center. They have argued that the laws violate the First and Fifth Amendments. Those groups have been involved in protracted litigation concerning their challenge for over ten years. As of this time, the United States Court of Appeals for the Ninth Circuit has upheld most but not all of the provisions of the material support law subject to challenge in the suit. The litigation is discussed in greater detail below.

⁵ The tsunami killed over 30,000 people in Sri Lanka. See John Lancaster, *In Sri Lanka, a Hard Lesson On Road of Good Intentions*, WASH. POST, May 28, 2005, at A01. Approximately 800,000 more were rendered homeless. Robert McFadden, *Relief Effort Gains As Aid Is Reaching More Survivors*, N.Y. TIMES, Jan. 3, 2005, at A1. In Indonesia, figures vary widely, but reports indicate that approximately 150,000 people died. Alan Sipress & Colum Lynch, *Indonesia's Death Toll Varies; 'Perhaps We Will Never Know,' President Says*, WASH. POST, Jan. 20, 2005, at A20. Large numbers of people died in other countries as well, including Thailand, the Maldives, India, and along the eastern coast of Africa.

by the sea, and parents who had been forced to choose, in a split second, which of their children to save because they could not hold on to all of them. I met children who saw their families, their homes, their villages—everything they had known—disappear in an instant. Seeing the destruction of whole towns, places of worship, roads, trees—everything—was a humbling experience that is indelibly etched in my memory.

If this had happened anywhere in the world, the devastation and its aftermath would have been terrible to behold. But it was made worse because it happened in Sri Lanka—a country that has been torn by civil war for over twenty years. Approximately one-fifth of the territory of Sri Lanka is currently controlled by the Liberation Tigers of Tamil Eelam (LTTE), an armed group fighting against the government of Sri Lanka. The LTTE has been designated as a Foreign Terrorist Organization by the State Department pursuant to Section 219 of the Immigration and Nationality Act, 8 U.S.C. § 1189. As a result, it is a violation of law to give “material support” to that group. Material support is defined very broadly, as I will discuss below, and the consequences for violating the law are severe. Non-citizens face deportation, while citizens and non-citizens alike face civil forfeiture and criminal penalties of up to fifteen years in prison. 8 U.S.C. § 1227(a)(4)(B); 18 U.S.C. § 2339B.

Although the LTTE is designated as a terrorist group, in the territory it controls it functions as a government. The LTTE runs a court system, a police force, orphanages, a set of health clinics, and even its own traffic police. It is, for all practical purposes, the government for approximately 500,000 people who live in the LTTE-controlled areas. And, because the LTTE governs its territory as an authoritarian military regime, it exerts a significant amount of control over all of the institutions in its territory. As with civil war and disaster situations around the globe—northern Iraq, western Pakistan, south and east Colombia, and Israel/Palestine, to name a few—providing humanitarian aid to the most needy people in Sri Lanka almost inevitably requires working in areas controlled by, and dealing directly with, a designated terrorist group.⁶

Unlike our material support laws, natural disasters do not differentiate between areas under the control of designated terrorist groups and those controlled by the governments at war with them. In Sri Lanka, thousands of people living in LTTE-held territory died in the tsunami. Hundreds of thousands more were displaced into camps, many having lost some or all of their family members and in urgent need of food, shelter, and medical care. In fact, because the LTTE controls large segments of the eastern seaboard of the island, which was most directly hit by the tsunami, people in LTTE territory were some of the most severely affected.

Although many hoped that the horror of the tsunami would somehow bring an end to the conflict in Sri Lanka, this has not come to pass, and the country remains in a severe humanitarian crisis now three and a half years since the tsunami struck. The peace that had existed for three years prior to the tsunami effectively ended in 2006, and the war has resumed with tremendous ferocity. The government formally withdrew from its ceasefire agreement with the LTTE in January 2008. Since that time hundreds of civilians have been killed, and tens of thousands of civilians living in the war zone have fled their homes.⁷ Not surprisingly, many of those displaced live in the

⁶ Designated terrorist organizations control territory in all of the conflict areas listed. U.S. DEP'T OF STATE OFFICE OF COUNTERTERRORISM, FOREIGN TERRORIST ORGANIZATIONS FACT SHEET (2005), *available at* <http://www.state.gov/s/ct/rls/fs/37191.htm>.

⁷ The war resumed approximately one year after the tsunami. In the first nine months of 2006, over 1,000 civilians died in the conflict, and approximately 13,000 refugees attempted to flee northern Sri

area controlled by the LTTE, much of which has become a war zone. As a result, even as I write this, there continue to be thousands of civilians living in those areas in urgent need of food, shelter, and medical care, just as there were on December 27, 2004, the day after the tsunami struck.⁸

II. HOW THE MATERIAL SUPPORT LAWS UNDERMINE HUMANITARIAN RELIEF

Although one might think that the law governing humanitarian relief should not distinguish between victims living in different parts of war-torn nations, that is not how our material support laws currently operate. A close examination of the specific laws at issue makes this clear.

A. THE STATUTE'S TEXT

The current version of the statute defines material support as follows: “the term ‘material support or resources’ means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (one or more individuals who may be or include oneself), and transportation, except medicine or religious materials” 18 U.S.C. 2339A(b).⁹

Several features of this statute work to undermine humanitarian relief efforts. First, the definition of what constitutes material support is exceedingly broad. “Any property, tangible or intangible,” can constitute material support. By its plain language, this definition would appear to cover a number of items that are obviously critical to the survival of people who are the victims of war and natural disaster. Much of what is needed for humanitarian relief work in situations of massive displacement, including water, water purification systems, sanitation equipment such as toilets, all forms of shelter (including even children’s clothing), and the materials needed for longer-term reconstruction such as boats and building materials, constitutes “any property, tangible or intangible.” Because the law makes no distinction between lethal aid—such as weapons or ammunition—and non-lethal aid, an

Lanka’s war zone by boat. See Somini Sengupta, *Resumption of Sri Lanka War Tests Civilians’ Endurance*, N.Y. TIMES, Sept. 18, 2006, at A12. The violence has escalated still further since the formal end of the ceasefire. See HUMAN RIGHTS WATCH, UNIVERSAL PERIODIC REVIEW OF SRI LANKA: HUMAN RIGHTS WATCH’S SUBMISSION TO THE UNITED NATIONS’ HUMAN RIGHTS COUNCIL (2008), available at <http://hrw.org/english/docs/2008/04/07/global18554.htm>.

⁸ Most urgently, the United Nations’ World Food Programme recently reported severe food shortages in north Sri Lanka, including several areas under LTTE control. As explained below, food aid constitutes material support under the current statute. “‘Scarcity of food items and the subsequent escalation in the cost of essential items may result in more than one million in the country facing starvation,’ Mohamed Saleheen, the resident representative of United Nations (UN) World Food program (WFP) in Colombo told the media Friday.” *One million people in Sri Lanka may face starvation—WFP*, TAMILNET, Apr. 26, 2008, available at <http://www.tamilnet.com/art.html?catid=13&artid=25437>.

⁹ As noted earlier, there is a similar material support prohibition in the immigration statute, although the provision is in some respects substantially broader than the criminal prohibition. Most significantly, its provisions are not limited to groups that are explicitly designated as terrorist organizations by the Secretary of State and Attorney General, and instead applies broadly to any number of groups, including groups that engage in no violence whatsoever. See 8 U.S.C. § 1182(a)(3)(B)(vi)(III) (defining “terrorist organization” for purposes of the immigration statute). All of the arguments I advance here in support of reforming the criminal material support laws also counsel in favor of parallel reforms to the immigration laws. Humanitarian assistance is equally vital whether provided by citizens or non-citizens, and neither group should be deterred from providing that assistance.

organization seeking to provide toilets to the LTTE's health ministry to take to camps in an area under its control risks violating the material support laws by providing such critical assistance. This is so notwithstanding the fact that the LTTE is the government for all practical purposes in the areas it controls.

Second, the statute contains no general exception for humanitarian assistance, even if it is necessary to save the lives of people who happen to live in territory held by a designated group. Instead, it contains a far narrower exception, for "medicine and religious materials." While this exception is important, it is sorely inadequate to meet the needs of people caught in humanitarian crises, whether they arise from natural disasters or political conflict. Thus, if one provides food aid to refugees and can show that the aid did in fact go to those refugees, the law still criminalizes that conduct if the designated group received that aid prior to distributing it. Indeed, the government could even contend that providing such aid was illegal as long as the designated group authorized its distribution, whether or not the group physically received it. In this context, it is irrelevant that medicine alone cannot save a starving person—the law allows the provision of medicine, but not food.

Third, the statute does not limit its proscription to material objects, but also bans the provision of "services," "training," "personnel," and "expert advice or assistance." Thus, a doctor who wants to teach medical workers who work for a designated group how to detect contagious diseases in a refugee camp, such as cholera or dysentery, may well be engaged in "training," while a doctor who wants to treat dying refugees in the group's camp may well be providing "personnel." Similarly, the statute's ban on the provision of "expert advice or assistance" could easily be read to mean that a public health expert who advises a designated group about how to set up water supplies so as to minimize the spread of diseases probably could be prosecuted under the statute. Indeed, even training psychological counselors working with a designated group—which is a crucial need for children who have lost parents to disaster or war—may violate the "training" or "personnel" provisions, as long as the training imparts a "specific skill" and the counselors work under the group's "direction and control."¹⁰

Finally, the law punishes support to a designated group regardless of whether the person providing that support intended to further, or did in fact further, the group's violent (or "terrorist") activities. Under amendments to the law passed in December 2004 (ironically, only weeks before the tsunami), a person violates the material support laws as long as he or she provides the support knowing that the recipient group has been designated as a "terrorist organization" or that the organization has been

¹⁰ After the court in the *Humanitarian Law Project* litigation struck down certain sections of the criminal statute as impermissibly vague, Congress amended the law, in December 2004. Under the amendments, the term "training" is now somewhat more specifically defined as "instruction or teaching designed to impart a specific skill, as opposed to general knowledge." The amendments also defined "expert advice or assistance" as "advice or assistance derived from scientific, technical or other specialized knowledge." 18 U.S.C. § 2339A(b)(2-3). The amendments also clarified the meaning of the prohibition on "personnel," stating that "No person may be prosecuted under this section in connection with the term 'personnel' unless that person has knowingly . . . work[ed] under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control." 18 U.S.C. § 2339B(h). The statute enacting the amendments is the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6603. Substantial amendments to the original law, which was passed in 1996, were also enacted in the Patriot Act, at USA PATRIOT Act, Pub. L. No. 107-56, § 805, 115 Stat. 272 (2001).

involved in “terrorist activity.”¹¹ In the context of Sri Lanka (and, I imagine, in many other similar contexts), many people in the humanitarian aid community are well aware of the LTTE’s designation, which has been the subject of a number of high-profile court decisions. Even without knowing of the designation, anyone with even a passing understanding of Sri Lanka knows that the LTTE and the Sri Lankan government are involved in a violent conflict. Knowledge that the LTTE has engaged in violent acts would probably satisfy the intent requirement under current law, given the breadth of the definition of “terrorist activity” itself. Thus, aid workers who provide humanitarian assistance to people living under LTTE control cannot defend their actions on the ground that their intentions are purely humanitarian.¹²

In sum, providing desperately needed drinking water, blankets, clothing or tents in LTTE-held areas may require working with the LTTE officials who are the *de facto* government in that area. Yet our material support laws put aid workers in the untenable position of having to choose between providing assistance, which exposes them and their organizations to the risk of exclusion from the United States, deportation, civil forfeiture or even criminal prosecution on the one hand, and abandoning the desperate victims of war and natural calamity in their hour of greatest need on the other.

B. THE MATERIAL SUPPORT LAW’S CHILLING EFFECT

In the immediate aftermath of the tsunami and in the years since, I have learned that the difficulties I am describing here are far from hypothetical. There can be no serious dispute that qualified organizations and individuals who have the willingness and ability to help those suffering in Sri Lanka and other parts of the world are scared to do so because of the current material support laws. I have spoken personally with dozens of doctors, teachers, and others who want to work with people desperately needing their help in Sri Lanka, but fear liability under the material support laws.

For example, in the first few days of relief work after the tsunami, my team of aid workers focused on treating people’s immediate medical needs—wounds, dehydration, respiratory infections—with medicine and dressings. Such assistance would probably fit under the law’s exception for “medicine.” But within a week, the most serious public health problems for the hundreds of thousands of displaced people changed. In situations of mass displacement, the greatest killer is often infectious disease, which spreads through contaminated water, inadequate sanitation, and exposure from a lack of shelter. To prevent outbreaks, humanitarian organizations must provide displaced people with water purification systems, toilets, tents, and other such provisions which are not “medicine” but nonetheless serve an absolutely critical medical function. However, providing these items to people living under the control of designated terrorist groups is nearly impossible to do consistent with our material support laws. As a result, many charitable organizations forego providing a number of vital—and perfectly innocuous—items such as clothing, children’s books, and medical equipment, to desperate victims of war.

¹¹ That change is codified in the law’s intent section, found at 18 U.S.C. § 2339B(a)(1), and was originally enacted in Section 6603 of the Intelligence Reform and Terrorism Prevention Act of 2004.

¹² Under the applicable definition, “terrorist activity” is not limited to hijackings, bombings, and other similar tactics, but broadly includes the use of any “weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.” Surely every aid worker who travels to Sri Lanka knows that the LTTE has engaged in “terrorist activity” under this extremely broad definition. *See* 8 U.S.C. § 1182(a)(3)(B)(iii)(V).

I spoke with a number of people working both independently and for charitable organizations who feared to send funds for such urgent humanitarian needs in the immediate aftermath of the tsunami, and in my capacity as an ACLU attorney, I have heard similar concerns from charitable organizations in the years since the disaster. Indeed, a set of humanitarian organizations including Oxfam, Operation USA, and the Unitarian Universalist Service Committee filed a brief asking a federal court to substantially narrow the material support law because of its adverse impact on their humanitarian work.¹³ More recently, two organizations concerned about this issue—OMB Watch and Grantmakers Without Borders—have extensively documented the ways in which “counterterrorism laws create barriers for international philanthropy and programs.”¹⁴

The effect of the ban on services, training, personnel, and expert advice or assistance is equally cruel. It is difficult for those of us living in peace to understand the impact of discouraging doctors from providing assistance to a particular area, because we do not live under the acute shortages that arise in conflict zones. In Northeast Sri Lanka, approximately fifty-five hospitals have been destroyed over the last twenty-five years of war. During that time, the overwhelming majority of professionally trained doctors have fled the war zones, because they fear for their lives. However, approximately half a million other people remain there. For the remaining several hundred thousand people living in the heart of the war zone in Sri Lanka, there are only about ten to twenty professionally-qualified doctors of any kind. That the law functions to discourage volunteer professionals from traveling to war zones to provide assistance is particularly perverse, because the conflict itself causes indigenous doctors, nurses, and other critical professionals to flee the areas worst-affected.¹⁵

The current material support statute, with its limited exceptions and extremely broad intent requirement, leads to truly irrational results. A humanitarian organization may send medicine to perform dialysis, but risks prosecution if it also seeks to send either the doctor or the equipment needed to perform the dialysis itself. Surely we do not enhance our nation’s security by enacting statutes that lead to such absurd, and cruel, results.¹⁶

III. THE GOVERNMENT’S VIEW CONCERNING THE MATERIAL SUPPORT LAWS AND HUMANITARIAN RELIEF

The federal government’s arguments in litigation have advanced the extremely broad interpretation of the material support laws described above, and in doing so, have shown that the fears of humanitarian organizations are well-justified. Our Department of Justice has argued that doctors seeking to work in areas under LTTE control are not entitled to an injunction against prosecution under the

¹³ Brief for American Civil Liberties Union et al as Amici Curiae Supporting Plaintiffs-Appellees, *Humanitarian Law Project v. Gonzales*, 380 F.Supp.2d 1134 (9th Cir. 2006) (Nos. 05-56753, 05-56846), available at http://www.aclu.org/images/general/asset_upload_file394_25628.pdf.

¹⁴ See *Collateral Damage: How the War on Terror Hurts Charities, Foundations, and the People They Serve*, at 47-50 (2008) (on file with author). The report also concludes that the Treasury Department’s claims concerning the extent to which terrorist organizations divert funds from charitable contributions are greatly exaggerated. See *id.* at 31, 34.

¹⁵ This data is derived from interviews with medical doctors involved with humanitarian assistance to Northeast Sri Lanka, which are on file with the author.

¹⁶ Dialysis is a particularly apt example because in Northern Sri Lanka it is often needed to treat snake bites which can otherwise be fatal. Temporary dialysis serves to alleviate the transient kidney failure which otherwise leads to easily preventable deaths.

material support laws, and it has even succeeded in winning deportation orders under the immigration law's definition of material support for merely giving food and shelter to people who belong to a "terrorist organization" even if that group is not designated.¹⁷ More recently, the government has denied asylum to doctors and nurses who provided medical care at the behest of terrorist groups.

The government has justified these draconian results primarily by reference to a single argument. The government has maintained—and a number of federal courts have agreed—that its sweeping interpretation of the material support laws is required because all humanitarian assistance to designated terrorist groups is "fungible" with other, more pernicious types of support.

The fungibility argument comes in a variety of forms. At its narrowest, the argument is simply that designated groups can divert funds from humanitarian to military ends—if an NGO provides money for blankets, the group may use the money to buy guns instead. *See, e.g., United States v. Afshari*, 446 F.3d 915 (9th Cir. Cal. 2006) ("money is fungible; if an organization engages in terrorism, it can channel money donated to it for humanitarian and advocacy purposes to promote its grisly agenda."). However, the argument also appears in broader forms. The government has asserted that non-financial assistance can be fungible, such that if an NGO provides a doctor to work in the designated group's refugee camp, then the group need not spend its own money on that doctor and can instead direct that money toward a violent end. As Judge Posner explained in a recent Seventh Circuit decision, when describing the rationale that Congress employed:

If you provide material support to a terrorist organization, you are engaged in terrorist activity even if your support is confined to the nonterrorist activities of the organization. Organizations that the statute, and indeed in this instance common parlance, describes as terrorist organizations, such as Hamas in Gaza and Hezbollah in Lebanon, often operate on two tracks: a violent one and a peaceful one (electioneering, charity, provision of social services). If you give money (or raise money to be given) for the teaching of arithmetic to children in an elementary school run by Hamas, you are providing material support to a terrorist organization even though you are not providing direct support to any terrorist acts.¹⁸

¹⁷ *See* Humanitarian Law Project v. Reno, 205 F.3d 1130, 1133 (9th Cir. 2000); Humanitarian Law Project v. U.S. Dep't of Justice, 393 F.3d 902 (9th Cir. 2004) (en banc); Singh-Kaur v. Ashcroft, 385 F.3d 293, 299-301 (3d Cir. 2004). As of the time of this writing, the Ninth Circuit has held that the ban on "services," "training," and some forms of "expert advice and assistance" (but probably not medical advice) are unconstitutionally vague, while the rest of the law has been upheld. *Humanitarian Law Project v. Mukasey*, 509 F.3d 1122 (9th Cir. 2007). However, the government is seeking rehearing in the case. In any event, the Ninth Circuit's decision does not bar the government from prosecuting people under those portions of the statute in other parts of the country.

¹⁸ *Hussain v. Mukasey*, 518 F.3d 534, 538 (7th Cir. 2008). There is support in the legislative history of the material support laws for the claim that Congress endorsed this view, although without any coherent explanation. Section 307 of the Anti-Terrorism and Effective Death Penalty Act of 1996, in which the material support laws were first enacted, contained a Congressional finding that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." I cannot believe the politicians who wrote this would have wanted their statement to deprive food, shelter, and medical care to the orphaned children I met in the tsunami's aftermath, no matter how "tainted" were the people who ran the camps to which those children had been brought.

Finally, at its broadest, the government deploys the fungibility argument to assert that *anything* done to benefit a designated group enhances its capacity in some sense, and enhancing that capacity provides the group greater capability for the group to use toward violent ends. As the Office of Foreign Assets Control has asserted, “terrorist abuse” of charitable organizations extends to the “exploitation of charitable services and activities to radicalize vulnerable populations and cultivate support for terrorist groups and networks.”¹⁹ On this view, a doctor who works with a designated group to save children dying of infectious diseases has provided material support to that group because saving the child has enhanced the group’s legitimacy.

There are many problems with the fungibility argument in defense of the material support laws. First, and most important, its rationale is fundamentally inconsistent with our values as a nation. As a society, we simply do not believe in collectively punishing innocent civilians in the name of furthering our political goals, however laudable and important those goals may be. I mentioned the most salient example at the outset—President Ronald Reagan’s declaration that “a hungry child knows no politics.” President Reagan’s statement reflects the basic American idea that we will not collectively punish innocent civilians for the sins of their government.

Reagan’s moral vision on this issue has had a long life. That same vision informs the policy of the International Committee of the Red Cross, whose first three Principles of Conduct in Disaster Response Programmes state that:

The humanitarian imperative comes first. The right to receive humanitarian assistance, and to offer it, is a fundamental humanitarian principle which should be enjoyed by all citizens of all countries... Aid is given regardless of the race, creed or nationality of the recipients and without adverse distinction of any kind. Aid priorities are calculated on the basis of need alone... Aid will not be used to further a particular political or religious standpoint.²⁰

The Red Cross’s policy reflects President Reagan’s moral vision, but cannot be reconciled with the material support laws, which forbid the provision of aid if the aid must pass through the hands of designated groups. Reagan’s view has also become official United States Agency for International Development (U.S. AID) policy. As the agency explained in a background paper on famine in 2002, “[f]ood aid will not be used as an instrument of diplomacy in a nutritional emergency. We separate people from government and follow Ronald Reagan’s advice: ‘a hungry child knows no politics.’”²¹ However, U.S. AID’s principle also cannot be reconciled with the material support laws, which flatly prohibit giving food to designated groups for distribution to civilians living under their rule.²²

¹⁹ U.S. DEP’T OF THE TREASURY, ANNEX TO THE ANTI-TERRORIST FINANCING GUIDELINES: VOLUNTARY BEST PRACTICES FOR U.S. BASED CHARITIES 14 (2006), *available at* http://www.treas.gov/offices/enforcement/key-issues/protecting/docs/guidelines_charities.pdf.

²⁰ See INT’L FED’N OF RED CROSS AND RED CRESCENT SOC’YS, THE CODE OF CONDUCT: PRINCIPLES OF CONDUCT FOR INTERNATIONAL RED CROSS AND RED CRESCENT MOVEMENT AND NGOS IN DISASTER RESPONSE PROGRAMMES, *available at* <http://www.ifrc.org/publicat/conduct/code.asp>.

²¹ Press Release, U.S. Agency for Int’l Dev., Background Paper: Famine, (June 11, 2002), *available at* http://www.usaid.gov/press/releases/2002/02fs_famine.html.

²² A number of other organizations also endorse the principle. For example, several aid groups, including the United Nations World Food Program, CARE, Catholic Relief Services, and World Vision invoked it

A second serious problem with the fungibility argument is that it proves too much; its rationale is too broad for what it seeks to support. As the government has itself argued, and as federal courts have recognized, there are a number of activities with respect to designated terrorist groups that cannot be banned. The statute itself explicitly exempts the provision of medicines and religious materials. As a result, during the tsunami's aftermath, humanitarian organizations could provide medicines to hospitals run by the LTTE without fear of being prosecuted. The Constitution also requires certain other exemptions. For example, the criminal laws do not, and cannot, punish mere membership in designated groups, because the First Amendment protects that freedom of association. Similarly, both the Constitution and the statute establish that the government cannot prohibit someone from writing articles in support of a designated group, or speaking out on its behalf.²³

However, the fungibility argument in support of the material support laws cannot make sense of these exceptions. If an aid organization gives medicine to a designated group, the group can use the money it would have spent on medicines to buy guns instead. At a broader level, membership in a group and advocacy on its behalf obviously serve to enhance its image at the most general level, and thereby enhance its capacity to engage in all of its activities, including terrorist activity. Indeed, if enough people were to write propaganda on behalf of a designated group, the group would not have to spend any of its own resources producing that propaganda, and could use those resources for other purposes. Nonetheless, Congress has not chosen to ban these forms of support, and at least some of them are constitutionally protected.

What these exceptions show is that legal and moral principles already recognized by Congress and in the Constitution require that we allow people to engage in some forms of activity even when those activities have the incidental effect of furthering the aims of designated terrorist groups, because other values trump our nation's interest in denying support to those groups. Although this principle is perfectly clear from the examples cited above, the material support laws recognize it in only the most haphazard way. They authorize providing medicine to designated groups in the name of the humanitarian imperative and allow people to be members of those same groups in the name of free speech and association, but do not allow doctors to treat people living under the control of these groups or aid workers to provide food, water, or a variety of other resources that are critical to the survival of people victimized by humanitarian disaster or armed conflict. These irrational policies offend our most basic values as a nation and also greatly increase the suffering of the most vulnerable people on our planet—innocent victims of wars and natural disasters.

to justify giving food aid to North Korea during a famine in 1997. See generally postings of Ted Yamamori & Andrew Natsios to <http://www.pbs.org/newshour/forum/august97/korea1.html> (Aug. 26, 1997).

²³ See 18 U.S.C. § 2339B(h) (exempting from liability the provision of personnel if done outside the direction and control of the designated group); *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1134 (9th Cir. Cal. 2000) ("Plaintiffs here do not contend they are prohibited from advocating the goals of the foreign terrorist organizations, espousing their views or even being members of such groups. They can do so without fear of penalty right up to the line established by [the First Amendment as explained in] *Brandenburg v. Ohio*, 395 U.S. 444 (1969)"). The government has also endorsed this view in its briefs, by arguing that people who independently advocate on behalf of designated groups cannot be subject to prosecution on that basis. See *Cross-Appellees' Petition for Rehearing and Rehearing En Banc*, at 17-19, *Humanitarian Law Project v. Mukasey*, (9th Cir.).

IV. REFORMING THE MATERIAL SUPPORT LAWS

The solution to this problem is for Congress to modify the material support laws to allow vital humanitarian assistance to proceed in situations of war and natural disaster. Congress could accomplish this in several ways. First, it could simply amend the law by requiring the government to prove that individuals charged under the material support laws actually intended to further terrorist activity when they provided humanitarian assistance. The government's assertion, in litigation, that the law should not apply to at least some people who engage in activity that has the incidental effect of supporting designated groups provides support for this view. If a person can write an article that advocates on behalf of a designated group without going to prison even though this activity may have the incidental effect of benefiting the group in some way, similarly a doctor should be able to provide medical care to civilians living under the group's rule even if that behavior also benefits the group in some abstract way. Amending the law in this way would recognize that the United States values the lives of innocent civilians everywhere, no matter what kind of government they happen to live under.

The government has argued that a rule requiring proof that an individual actually intended to further terrorist activity will allow bad actors who provide support to terrorist groups to escape liability. However, proof of intent has proved a workable standard in a variety of legal contexts. Reckless disregard of the risk that resources will be misused could still serve as a basis for prosecution, and "deliberate ignorance" or willful blindness to such misuse could also be punished. Indeed, implausible claims that a humanitarian agency did not intend to support a terrorist group are unlikely to succeed in front of juries concerned about the threat of terrorism.²⁴

If lawmakers have concerns about such an intent requirement, notwithstanding its use in other contexts, they should still support a second, narrower, solution. This would be to create an affirmative defense in the statute for certain kinds of humanitarian assistance. Under this approach, someone providing material support to a designated group could avoid criminal liability if they affirmatively show that their assistance went only to civilians, for humanitarian purposes. If they could not prove that the assistance they provided reached civilians for such purposes, they could be convicted under the statute. Under this approach, organizations should be able to continue their work if they carefully screen and monitor projects to ensure that aid is sent only to those who truly need it, audit their programs through detailed receipts and written acknowledgements from beneficiaries, or send their own personnel to ensure that aid is provided as intended. Such an approach should fully allay the government's concern regarding the creation of "sham" charities that could covertly aid designated groups, while allowing legitimate humanitarian organizations that can show that their work does not further terrorist activity to continue providing life-saving services in conflict areas such as Sri Lanka.

Whether or not Congress adopts either of these two approaches, at a minimum it should broaden the existing exception for medicine and religious materials to cover certain other services that are essential to victims of war and natural disaster. At a very minimum, the statute should authorize an exception for not only medicine and

²⁴ A slightly different version of this approach would allow humanitarian organizations to avoid liability if they could show that they took "reasonable measures" to ensure that their aid was not diverted to support violence. Under this approach, the law would still focus upon the organization's intent, but would place the burden on the organization to prove that its intent was pure, rather than requiring the government to prove that its intent was to support violence.

religious materials, but also “medical equipment and services, civilian public health services, and, if provided to non-combatants, food, water, clothing, and shelter.”

Finally, given the disastrous humanitarian situation in Sri Lanka at the moment, including approximately one million people displaced from their homes, many of whom may soon be at risk of starvation according to the United Nations World Food Program, the Bush Administration need not wait for Congress to act. Amendments to the statute put in place in 2004 allow the Secretary of State, acting in concert with the Attorney General, to essentially waive the “personnel,” “training,” and “expert advice or assistance” prongs of the statute so as to allow material support under certain circumstances, provided that the support cannot be used to carry out terrorist activity. While obviously not a complete solution, the administration should invoke this provision to allow humanitarian organizations to provide those forms of assistance in Sri Lanka.²⁵

V. CONCLUSION

I was working in Manhattan on September 11, 2001, and I felt the horror of the terrorist attacks in a very personal way. I believe we must do everything we can to make our country safe from the scourge of terrorism. However, as I sit here writing, the faces of the people I saw in the camps in Sri Lanka flash before me, and I know their need. Without some amendment along the lines discussed above, humanitarian organizations and individual volunteers will continue to be deterred from providing vitally needed assistance to victims of disasters like the tsunami. The people who managed to survive the tsunami and civil war in Sri Lanka should not be deprived of basic necessities such as food and shelter in their hour of greatest need simply because they happen to live in an area under the control of a designated terrorist group. Denying humanitarian assistance to such people does not make us safer; giving basic necessities to these devastated people simply does not undermine our nation's security. We do not have to choose between national security and our commitment to help those who are suffering around the globe. Amending our material support laws to allow vital humanitarian work to go unimpeded would allow us to fulfill our moral obligations without undermining our safety. The innocent victims of natural disaster and civil conflict deserve nothing less.

²⁵ See 18 U.S.C. § 2339B(j). Even with such a waiver in place, the material support laws would still bar much-needed humanitarian aid such as food, water, blankets and other genuine humanitarian items. For this reason, among others, invocation of the waiver is not a substitute for reform of the material support laws.

International and Foreign Law Sources: Siren Song for U.S. Judges?

Chimène I. Keitner*

In recent years, foreign and international law sources have come under attack as a particularly insidious form of temptation to U.S. judges engaged in constitutional adjudication. For some, this might seem a strange choice of target. After all, continued judicial reference to our English common law inheritance remains beyond reproach, even though this inheritance comes from a country whose institutions we fought a Revolution to reject. For others, this jurisprudential xenophobia might be unsurprising. As one of only two countries to have “un-signed” the Rome Statute creating the International Criminal Court, and as a non-party to the almost universally ratified Convention on the Rights of the Child, the United States has earned notoriety for its skepticism towards international institutions and influences.

Some of this skepticism might be born of ignorance. A National Geographic survey conducted in 2006 found that only 37% of Americans between the ages of 18 and 24 can find Iraq on a map; 6 in 10 young Americans cannot speak a foreign language fluently; and 20% of young Americans think Sudan is in Asia.¹ Unfamiliarity can breed contempt. Anti-internationalist arguments can capture the public imagination in a way that, for example, arguments about strict constructionism might not. To the extent that members of the public have opinions about what judges do and how they do it, anti-internationalist arguments have found a receptive audience in the United States.

In this issue brief, I first recap recent debates among judges about the appropriate use of foreign and international law sources (primarily, though not exclusively, the decisions of foreign courts and international tribunals), and the echoes of these debates in the court of public opinion. I then identify three principled objections to the use of foreign and international law sources in constitutional adjudication and suggest responses to each of them. I conclude that, although there are doubtless many grounds for criticizing opinions by U.S. Supreme Court justices on questions of constitutional interpretation, the citation of foreign and international law sources as non-binding authority should not be one of them.

I. THE JUDICIAL DEBATE

Attitudes towards the use of foreign and international law sources in U.S. constitutional interpretation can be grouped under three broad headings, although the views of individual justices do not fall neatly or consistently into discrete categories. For convenience, I label these attitudes “road to perdition,” “tempest in a teapot,” and

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¹ NATIONAL GEOGRAPHIC-ROPER PUBLIC AFFAIRS 2006 GEOGRAPHIC LITERACY STUDY (2006), at www.nationalgeographic.com/roper2006/pdf/FINALReport2006GeogLitsurvey.pdf.

“ignore at our peril.” Although the “road to perdition” view is generally associated with the political right, and the “ignore at our peril” view is associated with the political left, this is not an impenetrable division, nor are individual justices always rooted in one camp to the exclusion of the others. For example, many commentators have cited Chief Justice William Rehnquist’s recommendation that U.S. judges look beyond U.S. borders for persuasive reasoning about constitutional questions, even though he has elsewhere criticized this practice. The Chief Justice wrote:

When many new constitutional courts were created after the Second World War, these courts naturally looked to decisions of the Supreme Court of the United States, among other sources, for developing their own law. But now that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process.²

Similarly, Justice Sandra Day O’Connor, who has more consistently been supportive of transnational judicial dialogue, has observed:

As the American model of judicial review of legislation spreads further around the globe, I think that we Supreme Court Justices will find ourselves looking more frequently to the decisions of other constitutional courts, especially other common-law courts that have struggled with the same basic constitutional questions that we have: equal protection, due process, the Rule of Law in constitutional democracies.... All of these courts have something to teach us about the civilizing function of constitutional law.³

In terms of the three categories, Justice O’Connor has generally taken the “tempest in a teapot” approach, dismissing criticisms of the use of foreign and international law as “much ado about nothing,” since “it doesn’t hurt to know what other countries are doing.”⁴

Other justices have articulated rationales for looking beyond U.S. borders that reflect the “ignore at our peril” position. For example, Justice Ruth Bader Ginsburg has warned that an entirely self-referential jurisprudence impoverishes the judicial system: “The U.S. judicial system will be the poorer, I believe, if we do not both share our experience with, and learn from, legal systems with values and a commitment to democracy similar to our own.”⁵ Justice Stephen Breyer has advocated the empirical utility of looking to the experiences of other jurisdictions: “Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own.... But their

² William H. Rehnquist, *Constitutional Courts—Comparative Remarks* (1989), reprinted in *GERMANY AND ITS BASIC LAW: PAST, PRESENT, AND FUTURE—A GERMAN-AMERICAN SYMPOSIUM* 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993).

³ SANDRA DAY O’CONNOR, *THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE* 234 (2003).

⁴ Hope Yen, *O’Connor Dismisses International Law Controversy as “Much Ado About Nothing,”* U.S. SUP. CT. MONITOR, Apr. 4, 2005.

⁵ Ruth Bader Ginsburg, *“A decent respect to the Opinions of [Human]kind”: The Value of a Comparative Perspective in Constitutional Adjudication*, 99 ASIL PROC. 351, 351 (2005).

experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem....”⁶ And Justice Anthony Kennedy’s belief that foreign sources can be relevant for U.S. judges formed the subject of a lengthy article in *The New Yorker*, which quoted him as follows:

“Let me ask you this.... Why should world opinion care that the American Administration wants to bring freedom to oppressed peoples? Is that not because there’s some underlying common mutual interest, some underlying common shared idea, some underlying common shared aspiration, underlying unified concept of what human dignity means? I think that’s what we’re trying to tell the rest of the world, anyway.” ... He went on, “If we are asking the rest of the world to adopt our idea of freedom, it does seem to me that there may be some mutuality there, that other nations and other peoples can define and interpret freedom in a way that’s at least instructive to us.”⁷

Notwithstanding these remarks, recent U.S. Supreme Court justices have not uniformly endorsed the view that looking beyond U.S. borders is benign or even desirable in adjudicating constitutional questions. In particular, Justice Antonin Scalia has been a vocal opponent of this practice (even though he has also engaged in it). In *Thompson v. Oklahoma*, for example, the plurality opinion surveyed the practice of other U.S. states, as well as that of other countries, in determining that “it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense.”⁸ Justice Scalia, joined by Chief Justice Rehnquist and Justice Byron White, wrote in dissent:

That 40% of our States do not rule out capital punishment for 15-year-old felons is determinative of the question before us here, even if that position contradicts the uniform view of the rest of the world. We must never forget that it is a Constitution for the United States of America that we are expounding. The practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so “implicit in the concept of ordered liberty” that it occupies a place not merely in our mores but, text permitting, in our Constitution as well. See *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (Cardozo, J.). But where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution. In the present case, therefore, the fact that a majority of foreign nations would not impose capital punishment upon persons under 16 at the time of the crime is of no

⁶ *Printz v. United States*, 521 U.S. 898, 977 (Breyer, J., dissenting).

⁷ Jeffrey Toobin, *Swing Shift: How Anthony Kennedy’s Passion for Foreign Law Could Change the Supreme Court*, *The New Yorker*, Sept. 12, 2005, available at http://www.newyorker.com/archive/2005/09/12/050912fa_fact.

⁸ 487 U.S. 815, 826–30 (1988).

more relevance than the fact that a majority of them would not impose capital punishment at all, or have standards of due process quite different from our own.⁹

Justice Scalia would allow legislators to look beyond U.S. borders for insight and inspiration but, according to the approach he advocated in *Thompson*, this source of information should be foreclosed to judges interpreting the Constitution. In 1996, Justice Scalia included a statement to this effect in a footnote of his majority opinion in *Printz v. United States*: “We think such comparative analysis inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one.”¹⁰ This aside has become talismanic among those who seek to prohibit judicial reference to non-U.S. sources.

The debate about the appropriateness of looking to non-U.S. sources has been particularly virulent in the context of death penalty cases. In *Atkins v. Virginia*, a majority of the justices found that the execution of mentally retarded defendants violates the Eighth Amendment. Chief Justice Rehnquist, joined by Justice Scalia and Justice Clarence Thomas, wrote in dissent:

In my view, these two sources—the work product of legislatures and sentencing jury determinations—ought to be the sole indicators by which courts ascertain the contemporary American conceptions of decency for purposes of the Eighth Amendment. They are the only objective indicia of contemporary values firmly supported by our precedents. More importantly, however, they can be reconciled with the undeniable precepts that the democratic branches of government and individual sentencing juries are, by design, better suited than courts to evaluating and giving effect to the complex societal and moral considerations that inform the selection of publicly acceptable criminal punishments.¹¹

Chief Justice Rehnquist continued: “if it is evidence of a *national* consensus for which we are looking, then the viewpoints of other countries simply are not relevant.”¹²

As these quotations indicate, and as others have observed, one’s opinion about the potential relevance of foreign and international law sources to the question of what constitutes “cruel and unusual punishment” depends in no small part on one’s view of the role of judges in a constitutional democracy. In my view, it also depends critically on one’s view of what the *relevant community* is for determining the meaning of concepts such as decency, cruelty, and due process: the citizenry of a particular state within the United States;¹³ the United States population as a whole, either in the

⁹ *Id.* at 869 n.4 (Scalia, J., dissenting). Justice Stevens wrote the plurality opinion; Justice O’Connor concurred in the judgment; and Justice Kennedy did not participate. One year later, in *Stanford v. Kentucky*, Justice Scalia wrote an opinion for a 5–4 majority holding that the Eighth Amendment does not prohibit the execution of a person who was 16 years old at the time of his or her offense, because this practice is consistent with “*American* conceptions of decency.” 492 U.S. 361, 369 n.1 (1989).

¹⁰ *Printz v. United States*, 521 U.S. 898, 921 n.11 (1996).

¹¹ 536 U.S. 304, 324 (Rehnquist, C.J., dissenting).

¹² *Id.* at 325.

¹³ As Chief Justice Rehnquist put it in *Atkins*, “The question presented by this case is whether a national consensus deprives Virginia of the constitutional power to impose the death penalty on capital murder defendants like petitioner. . . .” *Id.* at 321.

late eighteenth century or today; or the wider global community of those who share certain core democratic values embodied centrally, but not exclusively, in the U.S. Constitution.

II. PUBLIC REVERBERATIONS

The debates among judges about the appropriate boundaries—both geographical and institutional—of judicial review drew intense public attention with the publication of two constitutional law opinions by Justice Kennedy for the Court in 2003 and 2005. The first, in *Lawrence v. Texas*,¹⁴ overruled the Court's prior holding in *Bowers v. Hardwick*¹⁵ and held that criminalizing consensual homosexual intercourse violates the liberty interests protected by the due process clause. The second, in *Roper v. Simmons*,¹⁶ abrogated the Court's prior holding in *Stanford v. Kentucky*¹⁷ and held that executing individuals who were under age eighteen at the time of their capital crimes violates the constitutional prohibition on cruel and unusual punishment. In both of these opinions, Justice Kennedy cited foreign or international law sources as additional support for the Court's interpretations of the scope of the protected freedoms.

In *Lawrence*, Justice Kennedy began by indicating that Chief Justice Warren Burger's concurring opinion in *Bowers* had inaccurately characterized non-U.S. authority: "The sweeping references by Chief Justice Burger to the history of Western civilization and to Judeo-Christian moral and ethical standards [condemning homosexual conduct] did not take account of other [European] authorities pointing in an opposite direction,"¹⁸ notably an earlier decision by the European Court of Human Rights, binding on all members of the Council of Europe, that struck down a statute similar to the one at issue in *Bowers*.¹⁹ Justice Kennedy then surveyed the evolving practice of U.S. states, and intervening U.S. Supreme Court precedents on the constitutional protection of personal autonomy and privacy interests in matters of intimacy. After this discussion, he added:

To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere... The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.²⁰

Although the experiences of other countries (here, members of the Council of Europe, Australia, Canada, New Zealand, Israel, and South Africa) were by no means determinative, Justice Kennedy found that these countries' decisions to protect this aspect of personal intimacy from governmental intrusion were informative, and he said so in his written opinion.

¹⁴ 539 U.S. 558 (2003).

¹⁵ 478 U.S. 186 (1986).

¹⁶ 543 U.S. 551 (2005).

¹⁷ 492 U.S. 361 (1989).

¹⁸ *Lawrence*, 539 U.S. at 572.

¹⁹ *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981).

²⁰ *Lawrence*, 539 U.S. at 576-77.

In *Roper*, Justice Kennedy again indicated the potential relevance of non-U.S. sources to interpreting the Eighth Amendment as *part of* the U.S. constitutional tradition:

It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime.... The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.... It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.²¹

While these non-U.S. references in *Lawrence* and *Roper* appear judicious, they have proved a lightning rod for criticism by those who object to the Court's decisions in these cases.

Certain U.S. legislators have become ardent critics of acknowledging the potential relevance of non-U.S. sources, and have repeatedly introduced congressional resolutions reflecting this criticism.²² Recent versions of the resolution state "that judicial interpretations regarding the meaning of the Constitution of the United States should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements inform an understanding of the original meaning of the Constitution of the United States."²³ To date, versions of this resolution have not advanced past committee, but they have garnered some measure of support.

Proponents of a congressional resolution have emphasized their perception that references to non-U.S. sources by U.S. judges threaten the independence of the United States. In introducing a Senate version of this resolution, Senator John Cornyn indicated:

If this trend [of citing foreign decisions] is real, then I fear that, bit by bit, case by case, the American people may be slowly losing control over the meaning of our laws and of our Constitution. If this trend continues, foreign governments may even begin to dictate what our laws and our Constitution mean, and what our policies in America should be.²⁴

²¹ *Roper*, 543 U.S. at 578.

²² At the time of writing, these resolutions have included: H.R. Res. 446, 108th Cong., 1st Sess. (Nov. 18, 2003) (introduced by Jim Ryun, R-Kan.) and H.R. Res. 468, 108th Cong., 1st Sess. (Nov. 21, 2003) (introduced by Sam Graves, R-Missouri); H.R. Res. 568, 108th Cong., 2nd Sess. (March 17, 2004) (introduced by Tom Feeney, R-Fla.); H.R. Res. 97, 109th Cong., 1st Sess. (Feb. 15, 2005) (reintroduced by Tom Feeney, R-Fla.); S. Res. 92, 109th Cong., 1st Sess. (March 20, 2005) (introduced by John Cornyn, R-Tex.); H.R. Res. 372, 110th Cong., 1st Sess. (May 3, 2007) (reintroduced by Tom Feeney, R-Fla.).

²³ S. Res. 92, 109th Cong., 1st Sess. (March 20, 2005); H.R. Res. 372, 110th Cong., 1st Sess. (May 3, 2007).

²⁴ 151 Cong. Rec. S3110 (daily ed. Mar. 20, 2005) (statement of Sen. Cornyn).

It is unclear from such statements whether the actual target of these congressional proposals is foreign influence or, rather, U.S. courts. Referring to the Court's decisions in *Atkins*, *Lawrence*, and *Roper*, Senator Cornyn opined that "because some foreign governments have frowned upon [prior] ruling[s], the U.S. Supreme Court has now seen fit to take th[ese] issue[s] away from the American people."²⁵ He continued, "I am concerned that this trend may reflect a growing distrust among legal elites—not only a distrust of our constitutional democracy, but a distrust of America itself."²⁶ Representative Tom Feeney, who has introduced several analogous bills in the House, has expressed a similar view:

Six U.S. Supreme Court Justices—approvingly described as “transnationalists” by Yale Law Dean Harold Koh—have increasingly expressed disappointment in the Constitution we inherited from the Framers and disdain for certain laws enacted by democratically elected representatives. . . . Mr. [Bob] Goodlatte, I, and others on this Committee hope to start a great civics debate on the constitutionally appropriate role of judges in this Republic.²⁷

Opposition to the citation of non-U.S. sources has thus become a vehicle through which certain legislators have sought to diminish the potential impact of judicial review on what they view as the “original meaning” of the Constitution.

This legislative movement also has some support from those Senator Cornyn dubbed “legal elites,” although presumably these elites would not be subject to Senator Cornyn's charge of “distrust[ing] America.” For example, Georgetown University law professor Nicholas Rosenkranz has testified: “Simply put, those who would cite contemporary foreign law necessarily embrace the [troubling] notion of an evolving Constitution.”²⁸ M. Edward Whelan, III, President of the Ethics and Public Policy Center, has emphasized:

Thus the broader long-term resolution to the problem that House Resolution 97 [the 2005 version of the Feeney resolution] usefully addresses is the confirmation to the Supreme Court of originalist Justices like Scalia and Thomas who understand that the Constitution constrains them to construe its provisions in accordance with the meaning those provisions bore at the time they were promulgated—Justices, in short, who understand that the Constitution does not give them free rein to impose their own policy preferences on the grand questions of the day.²⁹

A central goal of these proposals, then, is to promote a certain method of constitutional interpretation. Although the proposed resolutions would not be binding on courts, Representative Feeney has indicated: “my friend from Virginia [Rep. Robert

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 109th Cong., 1st sess. (July 19, 2005) at 72, available at http://commdocs.house.gov/committees/judiciary/hju22494.000/hju22494_0.HTM [hereinafter *Hearing*].

²⁸ *Id.* at 35.

²⁹ *Id.* at 32.

Scott] suggested that all we could really hope for with the resolution is to chill certain activities from the bench; and I have to admit that that is entirely what some of us intend to do with this.”³⁰

The American Bar Association voiced its opposition to House Resolution 97 on precisely these grounds, stating that the resolution inappropriately attempts to impose a particular disputed method of constitutional interpretation on the courts:

The resolution indirectly propounds a doctrine of constitutional construction that is itself highly controversial. The resolution states that judicial determinations should not rely on foreign judgments, laws or pronouncements of foreign institutions unless they “... otherwise inform an understanding of the *original meaning* [emphasis added] of the laws of the United States.” The debate over whether interpretation should always be limited to an inquiry into the original meaning of a text, or whether meanings may evolve over time to reflect a changing society, is as old as the Constitution and still unresolved. Our concern is that this incorporated jurisprudence of original intent is presented [by the resolution] as the normative mode of constitutional interpretation and therefore not a focus of discussion and debate.³¹

To the extent that the Feeney resolution is specifically intended to promote “originalist” jurisprudence, the ABA’s criticism is not likely to deter the resolution’s supporters.

The ABA is not alone in expressing concern about the tension between the principle of coequal branches of government and the wording of the proposed resolution. Representative Jerrold Nadler (D-New York), who has voiced a “tempest in a teapot” attitude toward the use of foreign sources, has commented:

I continue to believe that this is a big fuss over nothing. No case has ever turned on a foreign source. No foreign source has ever been treated as binding, and this phenomenon of citing foreign sources is certainly nothing new. What is really dangerous is the threats that accompany our deliberations, and the suggestion that Congress may exercise its power to tell the courts what is or is not appropriate, what is or is not an appropriate way to consider a complex issue.³²

Despite these words of caution, some have suggested that U.S. judges’ citation of non-U.S. sources ought to be grounds not only for censure, but for impeachment.³³ A bill introduced simultaneously by Senator Richard Shelby (R-Ala.) and Representative Robert Aderholt (R-Ala.) sought to mandate a particular vision of the appropriate sources for constitutional interpretation, and provided in part as follows:

³⁰ *Id.* at 61.

³¹ Letter from Robert D. Evans to F. James Sensenbrenner, Jr. (Sept. 30, 2005) available at www.abanet.org/poladv/letters/judiciary/050930letter_foreign.pdf.

³² *Hearing*, *supra* note 27, at 12.

³³ See, e.g., Dana Milbank, *And the Verdict on Justice Kennedy Is: Guilty*, Wash. Post, Apr. 9, 2005, at A3, available at <http://www.washingtonpost.com/wp-dyn/articles/A38308-2005Apr8.html>.

In interpreting and applying the Constitution of the United States, a court of the United States may not rely upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than English constitutional and common law up to the time of the adoption of the Constitution of the United States.³⁴

Going further, a resolution seeking to amend Title 28 of the U.S. Code regarding the “standards for impeachment of justices and judges” includes the following offenses in its definition of the term “other high crimes and misdemeanors”:

(G) Entering or enforcement of orders or decisions based on judgments, laws, agreements, or pronouncements of foreign institutions, governments, or multilateral organizations, other than orders or decisions based on the common law of the United Kingdom.

(H) Entering or enforcement of orders or decisions that conflict with or are inconsistent with the text of the United States Constitution.

(I) Entering or enforcement of orders or decisions based on precedent from previous Federal court decisions that conflict with or are inconsistent with the text of the United States Constitution.³⁵

Under proposed subsection (I), following *U.S.* precedent would become an impeachable offense!

Perhaps these lengthy quotations give these legislative proposals more attention than they are due. But the challenge of maintaining and renewing the legitimacy of constitutional provisions, interpreted through the process of judicial review, depends on the perceptions of the people these provisions and interpretations ultimately impact. Arguments for an exclusively self-referential jurisprudence based on a purported foreign threat to U.S. sovereignty are easy for the public to understand, and can be compelling. Coupled with misunderstanding or misinformation—such as the false belief that U.S. justices and judges are treating foreign sources as binding in constitutional cases—objections to the citation of non-U.S. sources have become incendiary.³⁶

³⁴ S. 520, Title II, Sec. 201, 109th Cong., 1st Sess. (March 3, 2005); H.R. 1070, Title II, Sec. 201, 109th Cong., 1st Sess. (March 3, 2005).

³⁵ H.R. Res. 2898, 110th Cong., 1st Sess. (June 28, 2007).

³⁶ See Bill Mears, *Justice Ginsburg Details Death Threat* (Mar. 16, 2006), at <http://edition.cnn.com/2006/LAW/03/15/scotus.threat/index.html> (describing internet chat group posting threatening Justices Ginsburg and O'Connor for citing foreign and international law sources); see also Gina Holland, *Justice Ginsburg Describes "Threats" to O'Connor and Herself* (Mar. 16, 2006), at <http://feministlawprofs.law.sc.edu/?p=238> (quoting language from posting, including the statement that Justices Ginsburg and O'Connor “have publicly stated that they use (foreign) laws and rulings to decide how to rule on American cases. This is a huge threat to our Republic and Constitutional freedom.”).

III. OBJECTIONS AND RESPONSES

The debate about the appropriate use of foreign and international law sources in interpreting provisions of the U.S. Constitution continues in multiple fora,³⁷ as do debates about the proper methods of constitutional interpretation generally. I do not engage this rich literature here. Instead, I identify three principled objections to the use of foreign and international law sources by judges interpreting the U.S. Constitution and suggest responses to each of them. Although there is a long-established tradition of looking to foreign sources in U.S. constitutional interpretation,³⁸ I accept that those who espouse a strictly “originalist” approach to constitutional interpretation are not likely to be receptive to the argument that the framers’ original intent *included* the intent to make the United States an active and engaged member of the world community through all of its branches of government. Once we move beyond originalism, however, it is reasonable to ask whether foreign and international law sources can be appropriate reference points for interpreting provisions of the U.S. Constitution. I submit that the answer is “yes.”

A. INSTITUTIONALIST OBJECTIONS

Institutionalist objections do not take issue with the practice of drawing on foreign and international law sources *per se*. They simply argue that U.S. judges are ill-suited to this task. The most basic version of this argument focuses on many U.S. judges’ lack of training in international and comparative law. In this view, although U.S. judges inevitably engage with foreign and international law when they are called upon to interpret treaties or to adjudicate transnational disputes, these forays into unfamiliar legal territory should be minimized.

This objection, while perhaps accurate, does not seem particularly troubling. U.S. judges are routinely called upon to engage with unfamiliar areas of law. At most, this objection indicates the continued importance of incorporating international and comparative law into legal education and outreach programs.³⁹ Common-law legal reasoning is by nature designed to ferret out the strongest legal arguments. To the extent that judicial decisions from other jurisdictions contain persuasive reasoning on legal questions of common concern, they are appropriate source material for common law judges, particularly in the absence of binding authority on a given issue. The Supreme Court stated over a century ago:

³⁷ ACS programs on this topic include a co-sponsored symposium on *International Law and the Constitution: Terms of Engagement* at Fordham University School of Law on October 4–5, 2007; a 2006 “program-in-a-box” on *The Use of Foreign and International Law in Interpreting the U.S. Constitution*; and a 2005 national convention panel on *The Application of International and Foreign Norms to Domestic Law*. Vicki Jackson and Mark Tushnet have institutionalized the comparative study of constitutional law (which can include, but is not reducible to, using foreign and international law sources to interpret the U.S. Constitution) in their law school casebook on *Comparative Constitutional Law*, now in its second edition.

³⁸ See, e.g., Sarah H. Cleveland, *Our International Constitution*, 31 Yale J. Int’l L. 1 (2006) (demonstrating that “international law has always played a substantial, even dominant, role in broad segments of U.S. constitutional jurisprudence”).

³⁹ In this regard, I was struck in reading former California Supreme Court Chief Justice Serranus Hastings’s comment upon founding the UC Hastings College of the Law in 1878 that “This College . . . was established not to make lawyers merely, as is generally supposed, but to qualify judges, statesmen, and law-makers; to educate young men [sic] who intend to engage in foreign and domestic commerce in a knowledge not only of the laws of their country, but of the laws of foreign nations and international law. . . .” *A Brief History of Hastings*, in HASTINGS COLLEGE OF THE LAW STUDENT GUIDEBOOK 2007–2008 at 2 (2007).

There is nothing in *Magna Charta*, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted.⁴⁰

There are a variety of situations in which casting a wide net can enrich judicial reasoning.⁴¹ I will focus on two of these. First, the lived experiences of other societies can provide relevant data for U.S. judges. For example, *Miranda* warnings have become a hallmark of U.S. criminal procedure. But the Supreme Court did not limit itself to U.S. precedents and experiences in establishing this standard. It canvassed the prevailing rules in England, Scotland, and India, as well as the U.S. Uniform Code of Military Justice (another form of comparative analysis) to support its conclusion that “the danger to law enforcement in curbs on interrogation is overplayed.”⁴² The Court explained:

There appears to have been no marked detrimental effect on criminal law enforcement in these jurisdictions as a result of these rules. Conditions of law enforcement in our country are sufficiently similar to permit reference to this experience as assurance that lawlessness will not result from warning an individual of his rights or allowing him to exercise them. Moreover, it is consistent with our legal system that we give at least as much protection to these rights as is given in the jurisdictions described.⁴³

Notably, the dissent did not take issue with the majority’s reference to foreign experiences, but rather suggested that the majority had not drawn the proper conclusions from the relevant data: “The law of the foreign countries described by the Court also reflects a more moderate conception of the rights of the accused as against those of society when other data are considered.”⁴⁴ Certainly, judges can differ in the lessons they draw from foreign experiences. But this is no different from the existence of divergent views on the proper interpretation and application of domestic experiences and precedents. Without such differences, there would be no need for a system of appellate review, or a court of final appeal with more than one justice assigned to each case.

The second situation involves references to non-U.S. precedents as part of an attempt to elucidate broad conceptions, such as “the concept of ordered liberty”⁴⁵ that animates the requirement of due process. Unlike references for empirical purposes, this category of references lies more in the realm of political and legal theory than the realm of policy. The idea here is that the experiences and conclusions of

⁴⁰ *Hurtado v. California*, 110 U.S. 516, 531 (1884).

⁴¹ For example, Harold Koh has usefully identified three such situations, which he calls “parallel rules,” “empirical light,” and “community standard.” Harold Hongju Koh, *International Law as Part of Our Law*, 98 Am. J. Int’l L. 43, 45 (2004). David Fontana has explored how judges might usefully adopt a “refined comparativist” perspective on certain constitutional questions in *Refined Comparativism in Constitutional Law*, 49 UCLA L. Rev. 539 (2001).

⁴² *Miranda v. Arizona*, 384 U.S. 436, 486 (1966).

⁴³ *Id.* at 489.

⁴⁴ *Id.* at 521–22 (Harlan, J., dissenting).

⁴⁵ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (Cardozo, J.).

other jurisdictions are relevant not because of the experiential lessons they teach, but because they are part of a common quest to identify and articulate the basic elements of human dignity that ought to be protected by the rule of law in a “civilized” society. Foreign and international law sources can be relevant in this context not because they are binding, or even because they evidence any sort of positive legal consensus in the world community, but because they get it (the right) right.⁴⁶

Inevitably, reasonable minds differ on what it means to get it “right.” As suggested above, objections to foreign and international law references by U.S. judges charged with interpreting the Constitution are often coupled with the accusation that these judges are simply imposing their personal conceptions of what it means to live in a just and well-ordered society. This criticism becomes especially pointed when justices reach a conclusion that differs from the conclusion reached by a particular set of elected representatives, and blends into the critique of judicial review as at odds with a strong notion of democratic accountability. To the extent that such criticisms really target the role of the judicial branch, however, they will not be assuaged by the simple deletion of foreign and international law references from U.S. judicial opinions.

In this fashion, what I have called the institutionalist critique, which focuses on the (in)competence of U.S. judges in grappling with foreign and international law sources, leads to the instrumentalist critique, which attacks the allegedly outcome-oriented reasoning that leads judges to invoke these sources in the absence of “favorable” domestic authorities. Georgetown University law professor Viet D. Dinh has testified:

[W]e as American lawyers, and especially as American judges, are just not very good at doing foreign laws. We are not steeped in their tradition, we do not know the interpretation. We do not know the entire body of law of a particular nation or of a particular organization or of a particular convention. So what is left is that we would cherry-pick those sources of law which would tend to support our point of view, whether it be in a brief or in a particular opinion.⁴⁷

The accusation of “cherry-picking” lies at the heart of the instrumentalist objection.

B. INSTRUMENTALIST OBJECTIONS

For those who view the judiciary as Ulysses chained to the mast of “originalism,” foreign and international law sources represent yet another siren song luring judges astray. In *Conroy v. Aniskoff*, Justice Scalia noted that “Judge Harold Leventhal used to describe the use of legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one’s friends.”⁴⁸ He reprised this metaphor in *Roper v. Simmons*, stating that “all the Court has done today, to borrow from another context, is to look over the heads of the crowd and pick out its friends.”⁴⁹

⁴⁶ Gerald Neuman usefully characterizes this aspect of a legal right as the “suprapositive” aspect, which “reflects the claim of the right to normative recognition independent of its embodiment in positive law.” Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 Am. J. Int’l L. 82, 84 (2004).

⁴⁷ *Hearing*, *supra* note 27, at 22.

⁴⁸ *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in judgment).

⁴⁹ *Roper v. Simmons*, 543 U.S. 551, 617 (2005) (Scalia, J., dissenting).

Chief Justice John Roberts popularized this image during his confirmation hearings.⁵⁰ In his view, “relying on foreign precedent doesn’t confine judges. It doesn’t limit their discretion the way relying on domestic precedent does.”⁵¹ However, contrary to the Chief Justice’s assertion, the use of *any* non-binding authority involves judicial discretion, regardless of where that authority comes from.

Foreign and international law sources have never been treated as binding in the context of constitutional interpretation, nor would they be. They might involve “more” discretion in the quantitative sense that they expand the field of available sources, but given the tremendous volume of reported U.S. state and federal decisions, not to mention other non-judicial sources routinely used by U.S. judges, this expansion of available non-binding source material cannot be said materially to affect the degree of judicial constraint, or lack thereof.⁵²

In line with the instrumentalist critique, Roger Alford has argued that what’s sauce for the goose is sauce for the gander.⁵³ If one considers any international practice, Alford argues, one must consider all of it:

In its 2002 *World Report*, Human Rights Watch states that “in virtually every country in the world people suffered from *de jure* and *de facto* discrimination based on their actual or perceived sexual orientation.” Amnesty International reports that “individuals in all continents and cultures are at risk” of discrimination based on sexual orientation and “many governments at the U.N. have vigorously contested any attempts to address the human rights of lesbian, gay, bisexual and transgender people.” One definitive source not cited in any amicus brief paints a bleak picture, indicating that there is “hardly any support for gay and lesbian rights” among the population in 144 countries, that the treatment of homosexuals is far worse in the former British colonies than elsewhere, that a majority in only eleven countries favors equal rights for homosexuals, that only six countries legally protect gays and lesbians against discrimination, and that 74 of the 172 countries surveyed outlaw homosexuality. In short, while the Court is no doubt correct that *Bowers* has been rejected elsewhere in the world, these and similar

⁵⁰ Transcript: Day Two of the Roberts Confirmation Hearings (Part III: Sens. Kyl and Kohl) (Sept. 13, 2005), at <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091301210.html>. Chief Justice Roberts also drew a distinction between foreign and U.S. judges in terms of their democratic accountability: “The president who nominates judges is obviously accountable to the people. Senators who confirm judges are accountable to people. And in that way, the role of the judge is consistent with the democratic theory.” *Id.* Of course, however, U.S. judges who cite foreign and international law sources as an element of their judicial reasoning *are* “accountable to the people.”

⁵¹ *Id.*

⁵² Concededly, researching foreign and international law sources might increase a judge’s workload (or at least that of his or her law clerks), but this does not inevitably magnify the degree of discretion reflected in that judge’s opinions. Objections to increasing the quantity of sources might come under the rubric of what David Strauss has labeled “conventionalist” arguments for relying exclusively on U.S. precedents in constitutional interpretation. See David A. Strauss, *Common Law, Common Ground, and Jefferson’s Principle*, 112 Yale L.J. 1717, 1738 (2003).

⁵³ Roger Alford, *Misusing International Sources to Interpret the Constitution*, 98 Am. J. Int’l L. 57, 67–68 (2004).

reports also make clear that the reasoning and holding in *Bowers* has *not* been rejected in much of the civilized world.⁵⁴

International law scholars habitually survey state practice and *opinio juris* (statements evidencing beliefs about the legality or illegality of particular actions) in order to determine whether a particular rule has attracted sufficient consensus to attain the status of customary international law. But the Court in *Lawrence* did not cite foreign sources in order to determine whether the Texas anti-sodomy statute was consistent with customary international law. Rather, the Court attempted to give meaning to the protection of privacy in the U.S. Constitution by examining critically a variety of sources and arguments, including the conclusions of foreign courts.

The selective invocation of non-binding authority is the essence of reasoning by analogy, which involves differentiating between “like” and “unlike.” The appropriateness of this kind of selectivity is underscored by Justice Ginsburg’s emphasis on learning from “legal systems with values and a commitment to democracy similar to our own.”⁵⁵ Precisely because the Court is charged with interpreting the U.S. Constitution and not a global constitution, the argument that any principled invocation of foreign sources ought to involve a global show of hands should not carry much weight. Just as one can distinguish domestic precedents that are incompatible with values of individual freedom and dignity, one can distinguish and choose not to follow foreign precedents that curtail rights and dignity, based on their inconsistency with the values embodied in the U.S. Constitution.

C. INHERENTIST OBJECTIONS

The third principled objection to the use of foreign and international law sources is what I call the inherentist objection. This objection takes the position that U.S. constitutional values are simply intrinsically different from those of other countries, such that foreign and international precedents are *never* relevantly similar to the issues confronted by U.S. judges in constitutional cases. Often, those who make institutional and instrumentalist objections are also motivated—explicitly or not—by inherentist concerns.

The debate between “originalists” and “evolutionists” (or between a “dead” constitution and a “living” one) could be framed as a debate about which community’s mores and commitments should provide the touchstone for U.S. constitutional interpretation: the community that existed in the United States at the time the Constitution was adopted, or the contemporary national community informed by, but not restricted to, eighteenth-century understandings.⁵⁶ Arguments about federalism are likewise, at bottom, arguments about which community’s standards ought to govern interactions among individuals in a particular geographic area (state, federal, or, in certain instances, tribal). The inherentist view accepts the appropriateness of looking to the contemporary national community, but disputes that any non-domestic sources are relevant to this task unless they have been explicitly endorsed by the national

⁵⁴ *Id.* at 65–66 (citations omitted).

⁵⁵ Ginsburg, *supra* note 5, at 351. This ability to differentiate is also central to the appropriate empirical use of comparative information, whether that information comes from another U.S. state or a foreign country.

⁵⁶ Congressman Robert Scott (D-Va.) stated during a subcommittee hearing on House Resolution 97: “I hope the sponsors of the amendment won’t be offended if I don’t agree with the idea that we ought to rely on the original intent of the Constitution. Insofar as if we kept the original intent, I would only have three-fifths of a vote on this Committee and not a full vote.” *Hearing, supra* note 27, at 54.

legislature (for example, in the form of a self-executing treaty, or a non-self-executing treaty accompanied by implementing legislation). While inherentists would generally accept that Illinois state decisions, for example, might be relevantly similar for the purposes of judicial decision-making on similar state law issues in Vermont, they would not extend this reasoning to encompass jurisdictions beyond U.S. borders.

The argument that the “provenance” of foreign and international law analogies is what makes them objectionable is an inherentist objection. Kenneth Anderson articulates this objection as follows:

The problem with comparative constitutionalism for democratic constitutional self-government, then, is the *provenance* of materials used in constitutional interpretation. Provenance matters in constitutional interpretation, at least if democracy and self-government are important, because though the content of the material may be, so to speak, intelligent or unintelligent, sensible or stupid, prudent or imprudent, it is frankly secondary to the fact that it gives, even indirectly, the consent of the governed to its use and hence to the binding conclusions derived.... Without fidelity to the principle of democratic, self-governing provenance over substantive content in the utilization of constitutional adjudicatory materials, a court becomes merely a purveyor of its own view of best policy. Yet this is not solely an issue of an unconstrained Court. It is, more importantly, a violation of the compact between government and governed, free people who choose to give up a measure of their liberties in return for the benefits of government—a particular pact with a particular community, in which the materials used in the countermajoritarian act of judging them nonetheless have, in some fashion, even indirectly, democratic provenance and consent. In this respect, citing a foreign court will *always* be different from citing Shakespeare, and it does not help to say, well, it is not binding precedent. It is the source that is the problem.⁵⁷

Anderson posits a stark dividing line between sources that are internal to “the political community which enacted and sustains [the Constitution]” and those that are external to it.⁵⁸ Internal sources can readily be differentiated, since “[w]e all know ... the difference between citing a Supreme Court case and a quotation from Bartlett’s.”⁵⁹ External sources are problematic at least in part because there is no commonly understood hierarchy dictating which countries’ judicial decisions should be treated as more persuasive than others. Foreign judicial opinions, which express the “particularity” of other political communities, cannot properly be weighed by U.S. judges and should therefore never be considered by them in deciding constitutional questions.

One could point to abysmally low voter turnout rates, the *de jure* and *de facto* disenfranchisement of large segments of American society, and the various dysfunctions of our system of representative government to impugn the “democratic

⁵⁷ Kenneth Anderson, *Foreign Law and the U.S. Constitution: The Supreme Court’s Global Aspirations*, Pol’y Rev. (June–July 2005), available at <http://www.hoover.org/publications/policyreview/2932196.html>.

⁵⁸ *Id.*

⁵⁹ *Id.*

provenance” of many U.S. legal materials. However, the point remains that Americans do have a conception, however fanciful, that we have made “a particular pact with a particular community.” Anderson seems to come to terms with the “countermajoritarian act of judging” within this community by reassuring himself that, at least, the “materials” used in this endeavor “have, in some fashion, even indirectly, democratic provenance and consent,” as well as a commonly understood hierarchy of persuasive value. But this account of democratic legitimacy does not, in fact, differentiate among various types of non-binding sources. The only thing that appears to make Shakespeare, or state law materials in a federal case, or Illinois materials in a Vermont case, “even indirectly” legitimate is that they have been filtered through the analytical machinery of a U.S. court—an integral part of the U.S. government. The same is true of non-U.S. sources referenced by U.S. judges in reaching decision

Popular rhetoric, drawing on inherentist themes, has framed the “threat” posed by citing foreign and international law decisions—as opposed to, say, Shakespeare—in terms of its implications for national sovereignty.⁶⁰ The Feeney resolution specifically articulates the premise that “inappropriate judicial reliance” on foreign judgments “threatens the sovereignty of the United States.”⁶¹ But U.S. judges who cite their foreign counterparts in reasoning about domestic constitutional questions do not “rely” on foreign judgments as binding precedent. This tendency to overestimate the role of foreign and international law sources, and its consequent threat to U.S. sovereignty (even though U.S. judges remain the gatekeepers for such sources), has been reinforced by certain legal scholars. Professor Rosenkranz has testified: “When the Supreme Court declares that the Constitution evolves, and declares further that foreign law affects its evolution, it is declaring nothing less than the power of foreign governments to change the meaning of the United States Constitution.”⁶² If there is one thing stronger than the language of democracy to inflame public opinion, it is the language of sovereignty.

Sovereignty-based arguments should be engaged seriously, precisely because of their popular resonance. But they should be placed in perspective. I do not take the position that borders have no meaning, and I am not aware of any U.S. judge or justice who would embrace this view. Nor would I disagree with Justice Scalia’s statement in *Stanford v. Kentucky* that “it is *American* conceptions of decency that are dispositive”⁶³ The point is that the experiences of other relevantly similar communities (our proverbial “friends in the crowd”) might help judges discern what protecting these conceptions entails in a particular case. Following the *American* tradition of transparency in judicial reasoning, it is only appropriate that judges who consider such materials cite them in their written opinions so that the American public can continue to debate and refine what our constitutional commitments are, and how “we the people” can best honor them.

IV. CONCLUSIONS

The use of foreign and international law sources as non-binding authority in constitutional adjudication has created a furor in recent years. In part, this is attributable

⁶⁰ See, e.g., Eric D. Hargan, *The Sovereignty Implications of Two Recent Supreme Court Decisions* (July 10, 2003), available at http://www.fed-soc.org/publications/pubID.61/pub_detail.asp.

⁶¹ H.R. Res. 568, 108th Cong., 2nd Sess. (March 17, 2004) (introduced by Tom Feeney, R-Fla.); H.R. Res. 97, 109th Cong., 1st Sess. (Feb. 15, 2005) (reintroduced by Tom Feeney, R-Fla.).

⁶² *Hearing*, *supra* note 27, at 35.

⁶³ *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989) (emphasis in original).

to the highly charged issues that a divided Supreme Court has addressed in opinions that cite non-U.S. materials, including the constitutionality of criminalizing homosexual conduct and executing juvenile offenders. When judicial opinions constrain legislative action on issues deeply connected to social mores and values, they understandably attract public scrutiny. A critique of judicial methodology that blames foreign influence taps into strong, if often imprecise, feelings about the importance of democracy and national sovereignty. Sovereignty-based arguments provide a further means by which proponents of a certain constitutional vision can impugn “activist” judges.

The confirmation of Chief Justice Roberts and Associate Justice Alito might quell concerns over what some perceived as the Supreme Court’s wayward leanings in cases such as *Lawrence* and *Roper*. This is both because the Court’s decisions are likely to be more politically conservative (although perhaps just as—if not more—judicially “activist”), and because foreign and international law sources are not likely to figure prominently in these justices’ written opinions. This development lends credence to the “tempest in a teapot” view of the debate over foreign and international law sources, at least for now. Even so, discussions about how open U.S. judges should be to learning about, and learning from, their foreign counterparts will continue. Participating in international judicial dialogue should be viewed as a means of strengthening, not weakening, our commitment to the democratic values embodied in the U.S. Constitution.

