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Abstract: This Article examines the doctrine of separation of powers and considers its relevance and significance in African constitutional practice, in particular its operation in Botswana. The Article outlines the doctrine’s origins, nature, purposes, and its major modern manifestations. The Article then analyzes the separation of powers in Botswana and considers how the doctrine’s operation in Botswana has contributed to the country’s solid and sustained constitutional system and its reputation as Africa’s most successful democracy.

Introduction

One important fundamental preoccupation of constitutionalism is the avoidance of governmental tyranny through the abuse of power by rulers pursuing their own interests at the expense of the life, liberty, and property of the governed. A major challenge faced by constitutional engineers has been to design a system of governance that maximizes the protection of individual members of society while minimizing the opportunities for governments to harm them. Of the theories of government that have attempted to provide a solution to this dilemma, the doctrine of separation of powers—in some respects, a fairly late addition to the body of organizational prescriptions—has been the most significant both intellectually and in terms of its influence upon institutional structures. Although it is a doctrine with a long history and respected pedigree, a careful perusal of the abundant literature it has spawned shows that it is by no means a simple, immediately recognizable, or unambiguous set of concepts. In fact, modern scholars of the doctrine are not quite agreed on exactly what it means and its relevance to contemporary institutional development.

* Associate Professor of Law, University of Botswana. The author received his Licence en droit at the University of Yaounde in Cameroon, and his L.L.M. and Ph.D. at the University of London.
Nevertheless, in the last two decades, African regimes caught in the wake of the so-called “third wave”\(^1\) of democratization have tried to display their nascent democratic credentials by introducing new constitutions that apparently provide for a separation of powers.\(^2\) This is not surprising, for the French considered this doctrine so important that Article 16 of their Declaration of the Rights of Man and of the Citizen of 1789 stated that any society in which the separation of powers is not observed “has no constitution.”\(^3\) While many scholars, like the French, will go as far as identifying the separation of powers with constitutionalism, many others, such as Geoffrey Marshall, feel that the doctrine is far too imprecise and incoherent to be useful in the analysis or critique of constitutions.\(^4\)

Since 1966, Botswana has had a constitution that appears to provide for a separation of powers.\(^5\) Botswana remains, by and large, Africa’s most successful example of an open, transparent, and democratic culture.

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\(^4\) See Geoffrey Marshall, *Constitutional Theory* 124 (1971). In fact, he concludes that the doctrine is “infected with so much imprecision and inconsistency that it may be counted little more than a jumbled portmanteau of arguments for policies which ought to be supported or rejected on other grounds.” *Id.*

\(^5\) See Bots. Const. §§ 30–56 (on the executive); id. §§ 57–94 (on parliament); id. §§ 95–106 (on the judiciary).
government. Like many other African countries, however, it is marked by elements of personal government under an increasingly “imperial” president, who heads the Botswana Democratic Party (BDP), which has monopolized power since independence. This has raised questions about whether the apparent separation of powers provided for in Botswana’s constitution is anything more than the hegemony of the executive over the other two branches of government. Is the doctrine of separation of powers a feature of the Botswana constitutional system, or is it merely an abstract philosophical inheritance that lacks both content and relevance to the realities of the country today?

To answer this question, as well as to appreciate fully the operation of the doctrine in Botswana, this Article briefly traces the origins, evolution, and purposes of the doctrine of separation of powers, as well as its main modern manifestations. The Article argues that the doctrine can now be regarded as a general constitutional principle that was never conceived, nor intended, to operate as a rigid rule or dogma. Mindful of this significant fact, the Article analyzes the structure of government in Botswana and examines the extent to which the doctrine operates within the executive, legislative, and judicial branches. What emerges from the analysis is that, despite the considerable scope for using the doctrine as a smokescreen for unconstitutional practices in Africa, Botswana is an excellent example of a country where the doctrine has strengthened the pillars of constitutionalism and good governance.


Debates have raged over the centuries about the origins of the doctrine of separation of powers. Some ideas about the doctrine can be found in the writings of many writers and thinkers of the medieval

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6 See, e.g., Larry Diamond, Introduction, in 2 Democracy in Developing Countries: Africa 5 (Larry Diamond et al. eds., 1988) (citing the Botswana government’s repeated “free and fair elections” and toleration of “open dissent . . . in a relatively liberal spirit”); Bureau of African Affairs, U.S. Department of State, Background Note: Botswana (Mar. 2005), at http://www.state.gov/r/pa/ei/bgn/1830.htm (“Botswana has a flourishing multiparty constitutional democracy.”).

period and middle ages in their search for the secrets of good government. Plato’s ideas of a “mixed state,” set forth in *The Republic*, are considered by some to be the ancestors of the doctrine.\(^8\) Aristotle, while accepting Plato’s idea of a mixed state as the only expedient way to ensure a stable and durable government, classed governmental functions into three categories: the deliberative, the magisterial, and the judicative.\(^9\)

The main controversy over the origins of the doctrine, however, centers on those who argue that John Locke and earlier writers are responsible for only the rudimentary and incomplete form of the doctrine, and that Charles-Louis de Secondat, Baron de Montesquieu\(^{10}\) created the normative theory of it as it is known today, as opposed to those who reject this two-pronged view.\(^{11}\) The view that currently enjoys broad support contends that, while the roots of the doctrine can be traced to numerous English writers and philosophers before John Locke, the latter is the author of the modern doctrine. Locke’s conceptualization of the doctrine in his famous 1690 *Second Treatise*,\(^{12}\) came to be for his contemporaries and successive generations “the ABC of politics.”\(^{13}\) Likely influenced by the traditional twofold analysis of governmental powers common to writings of that time, he advocated placing

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\(^{10}\) See W.B. Gwyn, *The Meaning of the Separation of Powers* 66, 69 (1965) [hereinafter Gwyn, *Separation of Powers*]. Professor Gwyn quotes British translator Sir Ernest Barker, who writes in his translation of Otto Gierke’s *Natural Law and the Theory of Society* that John Locke “simply seeks to distinguish, in thought, between the different functions of political authority,” and that he was “dealing with the logical analysis of functions, rather than with the practical question of separation (or union) of the organs which exercise functions.” Id. at 69. He also notes Edouard Fuzier-Herman’s view that the “truly scientific understanding” of the doctrine had a “completely French source,” that is, Montesquieu. Id. at 66.

\(^{11}\) See, e.g., William A. Dunning, *A History of Political Theories: From Luther to Montesquieu* 356 (1905) (describing Locke as treading “on new ground” in setting forth the doctrine of separation of powers); J.W. Gough, *John Locke’s Political Philosophy* 93 (1964) (citing Carl Ernst Jarcke’s assertion of Locke as the originator).


\(^{13}\) Gwyn, *Separation of Powers*, supra note 10, at 69 (attributing the phrase to Walter Moyle, in his *An Essay on the Lacedaemonian Government* (1698)).
the “federative” and executive power in the hands of the same person, but apart from legislative power. Although Locke recognized the importance of a neutral judiciary, he did not define an independent judicial branch of government, and stopped short of what may be called the “pure” theory of separation of powers.

It is Montesquieu, however, who can be considered to have given the doctrine its modern scientific form, and whose ideas substantially influenced the French and American Revolutions. Claiming to base his exposition on his understanding of the British constitution, he made two main contributions to the doctrine: he was the first to categorize governmental functions as legislative, the executive, and the judicial; and the first to analyze the relationship between the separation of powers and the balance of powers in terms of checks and balances. He believed that those possessing power will grasp for more powers unless checked by other power holders, and thus a separation of powers could only be maintained if accompanied by the system of checks and balances. Although Montesquieu was thus advocating what could be termed a “pure” form of separation of powers, as compared to that of John Locke, it is quite clear from his theory of checks and balances that he was not advocating a rigid separation in which the different organs work in isolation from each other, but rather a system in which they were working “in concert” with each other.

14 See John Locke, Two Treatises of Government 292–93 (Peter Laslett ed., 2d ed. rev. with amendments 1970) (1690); Vile, supra note 11, at 60. Locke saw “federative” power as a form of natural power over a state’s international relations, thus he located international and domestic executive power in the same person. Id. Locke’s “federative power” should be read as “executive power.” Vile, supra note 11, at 86, Locke was quite emphatic that the legislative and executive powers must be placed in distinct hands if liberty were to be preserved. Id. at 61.


16 See Baron de Montesquieu, 1 The Spirit of the Laws bk. XI, at 160–96 (Thomas Nugent trans., J.V. Prichard ed., Fred B. Rothman & Co. 1991) (1914); see also Gwyn, Separation of Powers, supra note 10, at 100–28 (discussing Montesquieu and those following him); Vile, supra note 12, at 76–97 (discussing Montesquieu’s doctrine of separation of powers).

17 See Montesquieu, supra note 16, bk. XI, ch. 6, at 162. This claim is now regarded as flawed, because the eighteenth-century English constitution did not observe the separation of powers in the form that he propounded. See Eric Barendt, Separation of Powers and Constitutional Government, 1995 Pub. L. (U.K.) 599, 600.

18 See generally Montesquieu, supra note 16.

19 See id., at 157–60.

American independence provided a “high noon” in many respects for the development of the doctrine of separation of powers.\textsuperscript{21} It was natural that the American revolutionaries after their hard-earned independence would not have the same trust in the legislature as the English did, nor would view the executive as somehow inferior or less representative than the legislature. Influenced by writers such as John Adams and the authors of \textit{The Federalist Papers}, described as “the greatest work of American constitutionalism,”\textsuperscript{22} the nation’s founders viewed the doctrine of separation of powers in its “pure” form as the best institutional structure of government.\textsuperscript{23} However, disagreements during the drafting of the federal constitution led to a compromise: the Constitution was to embody a moderate rather than a “pure” form of separation of powers, tempered by the idea of checks and balances.\textsuperscript{24}

The classic formulation of the doctrine of separation of powers in its “pure” form is based on the fundamental idea that there are three separate, distinct, and independent functions of government—the legislative, the executive, and the judicial—which should be discharged by three separate and distinct organs—the legislature, the executive (or government), and the judiciary (or the courts).\textsuperscript{25} Thus formulated, the doctrine means at least three different things.\textsuperscript{26}

First, the same person should not belong to more than one of the three organs of government.\textsuperscript{27} This, for example, implies that cabinet ministers should not sit in parliament.\textsuperscript{28} Second, one organ of government should not usurp or encroach upon the powers or work of another.\textsuperscript{29} This means, for example, that the judiciary should be in-

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\textsuperscript{21} See Morgan, \textit{ supra} note 15, at 5.
\textsuperscript{24} Morgan, \textit{ supra} note 15, at 6.
\textsuperscript{26} See \textit{id}. at 53.
\textsuperscript{27} Id.
\textsuperscript{28} Id.
\textsuperscript{29} Id.
\end{flushleft}
dependent of the executive, and ministers should not be responsible to parliament. It also means that a person holding office in one organ of government should not owe his tenure to the will or preferences of persons in any of the other organs. Thus, the continuation in office of ministers or members of parliament should depend on the will of the electorate at general elections. Third, one organ of government should not exercise the functions of another. For example, ministers should not exercise legislative powers. Although the doctrine has rarely been practiced in this extreme form, it does represent a sort of “bench-mark” or an “ideal-type” situation from which to appreciate its present application today.

Five main reasons have historically been given for requiring that the legislative, executive, and judicial functions should not be exercised by the same people: the rule of law, accountability, common interest, efficiency, and balancing of interests. These rationales begin to illustrate why the doctrine of separation of powers has, in practice, emerged in different forms over the centuries.

Under the “rule of law” version of the doctrine, those who make law should not also judge or punish violations of it, and vice versa. As the classic common law principle asserts, “no man shall be a judge in his own cause.” The rule of law rationale requires limits on executive discretion, but as Professor Joseph Raz has pointed out, it does not necessarily extinguish executive discretion, nor prevent lawmaking by the executive. For example, the executive may take discretionary action or make legal rules or orders, as long as they act within the limits of the powers given to them by the law.

The accountability rationale for the doctrine of separation of powers is closely linked to the rule of law. For example, if the legislature is to perform its function of calling delinquent government

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30 Wade & Bradley, supra note 25, at 53.
31 Id.
32 Id.
33 See id. at 53 (stating that complete separation of powers is impossible).
34 Gwyn, Separation of Powers, supra note 10, at 127–28; Gwyn, Modern Forms, supra note 22, at 68–70. Professor Gwyn provides a full discussion of this issue in these two works, to which this account is indebted.
35 This legal maxim is translated from the Latin phrase “nemo judex in causa sua.” See The Federalist No. 80, supra note 22, at 538 (Alexander Hamilton) (“No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias.”).
of officials to account, these officials should not dominate (or even be in) the legislature. Thus, they will not be judges in their own cases.37

The “common interest” theory of the separation of powers was developed in the late seventeenth and early eighteenth centuries in England to prevent factions or groups within parliament from pursuing their own rather than the common interest. The separation of executive and legislative powers was thought to protect the common interest, insofar as the legislature is more accountable to the people.38 Today, however, the pursuit of private interests by different factions within parliament is not necessarily a bad thing, so long as it forms the basis of bargaining and compromises that reconcile the different interests. To this extent, the common interest version may still be valid, unless particular groups pursue and exercise greatly disproportionate influence that is prejudicial to the rest of society.39

Governmental efficiency was one major reason for the development of the doctrine in the seventeenth and eighteenth centuries. The efficiency rationale is based on the assumption that the different functions of government require different qualities, and must therefore be performed by different organs.40 For example, the executive function was thought to require secrecy, expertise, and dispatch, but these characteristics were not necessary to other organs of government.41 Today, the efficiency argument no longer plays an influential role.42

Finally, the “balancing of interests” version of the doctrine was influenced by the English theory of the mixed constitution, which gave the legislative powers jointly to the monarch, the House of Commons, and the House of Lords.43 Within this tripartite legislature, checks and balances were supposed to operate within the different groups.44 For example, royal veto of legislation was seen as an executive check on the legislature, while the legislature by calling the executive to account and approving taxes, was able to place a check on the executive as well. Montesquieu formulated this balancing argument thus:

38 Id. at 39–40, 45, 89.
39 See generally Mark Hollingsworth, MPs for Hire: The Secret World of Political Lobbying (1991) (discussing the privatization of power in Britain).
41 See id. at 33, 37.
42 See Sharp, supra note 23, at 397–413.
44 See id.
Here, then, is the fundamental constitution of the government we are treating of. The legislative body being composed of two parts, they check one another by the mutual privilege of rejecting. They are both restrained by the executive power, as the executive is by the legislative. These three powers should naturally form a state of repose or inaction. But as there is a necessity for movement in the course of human affairs, they are forced to move, but still in concert.45

Political theorists and writers, from Plato and Aristotle to Locke, Montesquieu, John Adams, the American Federalists, and contemporary writers were driven by one central purpose: the desire to avert tyranny. This prevention of tyranny through the diffusion of power is the common thread that unites the five different historical justifications for separating the legislative, executive, and judicial functions of government. This remains true even though some rationales, such as accountability and balancing of interests, are not always compatible with each other, and historical contexts and institutional solutions have necessarily differed. Part II of this Article describes the three most influential models of the doctrine of separation of powers that have emerged, and examines various manifestations of the effort to diffuse and divide power.

II. THE MODERN MANIFESTATIONS OF THE DOCTRINE OF SEPARATION OF POWERS

The doctrine of separation of powers was never conceived as a rigid rule that completely prevents one organ of power from performing any of the functions normally performed by the other. In fact, Montesquieu, in advocating for a separation of the three functions of government using England as an example, could hardly have envisioned absolute disjunction between the three functions, since this was certainly not the case in England at the time he wrote.46

One political science professor has abstracted from historical experience a threefold classification into which modern governments that have adopted the doctrine can be classified.47 The first is the American system, the model and prototype of presidential government, generally regarded as having gone farther than any other in embodying

45 Montesquieu, supra note 16, bk. XI, ch. 6, at 162.
46 See generally Gwyn, Separation of Powers, supra note 10 (indicating the mingling of the three branches in England at the time of Montesquieu’s writings).
47 See Gwyn, Modern Forms, supra note 22, at 72–78.
the fundamentals of the doctrine of separation of powers. The second type is the British parliamentary, or Westminster model, which appears to contradict the doctrine by fusing or concentrating powers. The third is the assembly or convention government that can be traced to England during the Interregnum and France in the 1870s, but was typical of the former Soviet Union and its allies until their collapse in the 1990s. It suffices to note here that the assembly government system has generally been considered to reject the whole concept of separation of powers. Within these three types lie numerous hybrids, prominent among them being the French Fifth Republic Constitution of 1958, which combines a parliamentary system with the element of a strong and elected president. Some salient features of the American presidential system, the British parliamentary system, and the French hybrid system are examined briefly below.

A. The American Presidential System

The doctrine of separation of powers is clearly expressed in the U.S. Constitution of 1787. Article I vests the legislative powers in Congress, consisting of the House of Representatives and the Senate; Article II vests the executive powers in the president; and Article III confers judicial powers in the Supreme Court and such other lower courts that may be established by Congress. The president is elected separately from Congress for a fixed term of four years and may therefore be from a different party from that possessing the majority in either or both Houses of Congress. He cannot however, use the threat of dissolution to compel Congress’s cooperation.

Notwithstanding the emphatic, and sometimes unqualified terms in which the doctrine of separation of powers is expressed in the U.S. Constitution, even a cursory examination of the relevant provisions

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48 Id. at 73, 74.
49 See id. at 75–76.
50 The Interregnum (1649–1660) was a period in which England was literally “between reigns,” and as Lord Protector, Oliver Cromwell ruled Britain as a republic; during this time, however, the type of government that would ultimately come to rule England and Scotland was indeterminate. See Jeffrey Goldsworthy, The Sovereignty of Parliament: History and Philosophy 135–141 (1999) (describing the uncertainty of the Interregnum).
51 See Gwyn, Modern Forms, supra note 22, at 76–78.
52 Id. at 76.
54 U.S. Const. arts. I, II, III.
55 See id. at art. II, § 1.
reveals that the regime contemplated is far from a rigid separation of powers.\textsuperscript{56} This is manifested in several ways with respect to each of the three organs of power.

As regards the executive, neither the president nor his officers may sit or vote in Congress.\textsuperscript{57} The vice president is the only member of the executive who, as president of the Senate, is empowered to vote when they are divided equally, and thus to exercise limited legislative power.\textsuperscript{58} The president cannot directly initiate bills, but he may recommend legislation to Congress.\textsuperscript{59} He can also exercise limited control over the legislative function through his right to veto legislation, although this can be overridden by a two-thirds vote in both Houses.\textsuperscript{60} The executive does, however, wield substantial regulatory and adjudicatory power pursuant to congressional delegations of authority to administrative agencies.\textsuperscript{61} The president also exercises control over the judiciary through his power to grant reprieves and pardons for federal offenses, and more importantly, to nominate federal judges.\textsuperscript{62}

With respect to the legislative power, Congress controls the executive’s exercise of legislative powers to amend or repeal statutes that authorize executive agencies. Congress controls the budget and conducts oversight hearings.\textsuperscript{63} The Senate checks the executive further through its right to approve treaties negotiated by the president, as well as its right to approve appointments by the president of ambassadors, judges, and other senior officers.\textsuperscript{64} Each House has the right to punish its own members for contempt and thus exercises some form of judicial power.\textsuperscript{65} The Senate is allocated additional judicial powers, possessing the sole power to try impeachments.\textsuperscript{66} In addition to these internal judicial powers, the Congress has the power to create and regulate the lower federal courts.\textsuperscript{67}

Regarding the judicial power, although the judiciary has not been allocated specific or general supervisory powers over the execu-

\textsuperscript{56} Id. at arts. II, III.
\textsuperscript{57} See id. at art. I, § 6, cl. 2. Similarly, a judge cannot serve simultaneously in Congress and as an executive. See id.
\textsuperscript{58} U.S. Const. art. I, § 3, cl. 4.
\textsuperscript{59} See id. at art. II, § 3.
\textsuperscript{60} Id. at art. I, § 7, cl. 2.
\textsuperscript{61} See Bondy, supra note 9, at 145–48.
\textsuperscript{62} U.S. Const. art. I, § 2, cls. 1, 2.
\textsuperscript{63} See id. at art. I, § 8, cl. 1, § 9, cl. 7.
\textsuperscript{64} See id. at art. II, § 2, cl. 2.
\textsuperscript{65} See id. at art I, § 5.
\textsuperscript{66} See id. at art. I, § 3, cl. 6.
\textsuperscript{67} U.S. Const. art. III, § 1.
tive, it may use its general equitable jurisdiction to issue writs of mandamus against executive officers to ensure that they perform their constitutional duties.\(^68\) Perhaps the most important judicial check on executive action is the authority to enforce compliance with the constitutional guarantees embodied in the Bill of Rights, which include the rights to due process of law, freedom of speech, and the right to a jury trial.\(^69\) The judiciary also controls legislative action through its power to declare statutes unconstitutional.\(^70\) As in Britain and Botswana, discussed below, the common law doctrine of judicial precedent, or stare decisis, enables the judiciary to set precedents that have a quasi-legislative effect. Outside the constitutional arena, however, congressional action can nullify judge-made law.

In this way, the American presidential system, instead of isolating each organ from the other two, provides for an elaborate system of checks and balances. In the words of James Madison, in *The Federalist*:

> From these facts by which Montesquieu was guided it may clearly be inferred, that in saying “there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates” or “if the power of judging be not separated from the legislative and executive powers,” he did not mean that these departments ought to have no partial agency in, or no control over the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted.\(^71\)

This is based on the “open recognition that particular functions belong primarily to a given organ while at the same time superimposing a power of limited interference by another organ in order to ensure that the former does not exercise its acknowledged functions in an arbitrary and despotic manner.”\(^72\)

\(^{68}\) *See id.* at art. III (specifying no powers of the judiciary over the executive).
\(^{70}\) *See the famous judgment of Chief Justice Marshall in Marbury.* *See 5 U.S.* at 180.
\(^{71}\) *The Federalist No. 47, supra note 22, at 325–26 (James Madison).*
B. The British Parliamentary System

The same three fundamental governmental powers exist in Britain, just as they do in the United States. However, the extensive fusion and overlapping between the authorities in which the powers are vested has led many to question whether the doctrine of separation of powers is really a feature of the British constitutional system. Because of this fusion or concentration of legislative and executive powers, there is no strict separation of powers in Britain on the scale provided for in the U.S. Constitution. However, the impact of the doctrine of separation of powers on the British constitutional system can be seen from three perspectives.

The first examines the relationship between the legislature and the executive. The Queen, the nominal head of the executive, is an integral part of parliament, as is the Prime minister. Ministers, also part of the executive, must by convention be members of one of the two Houses of Parliament. The parliament controls the executive by its power to oust a government by withdrawing parliamentary support. Other forms of parliamentary control over the executive include question time, select committees, adjournment debates, and opposition days. The executive may also exercise considerable legis-

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73 See id. at 14. For example, Stanley de Smith, a scholar of constitutional law, asserts that "no writer of repute would claim that it is a central feature of the modern British system of government." Id. The weight of opinion today favors the contrary view. According to the British judge Lord Diplock, "it cannot be too strongly emphasised that the British constitution, though largely unwritten, is firmly based upon the separation of powers . . . ." Duport Steels Ltd. v. Sirs, [1980] 1 W.L.R. 142, 157.


75 See Bradley & Ewing, supra note 74, at 185. The House of Commons Disqualification Act limits the number of ministers who may sit in the House of Commons to ninety-five, which is about fifteen percent of the total number of members of Parliament. See House of Commons Disqualification Act, 1975, ch. 24, § 2 (Eng.); Bradley & Ewing, supra note 74, at 185.

76 CONSTITUTIONAL LAW, supra note 72, at 14.

77 Id. at 15. Modern scholars characterize question time, in which members of parliament question the prime minister on controversial issues, as "resembling presidential press conferences." Sir David Williams, The Courts and Legislation: Anglo-American Contrasts, Lecture in Accordance with the George P. Smith, II, Distinguished Visiting Professorship—Chair of Law and Legal Research Endowment (Apr. 12, 2000), in 8 IND. J. GLOBAL LEGAL STUD., 2001, at 323, 335; see Douglas W. Vick, Anglicizing Defamation Law in the European Union, 36 Va. J. INT’L L. 933, 965 (1996). Select committees are committees of backbench members of parliament (party members without official government positions) designated to investigate policy or administrative issues and produce detailed reports. See generally House of Commons Information Office, United Kingdom Government, Factsheet
lative functions through the making of statutory instruments, based on powers vested on it by parliamentary acts and the power to dissolve the House of Commons.\textsuperscript{78}

The second perspective considers the relationship between the executive and the judiciary, and reveals an absence of a strict separation between the two. For example, as head of the judiciary, the Lord Chancellor is entitled to preside over the House of Lords when the latter is sitting as a court, and is also a member of the cabinet.\textsuperscript{79} As a member of the House of Lords, he also belongs to the legislature, and is thus effectively part of all three powers.\textsuperscript{80} The executive exercises some control over the judiciary through the appointment of its members.\textsuperscript{81} The courts do exercise, however, considerable control over the executive by protecting citizens against unlawful acts of government agencies and officials, and, if proper application is made, by an aggrieved citizen, by reviewing executive acts for conformity with the law.\textsuperscript{82}

Finally, the relationship between the judiciary and the legislature also manifests some of the features of an admixture of functions that is typical of the British parliamentary system. As noted above, the Lord Chancellor heads the judiciary, is a member of the House of
Lords, and presides over it when it sits as a legislative body. Although parliament may control the judiciary by way of legislation affecting the judiciary, the fact that judicial salaries are authorized permanently deprives parliament of an important opportunity to annually review and possibly criticize judges. Though the judiciary and the legislature generally do not exercise each other’s functions, and the doctrine of legislative supremacy denies courts the power to review the constitutional validity of legislation, judges do exercise some lawmaking function in the process of interpreting and applying the law. But the effect of any court decision may be altered by parliament both prospectively and retrospectively. In addition, “[b]ecause of the [common law] doctrine of judicial precedent, the judicial function of declaring and applying the law has a quasi-legislative effect.”

Absent a written constitution, there is no formal separation of powers in Britain. Because of the close relationship between the legislative and the executive, there is no strict separation of powers between the two. Nevertheless, the legislative and executive function remain clearly distinct. The judiciary is also effectively separated from the other two, with the exception of the Lord Chancellor and the Law Lords, who may participate in the legislative debates of the House of Lords. One scholar has even argued that the doctrine of separation of powers in Britain means nothing more than an independent judiciary. The crux of the British conception of the doctrine, however, is that parliament, the executive, and the judiciary each have “their distinct and largely exclusive domain,” and the circumstances where one

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83 Constitutional Law, supra note 72, at 16. It is worth noting that, except under certain circumstances specified in the Parliament Acts of 1911 and 1949, a bill may be presented for royal assent to become law only after both the House of Commons and the House of Lords have approved it. Bradley & Ewing, supra note 74, at 207. The House of Lords, therefore, plays a very important role in the lawmaking process in Britain. For a comparative perspective, see S.E. Finer et al., Comparing Constitutions 59–64 (1995).

84 Constitutional Law, supra note 72, at 16; see also Bradley & Ewing, supra note 74, at 59–64 (discussing legislative controls on the judiciary).

85 See Bradley & Ewing, supra note 74, at 96.

86 Id. at 96.

87 Id. at 97.

88 See Constitutional Law, supra note 72, at 15–16.

89 Id. at 18. In fact, Professor Reginald Parker has argued that effective separation of powers in England dates from the passage of a statute making judges removable from office only through impeachment by parliament for misconduct. See Reginald Parker, The Historic Basis of Administrative Law: Separation of Powers and Judicial Supremacy, 12 Rutgers L. Rev. 449, 450, 457 (1958).
exercises the functions of the other are the exception and dictated by practical necessity.\footnote{See R. v. Sec’y of State for the Home Dep’t, 2 All E.R. 244, 267 (1995).}

C. The French Hybrid

The United States’ approach to the doctrine of separation of powers is, as we have seen, largely derived from the work of Montesquieu, a French intellectual. The doctrine has firm roots in French constitutional tradition, exemplified by the bold assertion in Article 16 of the 1789 Declaration of the Rights of Man and of the Citizen that a society with no separation of powers is like one with no constitution at all.\footnote{See Declaration of the Rights of Man, supra note 3, at art. 16.} The doctrine is enshrined in the current 1958 constitution of the Fifth French Republic.\footnote{See generally Fr. Const.} However, the French understanding and application of the doctrine is markedly different from both the U.S. and British models. It is essentially a parliamentary system that provides for close cooperation between the executive and the legislature, rather than a strict separation of powers. It contains elements of parliamentarianism, such as a two-headed executive, the collective political responsibility of government to parliament, and the right of government to dissolve the lower chamber of parliament.\footnote{See id. at art. 8 (declaring the power of the president to appoint and dismiss the prime minister); id. at art. 12 (declaring the power to dissolve parliament); id. at arts. 34–40 (describing the limited legislative powers of parliament). The executive is controlled by the president of the republic, who appoints the prime minister from among the members of the national assembly (assembly). See id. at art. 8. The parliament is composed of the senate and the assembly, but in practice, the executive wields the most power. See id. at art. 24 (parliament consists of assembly and senate).} But the president of the republic plays a role that is hardly typical of a parliamentary regime. Several peculiarities of this system of separation of powers are notable.

Perhaps one of the most distinctive features of the French system is the position of the judiciary. Because of the poor reputation of royal courts (Parlements) before the French revolution, one of the first steps taken by the revolutionaries was to break the powers of these Parlements.\footnote{See John Henry Merryman, The French Deviation, 44 Am. J. Comp. L. 109, 109–10 (1996). The obsessive fear of legal dictatorship through a “Government by Judges” was so strong that French judges are only required, in Montesquieu’s words, to act as “la bouche qui prononce les paroles de la loi” [the mouth that pronounces the law]. Id. at 111–12. Stanford University law professor John Merryman describes the background of the present court system and the Parlements, and points out that the French legal system—in its pure}
1790, inspired in part by Montesquieu’s conception of the separation of powers. This law precludes ordinary courts from interfering with the work of government; an ordinary citizen aggrieved by some government action can seek a remedy only before the administrative courts, which exercise limited judicial, administrative (executive), and legislative functions. Perhaps the most serious effect of the somewhat obsessive French distrust of judges is that the limited control of the constitutionality of laws that does exist is exercised, not by a judicial, but rather a quasi-administrative body, the Constitutional Council (Conseil constitutionnel).

Another unique feature of the French incorporation of the doctrine is that, instead of defining the areas in which the executive is empowered to promulgate regulations on its own initiative, it defines only the parliament’s field of legislative competence. Outside this field, defined in article 34 of the constitution, the executive enjoys the competence to legislate on all other matters. Thus, residuary legislative power lies not with the parliament, as it does in other countries, but with the executive.

Article 64 of the constitution provides that the president of the republic is the guardian of the judiciary’s independence. This clearly suggests that the courts are not on the same level as the execu-

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95 Law of Aug. 16–24, 1790, tit. II (Fr.).
98 See Fr. Const. arts. 34, 37.
99 This residual power is exercised effectively by the prime minister, who has the right under article 39 of the constitution to introduce bills on behalf of the government to parliament. See id. at art. 39. Although members of parliament can also introduce bills, this is the exception rather than the rule. See id.
100 Id. at art. 64.
tive, but rather below. Article 65 reinforces this supposition by making the president of the republic the head of the High Council of the Judiciary, the body responsible for recommending judicial appointments and enforcing judicial discipline.\textsuperscript{101} This French deviation has been explained convincingly by the suggestion that the 1958 constitution did not envisage the French president as an executive officer, but rather as a person outside the classic tripartite division of legislative, executive, and judiciary.\textsuperscript{102} The overall effect, however, is the grant of greater control of the judiciary by the executive than in the American or British models.

With the judiciary largely subordinate to the executive, the doctrine of separation of powers in France thus means little more than distinguishing between the legislative and executive branches of government. As a form of parliamentary democracy, this system allows close collaboration between the executive and legislative powers rather than a strict separation between the two, and skews the balance of power toward the executive.

III. THE OPERATION OF THE DOCTRINE OF SEPARATION OF POWERS IN BOTSWANA

African constitutional systems have borrowed extensively from the leading Western constitutional models discussed above. What is remarkable is the extent to which these borrowed models have been adjusted and adapted to the conditions unique to each country. Thus, few African nations have adopted the U.S. presidential, the Westminster parliamentary, or the French semi-presidential and semi-parliamentary model in their respective entitres.

The constitution of Botswana implicitly recognizes the separation of powers by dealing with each organ of government in separate and

\textsuperscript{101} Id. at art. 65. The appointment of the nine members of the Conseil constitutionnel is divided equally among the president, the assembly, and the senate. Id. at art. 56.

\textsuperscript{102} See John A. Rohr, Founding Republics in France and America: A Study in Constitutional Governance 89–92 (1995). Article 5 of the constitution supports this statement, giving the president the power to ensure that the constitution is respected and requiring him to “ensure, by his arbitration,” the regular functioning of governmental authorities as well as the continuance of the state. See Fr. Const. art. 5. The president must also serve as the guarantor of national independence, the integrity of the territory, and respect for community agreements and treaties. Id. To guarantee national independence, article 16 grants the president virtually unfettered power to act decisively on his own initiative at times of great peril. See id. at art. 16. To emphasize the president’s “imperial role,” article 68 removes presidential accountability for official actions except in the case of high treason. See id. at art. 68.
distinct provisions. Like the French system, the Botswana model mixes the British parliamentary system with elements of the U.S. presidential system, but is much more similar to the British model with a number of unique features of its own. For example, the president is not elected by direct popular vote, as is done in France. Analysis of the operation of the doctrine shows that, like in Britain, it mixes executive and legislative power and provides for the relative independence of the judicial power, although in quite dissimilar aspects.

A. The Mixing of Executive and Legislative Powers

The executive is easily the most important of the three branches of government, functioning chiefly to execute or carry out state functions. As the engine of the political system, its power has always required a check. One of the major reasons for Africa’s dismal record on constitutionalism is the ease with which African leaders have managed to adopt imperial tendencies, enabling them to rule largely without legislative or judicial interference. In spite of the existence of written constitutions, insufficient governmental accountability led to the inability to prevent abuses of power. In a constitutional dispensation of power based on a philosophy of constitutionalism and separation of powers, an effective system must not only define and limit executive powers, but also ensure that the executive operates within these bounds. This requires a judicious balance that grants the executive sufficient powers to discharge its mandate without overly inhibitive and paralyzing restrictions. In Botswana, the mixing of executive and legislative functions is integral to the process of providing checks and balances. Although this mixing has, at times, led to the same persons forming part of the executive and legislative branches, the system also contains mechanisms by which the two branches can control and thus check each other.

103 See Bots. Const. §§ 30–56 (executive); id. §§ 57–94 (legislature); id. §§ 95–107 (judiciary).
104 See id. §§ 32–34; Fr. Const. art. 6. The president is chosen from and elected by members of Parliament. Bots. Const. § 32.
1. The Same Persons Forming Part of the Executive and Legislative Branches

A number of persons form part of both the legislative and executive branches. On the one hand, the state president (president) is vested with “the executive power of Botswana.”\(^{106}\) On the other hand, the president is also an ex officio member of parliament, with the power to speak and vote in all parliamentary proceedings.\(^{107}\) Other principal officers of the executive, consisting of the vice president, ministers, and assistant ministers, are appointed by the president and are members of parliament.\(^{108}\) Although the president may appoint the vice president and up to four ministers and assistant ministers from persons who are not MPs, such persons must qualify for and seek election to parliament.\(^{109}\) If they fail to gain a parliamentary seat within four months of their appointment, they cease to hold executive office.\(^{110}\) As “principal legal adviser to the Government of Botswana,”\(^{111}\) the Attorney General is responsible for conducting prosecutions on the state’s behalf,\(^{112}\) and is also an ex officio member of parliament.\(^{113}\) In effect, the president and ministers who are the chief executive officials are also members of the legislative branch. To avoid undue bureaucratic influence, however, civil servants and other salaried public employees must resign their offices before assuming a seat in parliament.\(^{114}\)

The dominant position of the executive vis-à-vis the legislature is underscored by many members of parliament who are members of the executive as well. The constitution provides for sixty-one\(^{115}\) mem-

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\(^{106}\) **Bots. Const.** §§ 30, 47(1). The president is considered the head of state. *Id.* § 30.

\(^{107}\) *Id.* §§ 57, 58(1).

\(^{108}\) See *id.* § 39(1) (addressing the vice president’s appointment); *id.* § 42(3) (addressing the appointments of ministers and assistant ministers).

\(^{109}\) *Id.* §§ 39(1), 42, 43.

\(^{110}\) *Id.* § 43.

\(^{111}\) **Bots. Const.** § 51(2).

\(^{112}\) *Id.* § 51(3)(a). Although the prosecutorial function is “conceptually closer to the judicial power in that it is quasi-judicial in nature,” it is generally regarded as a part of the functions of the executive. See Morgan, supra note 15, at 163–64, 267.

\(^{113}\) **Bots. Const.** § 58(1).

\(^{114}\) See *id.* § 62(e).

\(^{115}\) Constitution (Amendment) Act of 2002, No. 12 of 2002 (Bots.) (amending § 58 of the constitution). Section 58 of the amended constitution provides for sixty-one members of parliament, consisting of fifty-seven elected members and four specially appointed members. **Bots. Const.** § 58. The president appoints the specially appointed members, following a procedure laid out in a schedule to the constitution. *Id.* § 58(2)(b). Although parliament consists of the assembly and a house of chiefs, the latter has no legislative
bers of parliament. The executive constitutes nearly one-third of the members of parliament. The principle of collective responsibility ensures that any motion presented by the government will receive at least eighteen favorable votes. Given its dominance, the present government rarely loses a vote and effectively controls the legislature. Unlike Britain, no statutory limits exist to restrict the number of ministers coming from parliament. The chief drawback of this is that on a number of occasions, parliamentary sessions have had to be adjourned due to the absence of ministers who had gone out on official engagements.

The extent of executive influence over the legislative branch is particularly evident in the lawmaking process. Although the parliament’s principal function to make laws, as in most parliamentary democracies, the whole of this process—especially the most decisive pre-legislative stages—is controlled and driven completely by the executive. Direct parliamentary participation in the lawmaking process is limited at best to the virtually ineffective exercise of introducing private member’s bills, or at later stages, amending a government bill—

power and functions primarily as an advisory body with special purview over tribal and customary law matters. See id. §§ 57, 77, 85.

116 See Bots. Const. § 58. This excludes the Attorney General, who is an ex officio member of parliament, but has no vote. See id.

117 There are fourteen ministers and four assistant ministers.

118 The principle of collective responsibility is stated formally in section 50(1) of the constitution. D.D. Ntanda Nsereko, Constitutional Law in Botswana 96 (2002). Pursuant to this principle, cabinet members are jointly accountable to the assembly and public at large for government policies and decisions. Id. They are also jointly answerable for their colleagues’ official actions and for the legal implementation of those decisions or policies. See id.

119 A motion is a formal proposal put before parliament for a vote, and is a measure used to increase government accountability. See Nsereko, supra note 118, at 183.

120 “Backbench” members of parliament are supporters of the ruling party who are members of parliament, but do not hold executive office and are not officially part of the government. See Nsereko, supra note 118, at 66 (“Backbench MPs are potential Cabinet members. They would be careful to not to jeopardize their chances of being appointed to Cabinet posts by being overly critical of the Executive.”).

121 See discussion supra note 75 and accompanying text.

122 Under section 73 of the constitution, if less than one-third of the members of the assembly are present at any session, then the presiding member may adjourn the session. Bots. Const. § 73. Although it is not required that more than a third of members always be present, if fewer are present, and any member draws attention to that fact, then the session must be adjourned. See Bopa Reporters, Live Parliamentary Proceedings on TV Will Be Costly, Daily News (Bots.), Nov. 5, 2003, at 2.

but this rarely affects the content or fundamental principles of the bill. Bills only become law with the assent of the president.\(^\text{124}\) In the unlikely event that the president withholds assent, the bill is returned to parliament, who must resubmit it within six months.\(^\text{125}\) When the bill is returned, the president has twenty-one days within which to assent, or failing this, automatically dissolve parliament and call fresh elections.\(^\text{126}\) Thus, the possibility of a president refusing to assent to a bill is quite remote. Almost all bills are discussed in cabinet meetings chaired by the president, and are typically presented in parliament by a cabinet member, who, along with the whips,\(^\text{127}\) ensures the bill goes through without significant modifications. Because of the executive’s ability to ensure that desired legislation is passed, it is fair to conclude that, to all intents and purposes, the executive controls parliament.

2. The Executive Exercise of Legislative Functions

The principal area in which the Botswana executive performs the functions normally reserved for the legislature is in the making of legislation in the form of delegated or subsidiary legislation, or statutory instruments.\(^\text{128}\) Although section 86 of the constitution empowers parliament to “make laws for the peace, order and good government of Botswana,”\(^\text{129}\) over the years, it has entrusted the exercise of limited legislative powers to certain persons and subordinate bodies within the executive for various reasons. In fact, the bulk of subsidiary legislation today far exceeds legislation enacted by parliament in the form of parliamentary acts.\(^\text{130}\)

\(^{124}\) Bots. Const. § 87.

\(^{125}\) Id. § 87(4).

\(^{126}\) Id.

\(^{127}\) As are whips in British parliament, whips in the Botswana government are members of parliament responsible for ensuring that party members vote as the majority desires. See, e.g., Lisa E. Klein, On the Brink of Reform: Political Party Funding in Britain, 31 Case W. Res. J. Int’l L. 1, 8-9 (1999) (“Parliamentary discipline is reinforced by the political parties’ Whips, who serve as links between the party leadership and the ordinary Members of Parliament. The Whips are influential in advancing the career of back-benchers and may bring their influence to bear in persuading Members to support the leadership’s position . . . .”).

\(^{128}\) Subsidiary legislation in Botswana may take the form of proclamations, regulations, rules of court, orders, bylaws, or any other instrument made directly or indirectly under any enactment and having legislative effect. See Interpretation Act, Cap. 01:04, § 49 (1984) (Bots.).

\(^{129}\) Id. § 86.

\(^{130}\) See generally 84 BOTSWANA STATUTE LAW 2000 (Botswana Government Printer). This volume published all legislation made in 2000. It contains only fourteen acts of parliament, but includes eighty statutory instruments or subsidiary legislation.
Delegated legislation is an inevitable feature of modern governments for several reasons. First, the complex and protracted nature of the lawmaking process\footnote{See generally Fombad, supra note 123.} and the pressure upon parliamentary time would cause the legislative machinery to break down if parliament attempted to enact every piece of legislation by itself. Second, legislation on certain technical topics necessitates prior consultations with experts and stakeholders. Granting some legislative powers to ministers and other select bodies facilitates this consultation. Third, in enacting legislation, the parliament cannot foresee every administrative or other difficulty that may arise, nor is parliamentary recourse feasible each time amendments to acts become necessary.\footnote{For example, section 11(2) of the Motor Vehicle Accident Fund Act of 1998 allows the minister to adjust the compulsory fuel levy as he sees fit rather than resorting to the parliament for the complicated process of amending the act to achieve this purpose. Motor Vehicle Accident Fund Act of 1998, § 11(2) (Bots.).} Finally, in emergencies, the government must be able to act promptly and effectively outside its usual powers without resorting to parliament.\footnote{See Bots. Const. § 17.}

Although there is general agreement over the necessity of delegated legislation, real problems arise in reconciling it with the process of democratic consultations, scrutiny and control, which normal bills are subjected to before becoming law. Possible abuses of the powers of delegated legislation in Botswana are checked and controlled in three main ways. The first type of control is exercised before delegated legislation is published and comes into effect. For example, the Statutory Instruments Act of 1984 requires all statutory instruments to be printed and published in the \textit{Government Gazette} before they come into force.\footnote{Statutory Instruments Act, Cap. 01:04, § 3(1) (1984) (Bots.). The United States’ analog is the Administrative Procedures Act; it requires, among other provisions, the publication of rules in the Federal Register and for congressional rejection of major rules. 5 U.S.C. §§ 551–559 (2005).} This Act also states that bylaws, usually made by local authorities, must be submitted to the Minister for approval before publication in the \textit{Gazette}.\footnote{Statutory Instruments Act § 30. The \textit{Government Gazette} is published weekly by the Botswana Government Printer, and is the government’s chief means of disseminating lawmaking and other policy-related information to the public. See Ministry of State President, Government of Botswana, \textit{Government Printing and Publishing}, at http://www.gov.bw/government/ministry_of_state_president.html (last visited Apr. 14, 2005); see also Nsereko, supra note 118, at 176.} The second type of control is exercised by the parliament. According to the Statutory Instruments Act, all statutory instruments must be presented to parliament after they are written,
and the parliament may pass a resolution within twenty-one days nullifying any of them.\footnote{Statutory Instruments Act § 9.} In practice, however, this rarely happens, because these statutory instruments are rarely placed before the parliament. Furthermore, even when they are, members of parliament often do not have the time to examine them critically.

The third, and perhaps most effective method of controlling subsidiary lawmaking, is based on common law and exercised by way of judicial review. Individuals against whom a statutory instrument is being enforced may challenge its validity before the courts—even when the parliament has approved the legislation—if it is ultra vires or if the correct procedure was not followed in making it. Thus, in \textit{Botswana Motor Vehicle Insurance Fund v. Marobela}, the Court of Appeal declared section 7(1)(a)(iv) of the Motor Vehicle Fund Regulations, created by the Minister, null and void for its inconsistency with the spirit and intent of the parent Act, the Motor Vehicle Insurance Fund Act of 1986.\footnote{[1999] B.L.R. 21, 29–30; see \textit{Motor Vehicle Insurance Fund Act (Act No. 30 of 1986)} (Bots.).} The court made it clear that a regulatory authority could not “reduce, qualify, or diminish the rights conferred” by the parent statute.\footnote{See \textit{Marobela}, 1 B.L.R. at 29–30.} In \textit{Maauwe & Another v. Attorney-General}, regulation 75(1) of the Prisons’ Regulation, to the extent that it prevented condemned prisoners from consulting with their legal representatives out of the hearing of prison officers, was considered unreasonable, beyond the scope of the provisions of the Prisons Act, and thus of no force and effect.\footnote{After a second trial and the aid of advocates from Ditshwanelo, the Botswana Centre for Human Rights, the two men were acquitted of murder and released on March 21, 2005. Press Release: Maauwe & Motsweta Acquitted and Discharged, Ditshwanelo–Botswana Centre for Human Rights (Mar. 22, 2005), available at http://www.ditshwanelo.org.bw/index/Current_Issues/Death_Penalty/Maauwe%20Motsweta%202005.htm.}

Generally, as in \textit{Marobela}, where the statutory instrument is deemed only partially illegal, the courts may sever the lawful from the unlawful part and leave the instrument operational.\footnote{See, \textit{e.g.}, \textit{Marobela}, 1 B.L.R. at 29–30.} If this is impossible, the entire instrument may be declared invalid. But whatever the approach, the end result is that the courts may prevent the executive from abusing the wide-ranging power to make subsidiary legislation.

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\footnotesize{\begin{itemize}
  \item \footnote{Statutory Instruments Act § 9.}
  \item \footnote{[1999] B.L.R. 21, 29–30; see \textit{Motor Vehicle Insurance Fund Act (Act No. 30 of 1986)} (Bots.).}
  \item \footnote{See \textit{Marobela}, 1 B.L.R. at 29–30.}
  \item \footnote{After a second trial and the aid of advocates from Ditshwanelo, the Botswana Centre for Human Rights, the two men were acquitted of murder and released on March 21, 2005. Press Release: Maauwe & Motsweta Acquitted and Discharged, Ditshwanelo–Botswana Centre for Human Rights (Mar. 22, 2005), available at http://www.ditshwanelo.org.bw/index/Current_Issues/Death_Penalty/Maauwe%20Motsweta%202005.htm.}
  \item \footnote{See, \textit{e.g.}, \textit{Marobela}, 1 B.L.R. at 29–30.}
\end{itemize}}
3. The Legislative Control Over the Executive

Despite the executive’s apparently dominant position, legislative control of the activities of the executive is the crux of the parliamentary system that Botswana has implemented. Although obscurely worded, section 50(1) of the constitution states that the cabinet shall be responsible to parliament “for all things done by or under the authority of the president, vice president or any minister in the execution of his office.”\(^{141}\) The requirement that all ministers be members of parliament is justified most often by the principle that the ministers are responsible collectively to parliament.\(^{142}\) This allows parliament to control the conduct of cabinet members, and to check abuses of office, misconduct, mismanagement, and incompetence.\(^{143}\) Although the constitution expressly provides only for collective responsibility, over time, parliament developed a practice of debating “motions of no confidence” against individual ministers.\(^{144}\) This practice, however, ended in 1997 upon the passage of a government-sponsored motion to end it.\(^{145}\) The government rightly argued that considerable time was wasted in debating motions of no confidence against ministers. Debates over these motions proved futile, because even when such motions passed they were unenforceable, as only the president has the “prerogative to appoint or dismiss” ministers.\(^{146}\) This has not prevented the parliament from censuring individual members of the cabinet.\(^{147}\) The principle of collective responsibility, however, generally causes the government to rally to the defense of any minister, even if clearly incompetent or unpopular.

The parliament’s most potent weapon against the government is the power to oust it through a vote of no confidence. As provided for by section 92 of the constitution:

If the National Assembly at any time passes a resolution supported by a majority of all the Members of the Assembly who

\(^{141}\) See Bots. Const. § 50(1).

\(^{142}\) Id.

\(^{143}\) Id. For criticisms of this, see Nsereko, supra note 118, at 90–91.

\(^{144}\) See Bots. Const. § 50(1); see also Nsereko, supra note 118, at 91 (discussing the purpose of motions of no confidence).

\(^{145}\) Nsereko, supra note 118, at 91. The motion read: “That this Honourable House resolve in accordance with the provisions of section 76(1) of the Constitution of Botswana to prohibit with immediate effect the tabling of motions relating to ministers and individual Members except as specified in the Standing Orders.” Id.

\(^{146}\) Bots. Const. § 43(c); Nsereko, supra note 118, at 91.

\(^{147}\) Nsereko, supra note 118, at 91.
are entitled to vote declaring that it has no confidence in the Government of Botswana, Parliament shall stand dissolved on the fourth day following the day on which such resolution was passed, unless the President earlier resigns his office or dissolves Parliament.  

This provision, however, operates as a double-edged sword. A vote of no confidence not only leads to the automatic removal of the president, but also to the automatic dissolution of parliament and the holding of general elections within sixty days. Practically, section 92 makes dissolution difficult by jeopardizing political stability. Thus, the likelihood of passing a vote of no confidence is extremely remote, not only because of the comfortable majority that the ruling BDP party has had in every parliamentary election since independence, but also because the opposition parties are weak and deeply divided.

In spite of these impediments to legislative power, BDP backbenchers have on occasion pressured the government, leading to the introduction of several significant laws, and even compelling the government to withdraw some bills by threatening a backbench revolt. Other, more common means that the Botswana parliament uses to hold the executive branch accountable are through parliamentary processes like question time, during which any private member of parliament may question a minister as to statements made on public matters, motions, or the use of standing committees, sessional select committees, or commissions of inquiry. Although numerous other
measures exist, however, they fail to ensure a fully accountable government.

B. The Independence of the Judicial Power

The judicial branch is normally charged with the enforcement of the constitution and other laws, and to ensure that the other two branches act in accordance with them.\(^{153}\) The ability of the courts to do this is by no means automatic, but instead is heavily contingent upon the judiciary's independence. As in Britain, the relative independence of the judiciary from both the executive and the legislature marks the extent to which the doctrine of separation of powers operates in Botswana. The only remarkable departure from this is the position of the Attorney General, who, in his or her capacity as an ad hoc member of parliament,\(^{154}\) assists in presenting bills to parliament and addresses any legal questions raised.\(^{155}\) He is also part of the executive, as he occupies a “public office” and acts as “the principal legal adviser to the Government.”\(^{156}\) Although not strictly a member of the cabinet as defined in section 44 of the constitution, he may be invited to participate in cabinet discussions if his legal expertise is required. The duties vested in him by the constitution to institute and undertake legal proceedings on behalf of the state, and thus to enforce the criminal law are executive, rather than judicial functions. These have, however, been referred to at times as quasi-judicial functions, because in discharging these functions, the Attorney General is expected to act as guardian of the general public interest and operate apart from any party political influence.\(^{157}\) In this way, therefore, the Attorney General belongs to the executive, legislative, and judicial branches of the government.

As discussed below, though the judiciary enjoys considerable independence from the other two branches of government, it does not operate in a vacuum. Judicial independence does not mean judicial isolation. Hence, there are circumstances when the other two branches play a limited, but legitimate role in exercising functions usually attributed to the judiciary, as part of the checks and balances inherent to the separation of powers.

\(^{153}\) *Bots. Const.* §§ 105, 106.

\(^{154}\) See *id.* § 51(3).

\(^{155}\) See *Standing Order 60(2).*

\(^{156}\) See *Bots. Const.* § 50(1), (2).

\(^{157}\) See *Morgan, supra note 13,* at 163–164, 267.
1. The Extent of Judicial Independence

Two barometers typically measure the judiciary’s independence: personal independence and functional independence. The personal—sometimes referred to as the relational—independence of the judiciary is reflected by factors such as the nature of judicial appointments and the terms and conditions of service.

To the extent that the government appoints all the members of the Botswana judiciary to their positions, the executive controls the judiciary. According to the Magistrates’ Court Act of 1983, the president, acting in accordance with the advice of the Judicial Service Commission, may appoint qualified persons to any of the five grades of magistrates provided for under that Act. The constitution also empowers the president alone to appoint the Chief Justice, who heads the High Court, but requires the president to consult with and obtain the advice of the Judicial Service Commission in appointing all other judges of the High Court. The same anomaly exists with respect to the Court of Appeal, where the president appoints the judges in consultation with the Judicial Service Commission, but alone appoints the president of that court. It is certainly not satisfactory for a politician acting in isolation to appoint the heads of the country’s two highest courts without the benefit of the Judicial Service Commission’s advice, and with no constitutional criteria to counter the influence of a desire for political expediency. This provision exposes judges so appointed to political manipulation, therefore placing the independence of the judiciary at risk.

Two factors work together, however, to limit these risks. First, there is a considerable degree of security of tenure. Judges of the High Court and Court of Appeal are appointed on permanent, pensionable terms, and hold office until they reach compulsory retirement at the age of seventy. Lower court judges are on contract and hold office until their contracts expire. Generally, a judge can only be removed from

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158 It is important, however, to point out that this discussion is limited to the Common Law Courts and therefore excludes Customary Courts, where the position is more complicated. See generally Customary Courts Act, Cap. 04:05.

159 Magistrates’ Court Act, Cap. 04:04, § 8 (1983) (Bots.).

160 Bots. Const. § 96(1).

161 See id. § 100(1), (2).

162 See id. §§ 97(1), 100(5).

163 Because of an absence of trained local personnel, however, most judges are expatriates appointed on temporary contracts for two- or three-year terms. The possibility that their contracts might not be renewed has certainly influenced the work of some of these judges, especially when dealing with politically charged controversial constitutional mat-
office for the “inability to perform the functions of his office (whether arising from infirmity of body or mind or from any other cause) or for misbehaviour,” according to a fairly stringent procedure laid out in the constitution.\textsuperscript{164} The Magistrates’ Court Act is silent with respect to the position of magistrates, but as civil servants, magistrates retire like other civil servants at the age of sixty.\textsuperscript{165} They are removable by the president acting on the advice of the Judicial Service Commission, usually following a series of disciplinary hearings.\textsuperscript{166}

The second factor that may explain the relatively high degree of judicial independence in Botswana is their financial independence. The salaries of judges, the Attorney General, and members of the Judicial Service Commission are charged to the Consolidated Fund,\textsuperscript{167} which permanently authorizes their compensation and prohibits the government from reducing it arbitrarily to pressure or influence them.\textsuperscript{168} Although the government appoints the Attorney General, the independence of the office is guaranteed constitutionally by section 51(7), which provides that in discharging judicial functions, the Attorney General “shall not be subject to the direction or control of any person or authority.”\textsuperscript{169} Thus, the Attorney General, although part of the executive and the legislature, is independent of each.

Functionally, judges in Botswana are shielded from threats, interference, or manipulation intended to compel them to favor unjustly a party or the state in legal proceedings. Various acts of parliament bol-

\textsuperscript{164} See Bots. Const. §§ 97(2), (3) (High Court judges), 101(2), (3) (Court of Appeal judges).

\textsuperscript{165} See Public Service Act § 15(2)(a) (Act No. 13 of 1998) (Bots.). As in England, judges—appointed to superior courts of record—are distinguished from magistrates—appointed to the inferior magistrates’ courts. While judges must have a law degree and ten years of experience in practice, magistrates may be appointed from the rank of court officials without a law degree. Botswana’s system thus departs from the English system by allowing experienced senior magistrates with law degrees to be appointed judges, creating a sort of career judiciary.

\textsuperscript{166} See Bots. Const. § 96(3).

\textsuperscript{167} The constitution creates a Consolidated Fund, into which all revenues or other funds raised or received on behalf of Botswana’s government must be paid. Id. § 117; Nsereko, supra note 118, at 330.

\textsuperscript{168} See Bots. Const. § 122(3).

\textsuperscript{169} Id. § 51.
ster their independence, boldness, and firmness in deciding cases by granting them immunity from civil and criminal proceedings. They are protected against unwarranted external pressure by the offense of contempt of court, enabling them to cite offenders for contempt and commit to prison anybody who attempts to denigrate or flout their decisions.

2. Instances of Limited Mixing of Functions Between the Judiciary and the Executive

Although the Botswana judiciary acts relatively independently, a number of situations occur in which the executive and the judiciary exercise each other’s functions. The scope for this overlapping appears fairly well defined.

The executive exercises limited judicial functions in two main ways. The first is the exercise of the presidential “prerogative of mercy.” These powers enable the president to:

(a) grant to any person convicted of any offense a pardon, either free or subject to lawful conditions;
(b) grant to any person a respite, either indefinite or for a specified period, of the execution of any punishment imposed on that person for any offence;
(c) substitute a less severe form of punishment for any punishment imposed on any person for any offense; and
(d) remit the whole or part of any punishment imposed on any person for any offense or of any penalty or forfeiture otherwise due to the Government on account of any offense.

In exercising these powers the president generally has the discretion to consult the advisory committee on the prerogative of mercy. However, when any person has been sentenced to death, the president must order the advisory committee to consider a report of the

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170 See, e.g., Customary Courts Act, § 46 (granting indemnity to officers acting judicially for official acts done in good faith and while executing warrants and orders); High Court Act, Cap. 04:02, § 25(1) (Bots.) (stating that a judge shall not be sued in any court for any act done by him or ordered done by him); Bots. Penal Code § 14 (1986) (stating that a judicial officer is not criminally responsible for anything done or omitted in good faith in the exercise of his judicial functions).

171 See Bots. Const. §§ 53–55. According to the constitution, the president has the power to pardon convicted criminals with or without condition, alter their sentences, or commute them altogether. See id.; Nseroko, supra note 118, at 86–87.

172 Bots. Const. § 53.
case on the prerogative of mercy, and can only exercise his powers of mercy after obtaining their advice. The president is not, however, obliged to follow the Committee’s advice. Should the president decline to exercise the prerogative, the president personally must sign the death warrant ordering the execution. The exercise of the prerogative of mercy constitutes a serious interference with the judicial process, and is exercised only for good cause. Although the current president has exercised this prerogative often in decisions imposing prison sentences, he has generally been reluctant to intervene when the Court of Appeal has confirmed a death sentence. The practice so far suggests that only the most exceptional and unusual situation will cause the president to exercise his prerogative with respect to a death penalty passed by any of the superior courts.

The second area in which the executive exercises some judicial functions is in the regular creation of administrative tribunals and other disciplinary bodies, and conferring on them the right to determine matters that traditionally come within the jurisdiction of courts of law. In fact, many disputes arising within the public service today are not decided by litigation in the ordinary courts, but are decided by administrative bodies operating within the executive. For example, the Public Service Commission may undertake disciplinary proceedings and impose sanctions against public servants. The courts have, however, repeatedly stressed their inherent or common law right to review the proceedings and decisions taken by these administrative bodies and tribunals, to ensure that they do not exceed the powers

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173 See id. §§ 54–55.

174 See Prisons Act, Cap. 21:03, § 117 (1980) (Bots.). Even after signing the death warrant, a convict may still apply to the president for mercy. Ditshwanelo & Others v. Attorney-General & Another, [1999] 2 B.L.R. 59, 71. In Ditshwanelo, the High Court granted a stay of execution even after the president had signed the death warrant. Id.; see Nsereko, supra note 118, at 86–87.

175 For example, in 2001, President Festus Mogae resisted enormous international pressure to grant clemency to a white South African citizen, Mariette Bosch, whose death sentence for murdering her best friend had been confirmed by the Court of Appeal. Gideon Nkala, Bosch Haunts OP, MMGII (Gaborone, Bots.), Apr. 12–19, 2001, at B1. Her application for clemency was rejected in a controversial manner, most likely to forestall further pressure; she was executed shortly afterwards. Address Erosion of Democratic Principles—Mpho, Daily News Online (Bots.), July 19, 2001, at http://www.gov.bw/cgi-bin/news.cgi?id=20010719; BBC Broadcasts Film—Featuring Bosch, Daily News Online (Bots.), July 19, 2001, at http://www.gov.bw/cgi-bin/news.cgi?id=20010719.

176 The bodies are either created directly by parliament or by the executive, acting under powers conferred on it under an act of parliament.

177 See Bots. Const. §§ 110–111; Public Service Act §§ 24–32.
conferred on them, and that they conform to the ordinary rules of
natural justice.\textsuperscript{178}

Because these broad executive powers exist, judicial control over
the executive is now one of the most crucial features of any modern
constititutional democracy. In Botswana, judicial control over executive
action is exercised regularly to protect citizens against the unlawful
acts of government officials or departments by ensuring that they per-
form their statutory duties and that in doing so they do not exceed
their powers. In exercising this control, the Botswana courts have on
several occasions nullified governmental acts that they considered to
be unlawful.\textsuperscript{179}

As regards the judiciary exercising executive functions, judges
and other members of the judiciary have at times been appointed to
discharge non-judicial functions falling within the executive domain.
These appointments may be of a temporary or permanent nature, but
both manifest in various ways and may provoke a range of problems.

One permanent appointment provided for by the constitution
itself is section 38(1), which makes the Chief Justice the returning
officer for purposes of presidential elections.\textsuperscript{180} This provision gives
the Chief Justice the right not only to determine questions that arise
regarding compliance with the constitution or laws relating to the
election of the president under sections 32 and 35, but also the valid-
ity of the election of any person as president.\textsuperscript{181} Section 38(2) states
that the Chief Justice’s “decision shall not be questioned in any
court,” but the High Court maintains its inherent power to review and
quash any decision, if procedural irregularities were present or the
Chief Justice acted ultra vires.\textsuperscript{182}

\textsuperscript{178} See, e.g., Crown Paints v. Botswana Hous. Corp. & Others, [1999] 2 B.L.R. 78, 81
(reviewing housing corporation’s procedure for tendering supply and delivery of painting
materials contracts); Nyoni v. Chairman, Air Botswana Disciplinary Comm. & Another,
[1999] 2 B.L.R. 15, 24 (reviewing a disciplinary committee’s decision); Students’ Repre-
sentative Council v. Univ. of Botswana & Others, [1989] B.L.R. 396; Mosebola v. Attorney-
Gen., [1988] B.L.R. 159. For further discussion of the government’s sensitivity over this
issue, see Sello Motseta, \textit{Botswana's Democracy Losing Its Shine}, MMEGI (Gaborone, Bots.),
June 28, 2001, at 40.

\textsuperscript{179} See, e.g., Molapisi v. Attorney-Gen. & Another, [1999] 1 B.L.R. 519, 522–27; Mbisana

\textsuperscript{180} Bots. Const. § 38(1).

\textsuperscript{181} Id. §§ 32, 35, 38.

\textsuperscript{182} Id. § 38(2). Another example is the appointment of the Chief Justice, under section
103 of the constitution, to serve as the chairman of the Judicial Service Commission. Id.
§ 103.
More often, however, judges and other members of the judiciary are appointed to preside over ad hoc commissions of inquiry, or over bodies or groups reporting on policy issues. A recent and controversial example was the appointment of a retired South African judge in 2001, to head what became known as the Khumalo Presidential Commission. The Commission investigated certain failings in the preparation of the 2001 referendum to amend certain provisions of the constitution.183 The final report held the Attorney General responsible for some of the mistakes made.184 For several months, there were reports of plans by the Attorney General to sue the president and government, allegedly to clear his name and reputation based on his absence at the Commission’s hearings and lack of legal representation.185

Selection of members of the judiciary to perform some of these executive functions, such as the Chief Justice, reflects an intuitive desire to seek persons whose independence and impartiality in handling matters of public concern is recognized and accepted widely. Nevertheless, as is evidenced by these examples, the non-judicial responsibilities given to judges, especially those relating to investigatory tasks or controversial policies, may imperil the reputation and prestige of the judiciary.186 Judges risk public identification with the policies of the group or body concerned in the investigation, or they may be put in a position of being seen as either critics or supporters of the government. There is also the risk that some judges’ performance of these duties may be influenced by the expectation of elevation to a higher judicial office. In addition, the absence of a judge from regular

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184 Id. Among other tasks, the Commission was required to “identify, by name, the person or persons who are culpable or share in the culpability of the acts, errors or omissions,” leading to the postponement of the referendum and the amendment of the writ of the referendum. Id.
185 Subsequent newspaper accounts reported that an out-of-court settlement had been reached between the Attorney General and the office of the president. See generally Open Letter to Phandu Skelemani, MMegi (Gaborone, Bots.), Jan. 25–31, 2002, at 21. This is not surprising, for in Kaelagobe & Another v. Kgabo & Another, the court held that by failing to inform the applicants that their conduct was under investigation, a commission of inquiry failed to observe the rules of natural justice and thus its proceedings were null and void. [1994] B.L.R. 129.


186 See Vanderbilt, supra note 9, at 118–119.
duties in Botswana, a nation grappling with a shortage of competent judicial personnel, inevitably increases the workload of other judges and may encumber the disposition of cases.\footnote{See Otlhogile, supra note 163, at 89, 98–102, 126–27.}

Moreover, such appointments could lead to confusion between the judicial and executive functions. For example, it is one thing for the constitution to name the Chief Justice as the returning officer for presidential elections, and quite another to grant him the sole authority to determine the validity of the president’s election. On what basis should this determination be made: on the Justice’s judgment as a returning officer, an executive position, or as a Chief Justice, a judicial position? Further, the fact that the president alone appoints the Chief Justice, without the obligation to consult anybody or follow objectively defined criteria must not be forgotten.

As the Khumalo Presidential Commission Report shows, non-judicial activities often produce and provoke dissension or criticism that threaten to undermine the prestige and respect of the judges involved, or even the judiciary as a whole. The controversy generated by the Khumalo Report certainly has not enhanced the reputation of Justice Khumalo, an otherwise well-respected judge. Because he was already retired and from a foreign jurisdiction, however, the damage was not as serious as it would have been if the criticism had been directed against an active judge. Upon resuming his or her regular duties, a judge who serves on a commission may feel compelled to adopt a position that justifies or defends the position taken while serving on the commission, regardless of its merits.

Be that as it may, judges and other members of the judiciary will continue to be appointed to discharge non-judicial functions, especially when these functions require some degree of legal expertise. To the extent that this occurs, it is desirable to use only retired judges or limit the participation of active judges to non-controversial policy matters, where there is little chance of endangering their reputation for independence and impartiality.

Judges also may perform executive functions in the review of the exercise of discretion by an administrative body. As noted above, the courts stress their common law right to review these proceedings and decisions. Courts intervene even when the statute establishing a particular tribunal or body purports to grant it exclusive jurisdiction, and states that its decisions are final and not subject to appeal or review by
the courts. Thus, in *Tafic Sporting Club v. Mokobi N.O. & Another*, even though section 17(2) of the Botswana National Sports Council Act stated that the National Sports Council Appeals Board’s decisions would be final, the Act did not deprive the court of its inherent powers to quash the board’s decision, if the decision was ultra vires or erroneous. Typically, however, the courts do not exercise discretion that has been reserved exclusively for these administrative bodies.

The general principle reiterated in *Arbi v. Commissioner of Prisons & Another* is that where the legislature has conferred discretion upon an administrative body, the courts would not attempt to substitute it with their own. Nevertheless, exceptions exist where the courts, in an action for judicial review, may substitute their own decisions for that of an administrative body and indirectly perform functions reserved by the legislature for that body. These situations are:

(a) where the end result is in any event a foregone conclusion and it would merely be a waste of time to order the administrative tribunal or authority to reconsider the matter;
(b) where further delay would cause unjustifiable prejudice to the applicant;
(c) where the administrative tribunal or authority has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again; and
(d) where the court is in as good a position to make the decision itself.

In *Arbi*, the Minister of Labour and Home Affairs rejected an application for remission under section 53(d) of the constitution.

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189 See Gogannekgosi v. Comm’r for Workmen’s Compensation & Others, [1993] B.L.R. 360, 361–62 (dismissing for lack of jurisdiction a claim to overturn a decision made on behalf of the minister under the Workmen’s Compensation Act); Attorney-Gen. & Another v. Kgalagadi Res. Dev. Co. (Pty.) Ltd., [1995] B.L.R. 234, 240 (stating that the proper approach to a proceeding involving the review of a Central Tender Board decision is to consider whether the allegations and remedy sought are within the general scope of “reviewable acts by public bodies”).
191 See id. at 255.
192 See id.; Nseroko, supra note 118, at 312.
193 [1992] B.L.R. at 255–56. The Court of Appeal granted the appellants’ request and set aside the decision of the responsible officers, after concluding that “another day’s delay in the administrative process would . . . result in unwarranted incarceration of the appellant and [cause] severe prejudice.” Id.
Clearly, the courts do sometimes exercise some administrative functions, though they will not do so unless a firm legal basis allows such action.

3. Instances of Limited Mixing of Functions Between the Judiciary and the Legislature

In certain situations, the judiciary or legislature may exercise some control over each other, or even exercise each other’s functions. The legislature generally controls the judiciary by its ability to make legislation that regulates the judiciary. Nevertheless, as seen earlier, unlike other public servants in Botswana, the provision for payment of judges’ salaries from the Consolidated Fund denies parliament an annual opportunity to discuss and criticize the activities of judges. Judicial salaries can still, however, be changed. In a period of rapid inflation such as that existing today, the purpose of this principle is not so much to guard against reductions in salaries, but rather to provide a mechanism by which salaries of judges can be increased at a pace commensurate to that of other public servants. Therefore, salaries can be increased, but not reduced. Income tax is levied against a judge’s salary in the same way as on the salaries of other members of the community, provided that doing so does not discriminate against judges. These principles attempt to insulate judges from parliamentary pressure, and are reinforced by a convention that protects judges from disparaging criticism in parliament. This does not mean that members of parliament, like ordinary citizens, should not criticize judges, but rather requires such criticisms to be fair and reasonable, and not made maliciously or in a way that brings unwarranted disrepute on the courts.

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194 As Alexander Hamilton explained, “In the general course of human nature, a power over a man’s subsistence amounts to a power over his will.” The Federalist No. 79, supra note 22, at 531 (Alexander Hamilton).
195 Over the last few years, inflation has been fairly steady at around 7.5%, but in 2003, it rose to 9.7%, causing the government to increase salaries by ten to twenty-five percent. Last year, however, inflation dropped to 6.7%. Unsurprisingly, the Minister of Finance and Development Planning made no mention of further salary increases in the 2005–2006 budget presented to parliament in February. Modest Surplus for ’05/’06, Daily News Online (Bots.), Feb. 8, 2005, available at http://www.gov.bw/cgi-bin/news.cgi?id=20050208; Bank of Bots., 2 Botswana Financial Statistics 8 (Sept. 2004).
196 See In re Editor of Botswana Gazette & Another, [1990] B.L.R. 655, 657 (noting that newspapers have published articles criticizing Botswana courts, which they have a right to do, but they should be “fair and reasonable”).
Regarding the control exercised by the courts over the legislature, Botswana differs from Britain, where the doctrine of legislative supremacy denies the courts the power to review the validity of legislation. Although the constitution vests in parliament the “power to make laws for the peace, order and good government of Botswana,” this does not include the power to make laws that contravene the constitution itself. As Justice I.A. Maisels said in Desai & Another v. State:

[T]he National Assembly is supreme only in the exercise of its legislative powers and these powers cannot override the rights and freedom of its citizens or other persons . . . which are entrenched in the Constitution.

Thus, the courts have not hesitated to invalidate parliamentary enactments or subsidiary legislation inconsistent with the constitution. For example, in Petrus & Another v. State, the Court of Appeal declared section 301(3) of the Criminal Procedure and Evidence Act void on the grounds that it infringed section 7(1) of the constitution, prohibiting torture, inhuman, or degrading punishment. Again, in Attorney-General v. Dow, the court also declared section 4(1) of the Citizenship Act void for violating the constitutional prohibition of discrimination in sections 3 and 15, because it denied citizenship to the offspring of Batswana men married to foreigners, but granted citizenship to the offspring of Batswana women married to foreigners.

A third example, this time of subsidiary legislation, is the case of Students’ Representative Council of Molepolole College of Education v. Attorney-General. The Court of Appeal held that a college regulation, which required pregnant women to leave the college for at least one year, was contrary to section 15 of the constitution and therefore void. In fact, section 105 of the constitution vests exclusive jurisdiction on the High Court and Court of Appeal to entertain any matter

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197 See Bots. Const. § 86.
200 This section provided for corporal punishment in the form of strokes to be administered in the traditional manner using traditional instruments. Act No. 21 of 1982 (amending the Criminal Procedure and Evidence Act, Cap. 08:02, § 301(3) (1982) (Bots.).
202 One citizen of Botswana is referred to as a Motswana, while multiple citizens are referred to as Batswana.
204 Id. at 196.
involving constitutional interpretation. But although this gives these courts the power to review all legislation and quash any that infringe any constitutional provisions, it does not give them power to nullify sections of the constitution itself. Thus, the High Court in the recent case of *Kamanakao & Another v. Attorney-General*, while expressing sympathy with the plaintiffs’ case that sections 77, 78, and 79 of the constitution discriminated against certain tribes in the country, noted that it had no powers to order their amendment.

In Botswana, the judiciary exercises traditionally legislative functions at times in two principal ways. The first—and probably the more common way—is through the doctrine of binding precedent, which came to Botswana as a part of the general adoption of English law during the colonial era. The judicial function of legal interpretation and application has a quasi-legislative effect, creating precedents that must be followed in subsequent cases with similar facts. This process of “judicial legislation” in both common law and statutory interpretation contributes to legal development. In England and the United States, besides the enduring impact of the doctrine of binding precedent, judge-made law has often intervened in areas where the

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205 Bots. Const. §§ 105, 106.
206 See id.
210 As Lord Wilberforce stated in *British Railways Board v. Herrington*, “[T]he common law is a developing entity as the judges develop it, and so long as we follow the well tried method of moving forward in accordance with principle as fresh facts emerge and changes in society occur, we are surely doing what Parliament intends we should do.” [1972] 1 All E.R. 749, 778.
government has been unwilling to ask for legislation or has been too slow to propose new measures.211 This is also true in Botswana.212

The second setting in which the judiciary performs legislative functions arises when parliament expressly authorizes the judiciary to legislate on certain matters. The best example of this appears in section 95(6) of the constitution, which states that “the Chief Justice may make rules with respect to the practice and procedure of the High Court in relation to the jurisdiction and powers conferred on it.”213 On this basis, section 28 of the High Court Act provides the Chief Justice with wide-ranging powers to make rules as he deems necessary or desirable to facilitate the proper dispatch and conduct of the business of the High Court.214

The obvious advantage of this system is that, as legal experts, judges are better situated to understand the specific procedural problems needing resolution and the various ways to do so. It also expedites amendments of rules as needed, without requiring the complex and protracted legislative amendment process. Perhaps the greatest advantage of judicial rule-making here is the reinforcement of judicial independence. Even though made by judges, these rules of court, like all other forms of subsidiary legislation, must nevertheless fall within the powers conferred on them by the enabling legislation. Thus, in *Ngope v. O'Brien Quinn*, the Court of Appeal declared a rule made by the Chief Justice, acting under section 28 of the High Court Act, as ultra vires and therefore invalid.215

The exercise of judicial functions by the legislature, in contrast, has been limited because of the general desire of parliament to respect and preserve the prestige and independence of the judiciary. Neverthe-

211 See, e.g., Roe v. Wade, 410 U.S. 113 (1973) (legalizing abortion); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (holding state-sanctioned segregation of public schools to be unconstitutional); Brind & Others v. Sec’y of State for the Home Dep’t, [1991] 1 All E.R. 720, 725 (stating that the courts cannot undertake judicial review unless the Home Secretary’s decision was “irrational” or “perverse”); Conway v. Rimmer, [1968] 1 All E.R. 874 (holding that, absent clear evidence that withholding information was in the public interest, disclosure was required).


213 Bots. Const. § 95(6).

214 High Court Act § 28. Similar powers have been conferred on the president of the Court of Appeal in section 16 of the Court of Appeal Act, with respect to proceedings before the Court of Appeal, although this is not expressly sanctioned by the constitution. Court of Appeal Act, Cap. 04:01, § 16 (1982) (Bots.).

less, the parliament can intervene and perform judicial functions in many ways and specific situations. The most common example of this is where some legal uncertainty or controversy over an issue arises. The parliament may intervene through an enactment that is declaratory or expository on the law. Such a declaratory statute is designed to resolve any doubts as to what the law is or is intended to be.

For example, in *State v. Ndleleni Dube*, the High Court held that where the accused person provides police with material evidence as part of an inadmissible confession, that evidence is inadmissible against the accused person. Unhappy with this decision, parliament overrode it by passing the Criminal Procedure and Evidence (Amendment) Act of 1983. Section 87(6) of the constitution, however, precludes parliament from enacting penal legislation with a retroactive effect, thus limiting the scope of retroactive declaratory statutes. Absent this limitation, citizens have no vested right in any particular legal remedy and hence, parliament may change remedies, alter the rules of evidence, and generally modify the law as it sees fit and apply this to prior transactions.

The courts, however, retain the full right to interpret the law under the constitution. A curative act of parliament—such as legislation designed to change the decision in a particular case, or confirm judicial proceedings otherwise void for lack of jurisdiction—would constitute undue encroachment on the judicial domain and be declared void by the courts. For similar reasons, parliament cannot declare by statute the intent of a former act, or prescribe a certain construction of a former act. Likewise, parliament cannot by a statutory enactment declare an act either constitutional or void, although it can repeal or refuse to enact any law because it deems it unconstitutional, regardless of whether the courts declare it constitutional. On the whole, parliament’s extensive powers are tempered by a strong desire to avoid public perception that it is usurping judicial functions in a manner that undermines the judiciary’s independence.

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217 Criminal Procedure and Evidence (Amendment) Act (1983) (Bots.).
218 In fact, section 10(4) of the constitution says that “no person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence.” Bots. Const. § 10(4).
219 See Bondy, *supra* note 9, at 89.
220 Id.
221 Id.
CONCLUSION

What emerges from the preceding analysis is not only that the doctrine of separation of powers is a prominent feature of Botswana’s constitutional system, but also that this doctrine is not merely an abstract theoretical and philosophical construct. Instead, it is a practical, workable principle that is as relevant today as it was when first formulated centuries ago. The threat of tyranny is as potent today as it was when Lord Acton warned famously that “power tends to corrupt, and absolute power corrupts absolutely.” The separation of power, whether in the American, British, or French sense, does not, as some critics suggest, require a rigid separation of the different organs of power into watertight compartments, but rather sufficient separation to forestall the dangers that are inherent in the concentration of powers.

The Botswana analysis demonstrates that the doctrine contains elements of universal validity that no country can afford to ignore in the arrangement of its governmental institutions. Although the doctrine of separation of powers alone cannot explain Botswana’s outstanding and enviable record in Africa as a successful, liberal, multiparty, constitutional democracy, its impact cannot be ignored. The executive, especially the Office of President, is as powerful as any in Africa, but what sets Botswana apart from most other African governments is the considerable freedom with which the courts regularly review and invalidate irregular and illegal executive and legislative acts. Individuals who feel that their constitutional rights have been infringed have regularly resorted to the courts. In a recent case, one party challenged the jurisdiction of the Industrial Court, arguing that it was subsumed under the executive arm of the state and thus in conflict with the doctrine of separation of powers embodied in the constitution. This judicial freedom places Botswana in marked contrast to many Francophone African countries, who copied the French model of the separation of powers, providing a much more limited vision of judicial independence. Consequently, those governments regularly suffer no consequences for violations of their constitutions.

222 Vanderbilt, supra note 9, at 37 (quoting John Emerich Edward Dalberg, Lord Acton, Essays on Freedom and Power 335–36 (Gertrude Himmelfarb ed., 1972)).
223 Direng v. Furniture Mart (Pty) Ltd., [1995] B.L.R. 826. The court held that the arguments advanced to support the contention were misplaced, and that the mere appointment of judges by the executive did not compromise the independence of these judges.
224 See generally Fombad, supra note 97 (referencing other discussions of the situation in Francophone Africa).
225 See generally Fombad, supra note 163.
The simple fact that Botswana’s constitution creates situations in which the same persons belong to more than one of the three organs of power, or that each of these organs to some extent control and exercise the functions of the other, does not by necessity contradict the doctrine of separation of powers. The special cases where an organ performs the functions of another, or interferes with the functions of the other are both explicit and implied by the nature of government itself. These special cases are determinable and limited; the doctrine would be meaningless if it could be circumvented completely and with impunity. The doctrine, as an important touchstone of constitutional democracy, appears to do no more than provide that particular functions, for practical purposes, belong primarily to a given organ of power, while simultaneously superimposing a power of limited interference by another organ to ensure that the former does not exercise its acknowledged functions in an arbitrary and despotic manner. In a modern age that stresses realism and political pragmatism rather than strict dogma, the doctrine of separation of powers facilitates unity, cohesion, and harmony within a system of checks and balances. It is clear that while the separation of powers on its own cannot guarantee constitutional democracy, where, as in Botswana, it exists and is allowed to work, it does so reasonably well and creates a more sustainable and feasible constitutional democracy.
WHAT LAWRENCE BROUGHT FOR “SHOW AND TELL”: THE NON-FUNDAMENTAL LIBERTY INTEREST IN A MINIMALLY ADEQUATE EDUCATION

MATTHEW A. BRUNELL*

Abstract: In 1973, under an Equal Protection Clause challenge, the Supreme Court in San Antonio v. Rodriguez held that education is not a fundamental right implicitly or explicitly found within the U.S. Constitution. The substantive due process jurisprudence of the Court’s 2003 term raises serious questions about the legal and theoretical underpinnings of Rodriguez. Lawrence v. Texas stands for a bold, new architecture that the Court may employ in future substantive due process decisions. This Note argues that if the due process analysis forged in Lawrence is followed, the Supreme Court may reconsider its thirty-year-old Rodriguez decision, recognize the non-fundamental liberty interest in a minimally adequate education under the Due Process Clause, and provide some relief to schoolchildren in grossly underperforming schools.

Introduction

Education is the highway that propels America, driving its businesses, delivering opportunity, and fueling its political, social, and moral conscience. Yet the American public school system is very...
much a “non-system system,” in which individual school districts progress at vastly different speeds. Many school districts in America, such as South Phoenix’s Roosevelt School District, are marooned in the highway’s breakdown lane. In neglecting these school districts, state legislatures have effectively abdicated their supervisory role in the development of responsible citizenry, and in the process, excluded the poor from the opportunity of education. State courts are also often unhelpful, simply redirecting the problem to indifferent legislators. Abysmally performing school systems like the Roosevelt School District suggest the need for greater federal intervention. However, the improbability of Congress passing a well-funded, comprehensive stat-

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2 James Traub, *The Test Mess*, N.Y. TIMES, Apr. 7, 2002, § 6 (Magazine), at 46 (noting that America “has never had an ‘educational system’; what it has had is 15,000 or so school districts, which decide more or less for themselves how and what to teach and what students need to learn in order to move from grade to grade, or to graduate”).


4 See Haki R. Madhubuti, *All Voices Matter: Artists, Intellectuals, Students and War*, BLACK ISSUES IN HIGHER EDUC., May 22, 2003, at 36 (noting that the “most critical learning period for all children is between birth and 6 years old,” and arguing that education is “vital for an informed citizenry [because a] full citizen is an informed and involved citizen”).

5 See discussion infra Part IV.B.

6 See Greenfeld Report Card, supra note 3; see also ABIGAIL THERNSTROM & STEPHAN THERNSTROM, *No Excuses: Closing the Racial Gap in Learning* 12, 14, 15, 124, 125 (2003). The National Assessment of Educational Progress (NAEP), a test initiated by Congress in 1969 and administered to a representative sample of students nationwide in various grades, divides students into four categories. Id. The lowest achieving of these categories, labeled “Below Basic,” is “for students unable to display even ‘partial mastery of prerequisite knowledge and skills that are fundamental for proficient work’ at their grade.” Id. To be sure, white and Asian students’ NAEP results are not particularly laudable. Id. Yet the performance of black students, particularly those attending city schools, is abysmal. Id. For instance, three out of four black students rank in the “Below Basic” category for science and seven out of ten rank “Below Basic” on the mathematics portion of the NAEP. Id.
This Note argues that in light of the bold, new substantive due process architecture announced in *Lawrence v. Texas*, the schoolchildren living in grossly underperforming school districts may in fact have a federal constitutional remedy under the Due Process Clause. *Lawrence* represents a sea change in the Court’s substantive due process analysis, and as a result, decisions such as *San Antonio Independent School District v. Rodriguez* are no longer on firm footing. When abys-

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7 See Diana Jean Schemo, *Kennedy Demands Full Funding for School Bill*, N.Y. Times, Apr. 7, 2004, at A18. The Bush administration’s foray into education, the No Child Left Behind (NCLB) Act, raised federal funding 42% in “high-poverty schools” but, as critics of the legislation maintain, there is a wide disparity between what the administration can authorize under the Act and what the administration actually has budgeted. *Id.* Senator Edward Kennedy argues that President Bush must have “misstated, misspoke, misrepresented his position” on the financing of the NCLB Act, because the 42% was much lower than President Bush initially suggested. *Id.*

8 See Brent Staples, *Schools Fail Children, Not the Other Way Around*, N.Y. Times, Apr. 6, 2004, at A22 (pointing out that it is not that the children are failing the schools, but that “the schools are failing the children”). In response to New York City Mayor Bloomberg’s proposal to hold back all students who fail third grade, Staples argues for the academic equivalent of the “Marshall Plan,” in which the city brings in “new principals, teachers, a proven new curriculum and smaller classes in the early grades.” *Id.*

9 539 U.S. 558 (2003). Justice Scalia’s dissent in *Lawrence* provides a perceptive analysis of the majority’s reasoning. *Id.* at 586–605 (Scalia, J., dissenting). This Note often refers to his dissent to shed light on the majority’s methodology in *Lawrence*.


Another major decision of the 2003 term, *Grutter v. Bollinger*, 539 U.S. 306 (2003), suggests that an Equal Protection Clause challenge to *Rodriguez* may have new life. The Court in *Grutter* revamped its strict scrutiny and rational basis tests for disputes under the Equal Protection clause. See *id.* Professor Wilson Huhn comments on this novel approach, implying that the Court’s entire equal protection jurisprudence may now stand on unstable ground:

Justice O’Connor’s deferential mode of strict scrutiny in *Grutter* is not the only modification that she makes to traditional standards of review. In her concurring opinion in *Lawrence*, Justice O’Connor stated that rational basis
mally performing schools fail to provide a baseline level of education, Lawrence implies that the students in these schools may have a limited constitutional remedy via the Due Process Clause.\(^{12}\)

In Lawrence, the Supreme Court struck down a Texas state law that prohibited consensual homosexual activity between adults.\(^{13}\) Admittedly, the holding in Lawrence has nothing to do with education, but the manner in which the Court reached its result has tremendous implications for the Court’s future approach to Due Process Clause challenges. Lawrence, as some commentators have already noted, represents the ascension of Justice Kennedy’s school of substantive due process.\(^{14}\) Not only did the majority in Lawrence radically depart from the accepted norms of substantive due process jurisprudence, a departure noted below, but they were receptive to protecting interests related to an “autonomy of self that includes freedom of thought, belief, [and] ex-

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12 One thorny issue among legal education scholars is how exactly to define the educational liberty interest safeguarded by the Due Process Clause. See Michael Heise, The Courts, Educational Policy, and Unintended Consequences, 11 CORNELL J. L. & PUB. POL’Y 633, 647–49 (2002). Professor Michael Heise notes the move from “equity,” a claim that schools within a state should receive comparable funding, to “adequacy,” a claim that schools should receive the funding necessary to achieve somewhat comparable educational results. Id. at 647. Considering that Rodriguez was principally cast in the “equality” framework, an “adequacy” assertion may be more likely to succeed. See id. This Note restricts the scope of the “adequacy” approach and suggests that only the educationally moribund or grossly underperforming schools should be entitled to constitutional relief under the Due Process Clause. To put the fiscal magnitude of this issue into perspective, one observer notes that the cost alone of restoring school facilities to an adequate level would be $111.1 billion. See Kristen Safer, Note, The Question of a Fundamental Right to a Minimally Adequate Education, 69 U. CIN. L. REV. 993, 993 (2001).

13 539 U.S. at 578–79.

14 See id. Professor Huhn contends that “prior to Lawrence, one wing of the Supreme Court believed that the ‘right to privacy’ is circumscribed by tradition, while the other recognized a general right to make ‘personal and intimate choices’ that are ‘central to personal dignity and autonomy.’” Huhn, supra note 10, at 73. It should be noted from the outset that Justice O’Connor did not join the Kennedy majority in Lawrence, electing instead to nullify the Texas sodomy statute as a violation of the Equal Protection Clause. Lawrence, 539 U.S. at 578–85. Justice O’Connor may eventually subscribe to Lawrence’s architecture, given her concurring opinion in Michael H. v. Gerald D. See 491 U.S. 110, 132 (1989) (O’Connor, J., concurring) (rejecting Justice Scalia’s substantive due process analysis).
pression . . .”

For purposes of this Note, three lodestars in Lawrence highlight the Court’s potential willingness to reconsider Rodriguez. First, the Court in Lawrence utilized a surprising form of scrutiny in which the majority neither enumerated a “fundamental right” nor explicitly employed the heightened form of scrutiny associated with a “fundamental right.” Conservative commentators decry this collapsing scrutiny as nothing less than a consequentialist approach. Results oriented or not, the Kennedy school of substantive due process in Lawrence has certainly tinkered with the doctrinal, three-tiered levels of scrutiny. Second, a majority of the Court looked to foreign judicial authority in deciding whether a non-fundamental “liberty interest” should survive scrutiny. By invoking international case law in its decisionmaking, the Kennedy majority signaled that the Supreme Court is open to a more global view of the law. International authority, particularly decisions of the European Court of Human Rights and the Charter of Fundamental Rights of the EU, favor granting a constitutional liberty interest in a minimally adequate education. Third, the Court in Lawrence expressed a willingness to shed the cloak of

15 Lawrence, 539 U.S. at 574–76. One scholar labeled this radical departure a “flawed performance.” Kevin F. Ryan, A Flawed Performance, 29 Vt. B.J. 5, 6 (2003). According to the Kevin Ryan, “The Court—or at least Justice Kennedy—has chosen to build jurisprudential castles on the most shifting of sands, if not on thin air.” Id. Ryan’s disdain for Justice Kennedy’s methodology borders on the vitriolic. Id. at 7. He argues that, “To the mindlessly liberal, the product of our overly therapeutic and new age times, talk of concepts of existence and the mystery of life evoke positive, oozy feelings—but it does not provoke thought.” Id.

16 Lawrence, 539 U.S. at 586–87 (Scalia, J., dissenting); see Huhn, supra note 10, at 112 (arguing that in Lawrence the Court demonstrated how “[s]tandards of review such as strict scrutiny and rational basis are not static but are sensitive to context”).

17 See Ryan, supra note 15, at 9 (reasoning that the Court “has a responsibility to explain its reasoning” and “should not simply adopt what it takes to be a generally accepted view, else it makes itself vulnerable to just these sorts of populist and reactionary attacks”).

18 Justice Scalia believes the “sweet-mystery-of-life paragraph” in Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992), included by the majority in Lawrence, is nothing short of results-oriented activism. Lawrence, 539 U.S. at 587–89 (Scalia, J., dissenting). According to Justice Scalia, this line of reasoning “ate the rule of law.” Id. at 588 (Scalia, J., dissenting).

19 See Lawrence, 539 U.S. at 576–78.

20 See id. Justice Scalia responds that such views are simply “meaningless,” even “[d]angerous,” because the Supreme Court “should not impose foreign moods, fads or fashions” in its decisions. Id. at 598 (Scalia, J., dissenting) (quoting Foster v. Florida, 537 U.S. 990 n. (2002) (Thomas, J., concurring in denial of cert.)).

stare decisis, a startling turnaround after *Casey*.

Given the Court’s revamped approach to stare decisis, the Court may modify the rigid holding of *Rodriguez*, if students were to bring a claim based on their liberty interest in a minimally adequate education.

Part I of this Note highlights the dire need for a federal remedy to the alarming lack of education students receive in places like South Phoenix. Part II focuses on the *Rodriguez* decision itself, explaining the factual and legal principles at work in the decision. Part III looks to the Court’s ruling in *Lawrence* and the effects of this decision on substantive due process methodology, emphasizing the three pillars of the decision. Part IV argues that *Lawrence*’s three pillars effectively uproot the legal premises underlying the Court’s decision in *Rodriguez*. Each part concludes with some of the practical difficulties in a post-*Lawrence* world, cautioning that there are still aspects of *Lawrence* that should trouble proponents of a liberty interest in a minimally adequate education. Nevertheless, for the children of destitute school districts of America, *Lawrence* brings a hope unseen for thirty years.

I. UNDER THE BASELINE OF MINIMALLY ADEQUATE: THE CASE OF SOUTH PHOENIX’S C.O. GREENFIELD MIDDLE SCHOOL

A survey of America’s public schools presents some rather troubling statistics: a third of the students who begin high school fail to graduate, Latinos are four times less likely and blacks two times less likely than whites to graduate from high school, and over ten thousand schools have been identified as “needing improvement” under the No Child Left Behind Act. A closer look at low-income school districts in America presents an even more sobering view of our “non-system system”: when students in low-income school districts reach the age of nine, they are typically three grade levels behind those students in higher-income school districts in both reading and mathematics.

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22 *Casey* begins with an emphatic call to follow stare decisis, stating, “Liberty finds no refuge in the jurisprudence of doubt.” See 505 U.S. at 833. Justice Scalia, in his *Lawrence* dissent, rebuffs the majority’s approach to stare decisis as confusing consequentialism. See 539 U.S. at 586 (Scalia, J., dissenting). When “stare decisis meant preservation of judicially invented abortion rights,” stare decisis binds the Court, yet when unpopular positions are at issue, it does not. Id. (Scalia, J., dissenting).

23 See *Lawrence*, 539 U.S. at 577–79; see also *Rodriguez*, 411 U.S. at 59.


25 See T Hernstrom & Thernstrom, supra note 6, at 12, 14, 15, 124, 125; Who We Are, Teach for America, at http://teachforamerica.org/about.html# (last visited Jan. 15,
By looking at one such school—C.O. Greenfield Middle School in South Phoenix, Arizona—situated in a low-income school district, the education crisis taking place in America’s worst schools comes more sharply into focus.  

In *Roosevelt Elementary School District No. 66 v. Bishop* (*Roosevelt Elementary*), the Arizona Supreme Court declared that the state financing scheme for public education violated the state constitutional requirement to provide a general and uniform public school system. Following *Roosevelt Elementary*, no one expected underperforming schools such as C.O. Greenfield Middle School, infused with greater monetary resources, to transform overnight into the academic powerhouses of neighboring Scottsdale and Paradise Valley. Yet, ten years after the decision, the optimism shared by many in the wake of *Roosevelt Elementary* is now gone. The plight of the schoolchildren remains just as pronounced as it was in 1994. Moreover, the current Arizona legislature remains just as ambivalent about changing the distribution of educational resources as it was prior to *Roosevelt Elementary*. Some commentators suggest that education reform is subject to the same critique as Russian-penned novels: “It goes on forever, and

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26 See Thernstrom & Thernstrom, supra note 6, at 12.  
30 Only 1% of C.O. Greenfield’s fifth grade mathematics students passed the state assessment, the AIMS test, in 2003; this figure is down from 2% in 2002. Greenfield Report Card, supra note 3.  
31 See *Roosevelt Elementary*, 877 P.2d at 806. In addressing the current budget woes, the Arizona Legislature has not ruled out scaling back education funding for the next fiscal year. Anne Ryman, Schools Examine Finances; Scottsdale Expects $1 Million Deficit, *Ariz. Republic*, Nov. 3, 2003, at 1.
in the end, everyone dies.” In the Roosevelt School District, children actually are dying; asthma rates are the highest in Phoenix and schools are too financially strapped to combat the problem. To illustrate further the disparate distribution of educational resources in the Phoenix metropolitan area, one need only look to Baseline Road, linking South Phoenix to Mesa. Along Baseline Road are two public schools: C.O. Greenfield Middle School in the Roosevelt School District, and Rhodes Junior High School in the Mesa Unified District.

Rife with escalating unemployment and beset with a migratory population, only 1% of Greenfield’s fifth grade student body met Arizona’s educational competency exams—the Arizona Instrument to Measure Standards, or AIMS—standards in mathematics. Only 2% of the eighth grade student body met or exceeded AIMS standards in math. Rates on the same eighth grade exam at Rhodes Junior High, located in a wealthy suburb, were 33%, a figure 12% higher than the state average for eighth grade math. The Greenfield scores on the Stanford 9, a nationally administered standardized test, confirm these abysmal results—students in the fifth and eighth grade consistently ranked in the bottom 5% of students taking the exam. Students at Rhodes, on the other hand, ranked in the upper 25%. Few think Greenfield is improving and yet schools such as the neighboring Rhodes continue to thrive.

33 Karina Bland, Asthma Robs Childhoods, Ariz. Republic, Feb. 25, 2001, at A10 (reasoning that schools in South Phoenix have higher rates of children hospitalized with asthma than anywhere else in the Phoenix area).
34 In the Roosevelt School District, “51 percent of the teachers are either non-tenured or substitutes.” Beverly Medlyn, Schools Gasping for Teachers, Ariz. Republic, Mar. 8, 2001, at B1. To put this high number in perspective, a recent study by Education Week found that students of certified teachers, as opposed to uncertified teachers, attained at least two months improvement on grade equivalency scales over the course of one year, equivalent to 20% in terms of overall academic growth. Maggie Galehouse, National Report Grades Arizona Teachers Poorly, Ariz. Republic, Jan. 8, 2003, at B3.
37 Rhodes Junior High School, Greatschools.net, at http://www.greatschools.net/cgi-bin/az/district_profile/1133 (last updated Sept. 2004) [hereinafter Rhodes Junior High].
38 Greenfield Report Card, supra note 3, at 8.
39 Rhodes Junior High, supra note 37.
40 See Rhodes Junior High, supra note 37. Granted that the state average on the AIMS for eighth grade math was an unspectacular 21% in 2003, Greenfield had no student pass the exam in either 2001 or 2002. Greenfield Report Card, supra note 3, at 6.
With a demographic significantly composed of aging, wealthy retirees who steadfastly vote against state tax increases for education and vote out legislators who support such measures, Arizona’s funding of education is not likely to change through the democratic process.\(^\text{41}\) Moreover, in Roosevelt Elementary, the Arizona Supreme Court emphasized that the state constitution does not require perfect equality and that disparities that “are not the result of the state’s own financing scheme do not implicate the interests sought to be served by art. XI, §1.”\(^\text{42}\) It is not surprising that Arizona currently ranks second to last in education spending per student in America\(^\text{43}\) and thirty-third on the wealth neutrality scale.\(^\text{44}\)

Though currently locally run, some within the Roosevelt School District would prefer the state to takeover their failing schools.\(^\text{45}\) In light of stalled legislative initiatives and the Arizona Supreme Court’s reluctance to achieve financial equity, it is unlikely that a state takeover would improve these children’s prospects.\(^\text{46}\) The state legislature repeatedly demands that underperforming school districts meet standards, yet does not provide the necessary resources to achieve desired results.\(^\text{47}\) The federal government could help these flagging schools, but if the most recent federal foray into education is any indication, that help may not be forthcoming.\(^\text{48}\) In his 1973 Rodriguez dissent, Justice Marshall stated, “[C]ountless children unjustifiably receive inferior educations that ‘may affect their hearts and minds in a way un-

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\(^{41}\) See Chris Fiscus & Mel Melendez, Education Bills Flooding Legislature, Ariz. Republic, Feb. 13, 2003, at B1. A recent initiative put forward by the current Superintendent of Public Instruction, Tom Horne, would further reduce state spending on education, shifting funding to local school districts. Id. Critics maintain that hiking local taxes will hurt poor school districts. Id.

\(^{42}\) Roosevelt Elementary, 877 P.2d 806, 816 (Ariz. 1994). Chief Justice Feldman, concurring in the judgment, would have resolved the funding disparity issue by appealing to the state’s equal protection clause. Id. at 818 (Feldman, C.J., concurring). He went further than the majority by concluding that “the equal protection clause prevents a state from making the quality of a child’s basic educational opportunity a function of the wealth of the district in which the pupil resides.” Id. (Feldman, C.J., concurring).


\(^{44}\) Id.


\(^{46}\) See id.

\(^{47}\) See Fiscus & Melendez, supra note 41.

\(^{48}\) Pat Kossan, U.S. Education Law to Cost State $108 Million, Ariz. Republic, Aug. 10, 2003, at A1. The members of the Arizona legislature and Arizona Supreme Court are not the only responsible parties. See id. Federally required tests under NCLB will cost Arizona $108 million, with the federal government picking up less than half the cost. Id.
likely ever to be undone.” More than thirty years after *Rodriguez*, there remain countless children toiling in America’s worst schools—schools such as C.O. Greenfield Middle School in South Phoenix—whose plight deserves some immediate remedy.50

II. INTRODUCTION TO *RODRIGUEZ*

Arriving at a constitutional remedy for the crisis in America’s worst schools requires an exposition of the factual and legal principles underlying *Rodriguez*, the towering precedent in the debate over the federal right to education.51 The plaintiffs in *Rodriguez* were the schoolchildren of the low-income Edgewood Independent School District, possessing a minority population of over 96%, 90% of whom were Mexican-American and over 6% of whom were black.52 In contrast to the nearby Alamo Heights Independent School District, whose equalized local tax rate yielded $356 per student, the tax rate in Edgewood yielded only $26 for the education of each child.53 The defendants in the *Rodriguez* class action consisted of the State Board of Education, the Commissioner of Education, the Attorney General, and the Bexar County (San Antonio) Board of Trustees.54 The plaintiffs relied on a two-prong Equal Protection Clause challenge.55 Either education was a fundamental right under the Equal Protection Clause that the Texas system of education finance violated without a compelling purpose, or the education-financing scheme disadvantaged a suspect class without a compelling governmental purpose.56 Significantly,

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50 See id. at 7–17.

51 In its substantive due process decisions, the Court has recognized numerous fundamental rights as safeguarded by the Due Process Clauses of the Fifth and Fourteenth Amendments. See, e.g., Loving v. Virginia, 388 U.S. 1 (1967) (reasoning that state law prohibiting interracial marriage violates right to marry); Griswold v. Connecticut, 381 U.S. 479 (1965) (reasoning that state law prohibiting sale of contraceptives violates right to privacy); Pierce v. Soc’y of Sisters, 268 U.S. 510 (1925) (reasoning that state law prohibiting parochial education violates parents’ right to control upbringing of their children).

52 411 U.S. at 12.

53 Id.

54 Id. at 5 n.2. In an interesting turn of events, the class action first brought suit against the San Antonio Independent School District (SAISD) as well, but the trial judge dismissed SAISD. Id. SAISD later joined the plaintiffs’ side, even filing an amicus brief on behalf of the schoolchildren of Englewood. Id.

55 Id. at 18.

56 Id.
however, the plaintiffs did not put forward a substantive due process challenge to the Texas financing scheme.\footnote{See Rodriguez, 411 U.S. at 18.}

The plaintiffs in \textit{Rodriguez} emphasized three previous decisions in which the Court spoke of education as immensely important, even fundamental to the function of society.\footnote{See \textit{id.} at 29–30; Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954); Pierce v. Soc’y of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390, 403 (1923).} \textit{Meyer v. Nebraska} invalidated a Nebraska law that had prohibited the teaching of German because it violated the cardinal right of parents to decide children’s upbringing and schooling.\footnote{262 U.S. at 403.} Likewise, in \textit{Pierce v. Society of Sisters}, the Court struck down a state law that prohibited attendance at parochial school as a violation of the right of parents to choose their child’s education.\footnote{268 U.S. at 535.} Perhaps most famously, \textit{Brown v. Board of Education} put an end to state-authorized segregation of school districts and recognized that “education is perhaps the most important function of state and local governments.”\footnote{347 U.S. at 493.} The Court in \textit{Rodriguez}, however, distinguished \textit{constitutionally} fundamental from \textit{socially} fundamental, explaining that education was a socially fundamental right and that the legislative branch therefore holds dominion over it.\footnote{See 411 U.S. at 30–31, 33–34. The Court invoked Justice Harlan’s cautionary view of fundamental rights, stating that:}

\begin{quote}
Mr. Justice Harlan, dissenting from the Court’s application of strict scrutiny to a law impinging upon the right of interstate travel, admonished that “[v]irtually every state statute affects important rights.” . . . If the degree of judicial scrutiny of state legislation fluctuated, depending on a majority’s view of the importance of the interest affected, we would have gone “far toward making this court a ‘super-legislature.’”
\end{quote}

\textit{Id.} at 30–31 (quoting Shapiro v. Thompson, 394 U.S. 618, 655, 661 (1969)).

\textit{Id.} at 35–36, 37–38. Justice Brennan in dissent took issue with the majority’s narrowed definition of “fundamentality.” \textit{Id.} at 62–63 (Brennan, J., dissenting). Justice Brennan contends that fundamentality “is, in large measure, a function of the right’s importance in terms of the effectuation of those rights which are in fact constitutionally guaranteed.” \textit{Id.} (Brennan, J., dissenting). For more on education as a precondition of other rights, see Timothy D. Lynch, \textit{Note, Education as a Fundamental Right: Challenging the Supreme Court’s Jurisprudence}, 26 Hofstra L. Rev. 953, 995-96 (1998) (reasoning that the \textit{Rodriguez} Court undervalued the “disparaging effects” on the right to vote, demonstrating that “the level of participation in our electoral democracy is lower among poor urban populations . . . compared to others”); Peter S. Smith, \textit{Note, Addressing the Plight of Inner-
held holding” of *Rodriguez* is that there may be an implicit right to “some identifiable quantum of education” within the Constitution. Yet this quantum must be an amount of education just short of absolute deprivation because the *Rodriguez* Court did not consider a right to a baseline level of education from plaintiffs’ facts. In sum, the Court was not convinced that Texas financing system denied children “an opportunity to acquire the basic minimal skills necessary for the enjoyment” of Constitutional rights.

Justice Powell, writing for the majority in *Rodriguez*, rejected as “simplistic” the district court’s finding that wealth is a suspect classification for purposes of Equal Protection Clause challenges. He wrote:

However described, it is clear that appellees’ suit asks this Court to extend its most exacting scrutiny to review a system that allegedly discriminates a large, diverse, and amorphous class, unified only by the common factor of residents in districts that happen to have less taxable wealth than other districts.

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64 411 U.S. at 36; Bitensky, supra note 11, at 595.
65 411 U.S. at 36.
66 411 U.S. at 37. According to Justice Powell, the Court would have to guarantee every person adequate housing, clothing, and sustenance, because such necessities are the most basic preconditions for the enjoyment of constitutional rights. Id.
67 Id. at 28. Some commentators have noted, unlike the Court in *Rodriguez*, that “poor districts may tax property at an even higher rate than the wealthy districts, yet generate less revenue.” Avidan Y. Cover, *Is “Adequacy” a More “Political Question” Than “Equality?”: The Effect of Standards-Based Education on Judicial Standards for Education Finance*, 11 CORNELL J.L. & PUB. POL’Y 403, 404 (2002).
68 *Rodriguez*, 411 U.S. at 19 (emphasis added). In his dissent, Justice Marshall looks to the racial segregation cases as standing for the principle that the invidiousness of segregated public institutions was not solely on the basis of race, but also on the basis of wealth. Id. at 84–85 (Marshall, J., dissenting). Justice Marshall writes:

In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the [whites only] Law School is superior . . . It is difficult to believe that one who had a free choice between these law schools would consider the question close.
Justice Powell’s critique was that such a classification lacks a “definitive description” of what separates an individual in the “poor” class as opposed to another class, and that such an amorphous classification does not result in the total deprivation of education for this class. As a result, the financing scheme for the state of Texas fell into the type of social and economic legislation subject to the most deferential level of scrutiny—rational basis. Not surprisingly, the scheme “abundantly” satisfied this minimal level of scrutiny. Local control, or the principle that local taxpayers should determine the amount of funding for government programs, represented a satisfactory basis for maintaining the school-funding scheme for the state of Texas.

### III. Introduction to the Three Pillars of Lawrence

Based upon the reasoning of Lawrence, the Supreme Court seems poised to revisit Rodriguez. In Lawrence, the Supreme Court overruled Bowers v. Hardwick, a seventeen-year-old decision in which the Court chose not to confer “the fundamental right upon homosexuals to engage in sodomy.” The Court noted the factual similarities between the two cases, but recognized that the Georgia law at issue in Bowers applied to both same-sex and heterosexual sodomy, whereas the Texas law at issue in Lawrence only applied to same-sex sodomy. In the ma-

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69 Id. at 19. One recent analysis contends that a “more discretely defined plaintiff class would have avoided the Court’s admonishment in Rodriguez” and potentially may have saved the suspect classification. David V. Abbott & Stephen M. Robinson, School Finance Litigation: The Viability of Bringing Suit in the Rhode Island Federal District Court, 5 Roger Williams U.L. Rev. 441, 450 (2000).

70 Rodriguez, 411 U.S. at 55.

71 Id. In Justice White’s dissent, he, like the majority, subjected the Texas financing scheme to rational basis scrutiny, but was unconvinced about Texas’ purported goal of local decisionmaking. Id. at 68–70 (White, J., dissenting). In a more searching form of rational basis scrutiny, Justice White concluded, “[I]n the present case we would blink reality to ignore the fact that school districts, and students in the end, are differentially affected by the Texas school-funding scheme . . . .” Id. at 70. But see Frank J. Macchiarola & Joseph G. Diaz, Disorder in the Courts: The Aftermath of San Antonio Independent School District v. Rodriguez in the State Courts, 30 Val. U.L. Rev. 551, 580 (1996) (reasoning that a “return to local control and a greater freedom to experiment with alternative forms of schooling appear to be working,” and that the judiciary should not undervalue local control as a legitimate governmental interest).

72 Rodriguez, 411 U.S. at 54.

73 Lawrence, 539 U.S. at 577–79; Bowers v. Hardwick, 478 U.S. 186, 190 (1986).

74 Lawrence, 539 U.S. at 566. This distinction generated Justice O’Connor’s concurring opinion, which decided Lawrence based on the Equal Protection Clause. Id. at 579–81, 585 (O’Connor, J., concurring). She believed that the “Texas statute makes homosexuals unequal in the eyes of the law by making particular conduct—and only that conduct—subject
Majority opinion delivered by Justice Kennedy, the Court expressly rebuffed the *Bowers* decision, declaring that it “ought not to remain binding precedent” and “now is overruled.” Although wielding the sword of substantive due process, however, the Court never explicitly recognized a fundamental right in *Lawrence*.

Unlike some aspects of Justice Kennedy’s opinion, the facts and procedural history of *Lawrence* are straightforward. Houston police responded to a reported domestic disturbance at one defendant’s home and found the defendants engaged in a private, consensual homosexual act. The Harris County Police Department charged and the Harris County Criminal Court convicted the defendants with violating a prohibition on same-sex “deviate sexual intercourse.” The defendants

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75 Id. at 578.
76 See id. at 586 (Scalia, J., dissenting). In his dissent, Justice Scalia writes:

> Though there is discussion of “fundamental proposition[s]” . . . and “fundamental decisions,” . . . nowhere does the Court’s opinion declare that homosexual sodomy is a “fundamental right” under the Due Process clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy were a “fundamental right.” Thus, while overruling the outcome of *Bowers*, the Court leaves strangely untouched its central legal conclusion. . . . Instead the Court simply describes petitioners’ conduct as “an exercise of their liberty”—which it undoubtedly is—and proceeds to apply an unheard-of form of rational-basis review that will have far-reaching implications beyond this case.

*Id.* (Scalia, J., dissenting).

77 *Id.* at 562–63.
78 *Id.*
challenged the statute as a violation of the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Texas Constitution’s own equal protection clause.\(^80\) Relying on \textit{Bowers}, the controlling federal case, the Texas appeals court rejected defendants’ federal claims and affirmed the trial court’s ruling on the constitutionality of Texas’ deviate sexual intercourse prohibition.\(^81\) In deciding the merits of the Due Process Clause challenge, the Court in \textit{Lawrence} used three different tools in its substantive due process analysis: a malleable form of minimal scrutiny, an appeal to international case law, and a new stare decisis test.\(^82\)

\textbf{A. Inscrutable Scrutiny and Fundamentally Not Fundamental: The Intriguing Level of Review in \textit{Lawrence}}

If \textit{Bowers} held that homosexuals did not have the fundamental right to engage in same-sex intercourse, one might presume an “overturning” of \textit{Bowers} would logically necessitate the declaration of a fundamental right.\(^83\) Instead, the Court provided a nebulous description of what \textit{Lawrence} decided:

\textbf{[I]ndividual decisions by married [or unmarried] persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of “liberty” protected by the Due Process Clause of the Fourteenth Amendment.\(^84\)}

\(^80\) \textit{Lawrence}, 539 U.S. at 563–64.
\(^81\) \textit{Id.}
\(^82\) See generally \textit{id.}
\(^83\) See \textit{id.} at 586–87 (Scalia, J., dissenting); \textit{Bowers}, 478 U.S. at 190.
\(^84\) 539 U.S. at 578. The Court in \textit{Lawrence} essentially decided that Justice Stevens’s dissenting opinion in \textit{Bowers} now controls. \textit{Bowers}, 478 U.S. at 216 (Stevens, J., dissenting). Melanie Falco argues that the Court could have more appropriately decided \textit{Lawrence} under the Eighth Amendment. Melanie C. Falco, \textit{The Road Not Taken: Using the Eighth Amendment to Strike Down Criminal Punishment for Engaging in Consensual Sexual Acts}, 82 N.C. L. Rev. 723, 758 (2004) (reasoning that the Eighth Amendment “provides a viable alternative framework for challenging punishment . . . in light of the problems with the due process and equal protection analyses presented”). Falco fails to consider the gain netted by the gay and lesbian community by the Court’s ruling in \textit{Lawrence}, because \textit{Lawrence}, rendered under the flexible Due Process Clause, can be a decision that the Court will revisit and possibly enlarge to encompass other legislation having only “public morality” as its basis. See \textit{id.}. 

To complicate matters, the Court added that public morality is “not a sufficient reason for upholding a law prohibiting [a] practice” traditionally viewed as immoral.85

Justice Scalia’s dissent argued that the Lawrence majority must have adopted rational basis review, but Justice Kennedy never revealed which level of scrutiny failed his substantive due process analysis.86 Public morality, the Court implied, is an unconvincing justification for intrusive government action no matter the level of scrutiny—rational basis, intermediate or strict—employed.87 As a result, Lawrence does not fit cleanly into the Court’s prior substantive due process jurisprudence, because the decision neither recognizes a single fundamental right nor articulates which level of scrutiny the Court imposed.88 Perhaps the Court in Lawrence collapsed the treasured three tiers of scrutiny and replaced it with a “sliding scale” approach.89 As Judge Posner recently noted, “We should follow what the Supreme Court does and not just what it says it is doing. The Court rejects a ‘sliding scale’ approach to equal protection in words but occasionally accepts it in deeds.”90

Or perhaps Lawrence recognized a fundamental liberty interest for persons of any sexual orientation to engage in consensual intimate behavior.91 Maybe the Court applied a form of rational basis scrutiny in which the asserted basis for the sodomy statute was not rationally related to the non-fundamental liberty interest.92 Perhaps it is best to refer to the liberty interest to engage in private, consensual sexual acts as having the “stature of a fundamental right,”93 or being a “quasi-fundamental” right, a term Justice Burger coined in Plyler v. Doe.94 Until another Supreme Court decision clarifies Lawrence, there will be no

85 Lawrence, 539 U.S. at 577–78.
86 See id. at 577–79.
87 Id. at 586 (Scalia, J., dissenting).
88 See id. (Scalia, J., dissenting).
89 See id. (Scalia, J., dissenting).
91 See A. Scott Loveless, Children on the Front Lines of an Ideological War: The Differing Values of Differing Values, 22 St. Louis U. Pub. L. Rev. 371, 396 n.77 (2003) (reasoning that “the Supreme Court has elevated private, consensual sodomy from the realm of being subject to state regulation to the stature of a fundamental right”).
92 See Ryan, supra note 13, at 7 (arguing that the Court must have decided that the right to engage in sodomy was non-fundamental because it would be “extremely difficult to root such a right deeply in our history and tradition”).
93 See Loveless, supra note 91, at 396.
definitive answer.\textsuperscript{95} The initial reaction to \textit{Lawrence} by the lower federal courts and state courts, however, indicates that judges are just as confused as legal scholars are.\textsuperscript{96}

Since the \textit{Lawrence} decision, the lower federal courts have described the “right” of \textit{Lawrence} in varied, and sometimes contradictory, manners.\textsuperscript{97} The Court of Appeals for the Eleventh Circuit recognized the glaring absence of a “fundamental right” and hints that Justice Kennedy’s legal analysis was particular to the set of facts in \textit{Lawrence}.\textsuperscript{98} The court in \textit{Lofton v. Secretary of Department of Children & Family Services} treated the “right” in \textit{Lawrence} as the “by-product of several different constitutional principles and liberty interests,” not carefully described and arrived at via rational basis review.\textsuperscript{99} Other courts refer to the “right” in \textit{Lawrence} as the “individual’s liberty interest in the rights . . . to privacy and choice in one’s personal and sexual relationships”\textsuperscript{100} or, in more pragmatic terms, “the right to engage in consensual homosexual activity.”\textsuperscript{101}

Similarly, state courts, in deciding issues under state constitutions, stumble over defining the “right” in \textit{Lawrence} and have difficulty articulating how the lack of a fundamental right should fit into future

\textsuperscript{95} At least one lower court avoided the right decided in \textit{Lawrence} by choosing more circumspect language. \textit{In re Marshall}, 300 B.R. 507, 520, 524 (Bankr. C.D. Cal. 2003) (referring to \textit{Lawrence} as “finding due process violation in Texas statute prohibiting same-sex sodomy,” while maintaining that substantive due process is “alive and well in its jurisprudence, insofar as it concerns individual rights and liberties”).


\textsuperscript{97} See, e.g., \textit{Fields v. Palmdale Sch. Dist.}, 271 F. Supp. 2d 1217, 1221 (C.D. Cal. 2003) (citing \textit{Lawrence} for the proposition that there is a “right to engage in private consensual homosexual conduct”).

\textsuperscript{98} \textit{Lofton v. Sec’y of Dep’t of Children & Family Servs.}, 358 F.3d 804, 817 (11th Cir. 2004), \textit{cert. denied}, 125 S. Ct. 869 (2005) (reasoning that \textit{Lawrence} “cannot be extrapolated to create a right to adopt for homosexual persons”).

\textsuperscript{99} \textit{Id.} at 817 (reasoning that it would be a “strained and ultimately incorrect reading of \textit{Lawrence} to interpret it to announce a new fundamental right”).

\textsuperscript{100} \textit{Doe v. Miller}, 298 F. Supp. 2d 844, 871 (S.D. Iowa 2004) (reasoning that Iowa statute that prohibited a criminal sex offender from living within two thousand feet of a school violated the sex offender’s fundamental right to family choice, privacy, and interstate travel).

\textsuperscript{101} \textit{Bradley v. N.C. Dep’t of Transp.}, 286 F. Supp. 2d 697, 706 (W.D.N.C. 2003) (reasoning that the reporting of corruption is not protected by one’s right to substantive due process).
due process analysis. In Commonwealth v. Mayfield, the Supreme Court of Pennsylvania referred to the Lawrence decision as standing for the “due process right of consenting adults to engage in private sexual conduct free from governmental interference.” A recent Arizona appellate decision on the issue of gay marriage takes a different approach. In Standhardt v. Superior Court, the court found that because “the Court did not consider sexual conduct between same-sex partners a fundamental right, it would be illogical to interpret [Lawrence] as recognizing a fundamental right to enter a same-sex marriage.” Put another way, the fundamental right analysis after Lawrence is “one great blooming, buzzing confusion.”

B. Justice Without Borders: International Authority Informing Constitutional Liberty Interests

Justice Kennedy’s frequent appeals in Lawrence to international authority suggest that the Court is globalizing its substantive due process analysis. To begin, Justice Kennedy uses international authority to undermine Justice Burger’s version of history. International

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102 The Kansas Court of Appeals, for example, referred to the right announced in Lawrence as a homosexual’s “privacy right to be free from the criminalization of homosexual sex.” State v. Limon, 83 P.3d 229, 234–35 (Kan. Ct. App.), cert. granted, 2004 Kan. LEXIS 284 (Kan. May 25, 2004). The court applied minimal scrutiny to an equal protection and a due process challenge of a Kansas law that imposed harsher penalties for same-sex statutory rape than for heterosexual statutory rape. Id.

103 832 A.2d 418, 425 (Pa. 2003) (reasoning that nonconsensual sexual acts are not protected by Lawrence).


105 77 P.3d at 457.

106 William James, The Principles of Psychology 488 (1998). Although the state and lower federal courts leave the right espoused in Lawrence ill-defined, the courts have in fact found limits to this right. See, e.g., United States v. Peterson, 294 F. Supp. 797, 803 (D.S.C. 2003) (reasoning that there is no violation of Due Process Clause for conviction under the federal child pornography possession laws); State v. Clark, 588 S.E.2d 66, 68–69 (N.C. Ct. App. 2003) (reasoning that Lawrence does not control alleged violation of Due Process Clause since the present case, unlike Lawrence, involved minors).

107 For a critique of Justice Kennedy’s appeal to international case law in Lawrence and Justice Ginsburg’s appeal to United Nations standards in her concurring opinion in Guttenberg, see John Leo, Editorial, What in the World Were the Justices Thinking?, SEATTLE TIMES, July 15, 2003, at B5 (arguing that the U.S. Constitution should not be “adapted to foreign governing documents”).

authority, particularly the British parliament’s 1967 repeal of antisodomy statutes and a 2001 decision of the European Court of Human Rights, discredit Burger’s overstated belief in the Western Civilization tradition of criminalizing homosexual conduct. Later in the decision, Justice Kennedy appeals to international case law to show that the values of the international community have changed since Bowers, and that the Court’s due process analysis must be in concert. He discusses three additional decisions of the European Court of Human Rights that speak to “action consistent with an affirmation of the protected right of homosexuals to engage in intimate sexual intercourse” in the forty-five nations of the EU.

Each of these decisions is grounded in article 8 of the European Convention of Human Rights, which, unlike the U.S. Constitution, explicitly asserts a right to privacy. Justice Kennedy takes legal and cultural values from jurisdictions with much more expansive constitutional rights and uses these values to inform his substantive due process analysis. If the Court follows this aspect of Lawrence in future substantive due process cases, the government must assert that its purported justification is “somehow more legitimate or urgent” than justifications that have failed previously in international jurisdic-

the sweeping nature of the statement by Chief Justice Burger as it pertains to private homosexual conduct between consenting adults.” Lawrence, 539 U.S. at 571.

Lawrence, 539 U.S. at 573 (citing Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) (1983) (striking down anti-sodomy laws as applied to persons over the age of twenty-one)).

Id. at 576 (reasoning that, 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”).


See Charter of Fundamental Rights, supra note 21, art. 8(1), at 10 (“Everyone has the right to the protection of personal data concerning him or her.”).

Lawrence, supra note 107 (perceiving Lawrence to be part of the “push toward standards out of sync with American traditions of liberty”).
tions.\footnote{539 U.S. at 577.} Put another way, the Court in \textit{Lawrence} chose not to distinguish America from the rest of western civilization.\footnote{See id.}

The dissent chastises the manner in which the majority plucked precedent from international authority.\footnote{Id. at 599 (Scalia, J., dissenting) (arguing that the “Court’s discussion of these foreign views [is] meaningless” for substantive due process analysis).} Justice Scalia refers to Justice Kennedy’s appeal to international law as “dangerous dicta, for this Court should not impose foreign moods, fads, or fashions on Americans.”\footnote{Id. (Scalia, J., dissenting) (quoting \textit{Foster v. Florida}, 537 U.S. 990 n. (2002) (Thomas, J., concurring in denial of cert.)).} In the recently decided \textit{Olympic Airways v. Husain}, Justice Scalia rebukes the Court for paradoxically being international on some issues, such as the criminalization of homosexual conduct, but insular on others.\footnote{540 U.S. 644, 658 (2004) (Scalia, J., dissenting). Referencing \textit{Lawrence}, Justice Scalia writes:}

\begin{quote}
Today’s decision stands out for its failure to give any serious consideration to how [international courts] have resolved the legal issues before us. This sudden insularity is striking, since the Court in recent years has canvassed the prevailing law in other nations (at least Western European nations) to determine the meaning of an American Constitution that those nations had no part in framing and that those nations’ courts have no role in enforcing.
\end{quote}

\footnote{Id.}

He suggests that the Court deems international authority “relevant” only when this authority comports with its own policy determination.\footnote{119 United States v. Sampson, 275 F. Supp. 2d 49, 65–66 (D. Mass. 2003) (noting that although “judicial consideration of attitudes in other countries has been criticized,” some provisions of the Constitution should be evaluated in light of the “English experience”).} The federal courts have taken notice of the “English experience and decisions of the European Court of Human Rights” in cases involving individual liberties.\footnote{See 539 U.S. at 599.} As Justice Scalia correctly argues, however, the Court in \textit{Lawrence} did more than just take notice of foreign authority; it deferred to it.\footnote{See \textit{Barbara K. Bucholtz, Father Knows Best: The Court’s Result-Oriented Activism Continues Apace: Selected Business-Related Decisions from the 2002–2003 Term}, 39 \textit{Tulsa L. Rev.} 75, 78 (2003) (reasoning that the \textit{Lawrence} Court “usher[ed] in a new authoritative source from which to develop and deploy legal argument: the authority of other sovereignties”).} As one commentator notes, \textit{Lawrence} achieves “landmark status” by using international authority to define liberty interests under the U.S. Constitution’s Due Process Clause.\footnote{See id.} In this respect, if \textit{Lawrence} serves as a guide for future due process challenges, internationally recognized values may
help determine whether a non-fundamental liberty interest survives this new form of scrutiny.123

C. Decisis-isis: The Court’s Multifactor Test for Relying on Precedent

Lawrence also broke ground with Justice Kennedy’s bold test for stare decisis, subjecting the Court’s prior substantive due process decisions to a greater possibility of reversal.124 The Lawrence test for stare decisis includes the extent that state government has relied upon the prior decision, the degree that subsequent decisions have eroded the foundations of the prior decision, and amount or pervasiveness of the criticism lodged against the prior decision.125 Since Bowers was the guinea pig for this innovative stare decisis test, the Lawrence-Bowers relationship must be regarded as the standard-bearer for future substantive due process analysis.126

Although Justice Scalia tries to delineate the three provisions of the Lawrence stare decisis test as though they are mutually exclusive, the provisions of this multifactor test are interrelated, and as a result, must be read together.127 For example, the Court’s assessment of the detrimental reliance on Bowers takes into account subsequent decisions of the Court.128 The Court looked to two decisions rendered after the 1985 Bowers decision—Romer v. Evans and Planned Parenthood v.

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123 See Janet Koven Levit, Going Public with Transnational Law: The 2002–2003 Supreme Court Term, 39 Tulsa L. Rev. 155, 164 (2003) (arguing that “a majority of justices sent a potent message to foreign constitutional courts that they will engage their foreign colleagues in a court-to-court transnational dialogue and will participate in the evolution of a ‘global jurisprudence.’”).

124 See 539 U.S. at 587 (Scalia, J., dissenting).

125 Id. (Scalia, J., dissenting). The Court’s first prong of the test, “detrimental reliance,” is something of a redundancy in terms. In keeping with the Court’s parlance, this Note uses “detrimental reliance” similarly, to describe the degree to which state courts rely upon a U.S. Supreme Court decision in resolving state constitutional issues. Detrimental reliance, therefore, measures the extent by which the federal precedent served as a guidepost for the state’s decision. For example, scant detrimental reliance would indicate that the state court or state legislature did not rely upon the Supreme Court’s decision in interpreting rights under the state constitution. On the other hand, considerable detrimental reliance would signify that the ruling in question played an important role in the state’s determination. Justice Scalia argues that this new three-prong test “should surprise no one” because the Lawrence analysis of stare decisis “exposed Casey’s extraordinary deference to precedent for the result-oriented expedient that it is.” Id. at 592 (Scalia, J., dissenting).

126 See id. at 572–79; Vitro v. Mihelcic, 806 N.E.2d 632, 641 (III. 2004) (Fitzgerald, J., dissenting) (looking in part to Lawrence for the proposition that “stare decisis is not so static a concept that it binds our hands to do justice when we have made a mistake”).

127 See Lawrence, 539 U.S. at 587–88 (Scalia, J., dissenting).

128 See id. at 570–79.
In *Romer*, the Court struck down a ratified amendment to the Colorado state constitution that would have denied persons of bisexual and homosexual orientation certain privileges, including protection under state anti-discrimination laws. The *Lawrence* Court also cited *Casey*, a decision that affirmed the fundamental right to an abortion, as standing for the proposition that “[p]ersons in a homosexual relationship may seek autonomy . . . just as heterosexual persons do.” According to the Court, the *Casey* and *Romer* opinions advised state governments not to rely on the decision in *Bowers*.

Moreover, the Court held that states placed little reliance on the *Bowers* decision because most states post-*Bowers* had abolished criminal prohibitions on private acts of sodomy. At the time of *Lawrence*, only four states actually enforced prohibitions targeting homosexuals. The Court also measured “societal reliance on *Bowers*” by looking at the “emerging awareness” of a liberty interest that provides “substantial protection to adult persons in deciding how to conduct their private lives.” Departing from *Michael H. v. Gerald D.*, the majority in *Lawrence* looked to the “emerging awareness” of the last twenty-five years as the basis for the historical context of their decision, rather

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130 *Romer*, 517 U.S. at 624. The Court in *Romer* applied a rational basis level of review and rejected the state’s proposed justification because it was “born of animosity toward the class of persons affected.” *Id.* at 634.
131 *Lawrence*, 539 U.S. at 573–74. The majority in *Lawrence* invoked *Casey*’s so-called “sweet-mystery-of-life passage.” *Id.* at 574. Reprinted in *Lawrence*, the passage from *Casey* reads:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

*Id.* (quoting *Casey*, 505 U.S. at 851).
132 See *id.; Romer*, 517 U.S. at 634; *Casey*, 505 U.S. at 851. Justice Kennedy does not explain why state courts should have looked to *Casey*, a case dealing with the right to an abortion and, more nebulously, with the right to autonomy, instead of *Bowers*, a case directly on point with issues similar to those encountered in *Lawrence*. See *Lawrence*, 539 U.S. at 573–74.
133 *Lawrence*, 539 U.S. at 573.
134 *Id.*
135 *Id.* at 572.
136 See *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989) (finding a state law that created the irrebuttable presumption that a woman’s husband is her child’s father did not infringe on the biological father’s substantive due process rights, granted by the Fourteenth Amendment).
than looking to the whole of American history or even the history of western civilization.\textsuperscript{137} This “emerging awareness” began before \textit{Bowers} but intensified in the last seventeen years, particularly on the federal level with the Court’s decisions in \textit{Romer} and \textit{Casey}.\textsuperscript{138} The Court integrated the lack of detrimental reliance placed on \textit{Bowers}, the mounting criticism of the decision, and subsequent decisions eroding the foundation of \textit{Bowers} in order to disregard stare decisis.\textsuperscript{139} As a result, the Court in \textit{Lawrence} boldly announced a revamped stare decisis test that questions longstanding substantive due process decisions.\textsuperscript{140}

\textbf{III. From \textit{Rodriguez} to \textit{Lawrence}: The Non-Fundamental Liberty Interest in a Minimally Adequate Education After \textit{Lawrence}}

In \textit{Lawrence}, the Court masked its level of scrutiny and its finding of a right, appealed to international authority, and disregarded the

\textsuperscript{137} See \textit{Lawrence}, 539 U.S. at 572. Some proponents of the fundamental right to education under the due process clause contend that all of American history, not just the last quarter century, demonstrates the value attached to this right. Bitensky, \textit{supra} note 11, at 592. Professor Bitensky states, “[T]here is a long and pervasive tradition in the United States of protecting children’s access to public elementary and secondary education, a tradition which, therefore, necessarily manifests the exceptional importance which this society attaches to children’s education.” \textit{Id.} Justice Kennedy’s history of legal prohibitions on same-sex intercourse differs with Justice Burger’s history in \textit{Bowers}, perhaps only in Justice Kennedy’s focus on western Europe and the latter half century in America. See \textit{Lawrence}, 539 U.S. at 572–74.

\textsuperscript{138} \textit{Lawrence}, 539 U.S. at 572–73; \textit{Romer}, 517 U.S. at 635 (reasoning that Colorado cannot so deem homosexuals “a class of persons stranger to its laws”); Planned Parenthood \textit{v. Casey}, 505 U.S. 833, 851 (1992); see Richard G. Wilkins, \textit{The Constitutionality of Legal Preferences for Heterosexual Marriage}, 16 REGENT U. L. REV. 121, 124 (2003) (reasoning that the “broader ‘fundamental right’ claim premised on the reasoning of \textit{Casey} fares no better” because not “every personal preference connected with ‘one’s own concept of existence’ . . . can (or should) be recognized as a ‘fundamental right’”).

\textsuperscript{139} \textit{Lawrence}, 539 U.S. at 574–76. The “mounting criticism” component of the \textit{Lawrence} stare decisis test is by far the least developed by the Court. See \textit{id.} As a result, this Note considers it the least influential in future substantive due process analysis. See \textit{id.} Justice Scalia correctly critiques the Court’s specious reasoning, stating:

\textit{Bowers}, the Court says, has been subject to “substantial and continuing [criticism] disapproving of its reasoning in all respects, not just as to its historical assumptions.” Exactly what those nonhistorical criticism are, and whether the Court even agrees with them, are left unsaid . . . . Of course, \textit{Roe} too (and by extension \textit{Casey}) has been (and still is) subject to unrelenting criticism, including criticism from the two commentators cited by the Court today.

\textit{Id.} at 588–89 (Scalia, J., dissenting) (citations omitted).

\textsuperscript{140} See 539 U.S. at 574–76.
stare decisis of a historically and culturally outdated precedent.\textsuperscript{141} These three aspects of the decision represent not simply legal reasoning peculiar to the \textit{Lawrence} decision, but a dramatic shift in the Court’s substantive due process analysis.\textsuperscript{142} Therefore, if schoolchildren confined to grossly underperforming schools raised a Due Process Clause challenge, Justice Kennedy’s reasoning in \textit{Lawrence} suggests that the Court may be receptive to a non-fundamental liberty interest in a minimally adequate education.\textsuperscript{143} By relying on the methodology of \textit{Lawrence}, the Court may revisit \textit{Rodriguez}, modify its outdated holding, and find that children shackled to abysmally achieving schools are constitutionally entitled to a minimally adequate education.\textsuperscript{144}

A. Liberty Interests and Judicial Scrutiny After \textit{Lawrence}: Opening the Door to a Minimally Adequate Education

The lower federal courts have interpreted \textit{Rodriguez} as holding that education is not a fundamental right under the Due Process Clause.\textsuperscript{145} When plaintiffs allege the denial of the fundamental right

\begin{footnotesize}
\begin{enumerate}
\item See discussion infra Part II.
\item See Bucholtz, supra note 122, at 77 (reasoning that \textit{Lawrence} may be a “seminal and watershed” event because of its “path-breaking reliance upon international and foreign legal authority”); Huhn, supra note 10, at 66 (reasoning that the \textit{Lawrence} and \textit{Grutter} decisions “represent a revolutionary shift in the interpretation of the Constitution of the United States”); Ryan, supra note 15, at 5 (arguing that \textit{Lawrence} “may well have implications for constitutional jurisprudence of lasting significance”).
\item See \textit{Lawrence}, 539 U.S. at 573–74; Mark Cenite, \textit{Federalizing Or Eliminating Online Obscenity Laws as an Alternative to Contemporary Community Standards}, 9 COMM. L. & Pol’y 25, 69 (2004) (speculating that the “implications of \textit{Lawrence} could indeed be wide-ranging”); Wilkins, supra note 138, at 137 (arguing that “wherever the road created in \textit{Lawrence} leads,” the Court should be “exceptionally wary with any journey into the landscape of marriage”).
\item See \textit{Lawrence}, 539 U.S. at 573–74; Cenite, supra note 143, at 69.
\item See Galdikas v. Fagan, 342 F.3d 684, 689 (7th Cir. 2003), cert. denied, 540 U.S. 1183 (2004) (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 34 (1973)) (reasoning that former graduate students’ § 1983 action should be dismissed, because alleged conduct was insufficient to support a claim for substantive due process violations); Wagner v. Fort Wayne Comty. Sch., 255 F. Supp. 2d 915 (N.D. Ind. 2003) (dismissing middle school student’s civil rights action against school district because the school district did not violate the student’s substantive due process rights).
\end{enumerate}
\end{footnotesize}
to education, and frame the allegation in precisely those terms, the federal courts summarily dismiss the challenges, relying solely on the Court's decision in *Rodriguez*.

*Lawrence*, however, instructs children attending grossly underachieving schools, as potential plaintiffs, to assert a lesser interest than a "fundamental right to education." By claiming a less sweeping, more limited liberty interest—the non-fundamental liberty interest in a minimally adequate education—the post-*Lawrence* Court may provide some constitutional remedy for the children in America's worst schools.

Two reasons support this claim: first, if there is debate over the existence of a constitutionally fundamental right to a minimally adequate education, then surely a non-fundamental liberty interest in a minimally adequate education—a lesser constitutional interest than a fundamental right—must exist; and second, if this liberty interest is subjected to the same level of scrutiny.

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146 See, e.g., *Galdikas*, 342 F.3d at 689; *Wagner*, 255 F. Supp. 2d at 922; *Johnson*, 233 F. Supp. 2d at 247.

147 See 539 U.S. at 586 (Scalia, J., dissenting).

148 See *id. Rodriguez* likely controls the other avenue for substantive due process violations, the so-called "shocks the conscience" test. See 411 U.S. at 12–13. The "shocks the conscience" test has many detractors. See, e.g., *Sacramento v. Lewis*, 523 U.S. 833, 861 (1998) (Scalia, J., dissenting) (arguing that the test is a "throw back to highly subjective substantive-due-process methodologies"); *Rochin v. California*, 342 U.S. 165, 176 (1952) (Black, J., concurring) (reasoning that the test grants the Court "unlimited power to invalidate laws"). The test remains a viable way of asserting a due process violation, but four principal reasons exist as to why *Rodriguez* would dissuade federal courts from employing the test. *See Rodriguez*, 411 U.S. at 12–13; *Lewis*, 523 U.S. at 846–48. First, the facts of *Rodriguez* discourage finding other school districts "shocking," because the Court in *Rodriguez* was not moved by the gross disparity between the Alamo Heights Independent School and the Edgewood School District. *See Rodriguez*, 411 U.S. at 12–13. Second, courts are reluctant to expand "shocks the conscience" substantive due process "because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)). Third, many consider the standard of "shocks the conscience" to be shaky judicial ground. See *Bishop v. Wood*, 426 U.S. 341, 350 (1976) (arguing that the Due Process Clause is "not a guarantee against incorrect or ill-advised personnel decisions"); Abbott & Robinson, supra note 75, at 476; Eric L. Muller, *Constitutional Conscience*, 83 B.U. L. Rev. 1017, 1040 (2003) (reasoning that the "shocks-the-conscience test stays with us . . . but it hangs by a thread"). Fourth, at least one circuit has not decided whether the "shocks the conscience" standard applies to all substantive due process violations. See *Butler v. Rio Rancho Pub. Schs. Bd. of Educ.*, 341 F.3d 1197, 1201 n.4 (10th Cir. 2003) (holding that student's suspension did not violate Due Process Clause, because the suspension did not "shock the conscience" of the court).

149 See *Lawrence*, 539 U.S. at 586–87 (Scalia, J., dissenting); Bogen, supra note 96, at 388 (arguing that the Court may be "far more active in imagining fundamental rights beyond existing traditions" in future decisions).
as *Lawrence*—a review that looked to international recognition of rights—children in underperforming schools could lay claim to a new constitutional interest.\(^{150}\)

1. From Fundamental Right to Non-Fundamental Liberty Interest

Because the right asserted in *Rodriguez*—the fundamental right to education—sweeps far broader than the non-fundamental liberty interest of a minimally adequate education, analysis of the non-fundamental liberty interest does not begin with *Rodriguez*.\(^{151}\) Instead, *Papasan v. Allain* offers a better starting point, as it considers whether a curtailed fundamental right to a minimally adequate education existed at all.\(^{152}\) To be sure, even alleging an infringement of the unsettled right as done by the plaintiffs in *Papasan* is difficult.\(^{153}\) The plaintiffs in *Robinson v. Kansas* were at least taught how to “read or write” and received “instruction on . . . educational basics,” thus the district court did not explore the scope of the undecided fundamental right to a minimally adequate education.\(^{154}\) Similarly, a Pennsylvania district court found in *Brian B. v. Pennsylvania Department of Education* that a school-aged, incarcerated child is not deprived of his or her fundamental right to a minimally acceptable education, even if the state withholds all forms of education during the incarcerated years.\(^{155}\)

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\(^{150}\) See Calvin Massey, *Federalism and the Rehnquist Court*, 53 Hastings L.J. 431, 463 (2002) (reasoning that judicial scrutiny is often “so gossamer that it is akin to the translucent newly shed skin of the snake: It has the form of the snake but none of its substance”).

\(^{151}\) See, e.g., *Galdikas*, 342 F.3d at 689; *Wagner*, 255 F. Supp. 2d at 915; *Johnson*, 233 F. Supp. 2d at 241. One law professor helps inform what this non-fundamental liberty interest to a minimally adequate education should entail. See Edward B. Foley, *Rodriguez Revisited: Constitutional Theory and School Finance*, 32 Ga. L. Rev. 475, 540–41 (1997–98). Professor Foley views education as a necessary precondition for the creation of “philosopher-citizens.” *Id.* According to Professor Foley, education fails when students leave the system not fully versed in the ethic of good citizenship, not knowledgeable about the political process and not fluent in general policy discourse. *Id.*

\(^{152}\) See 478 U.S. 265, 285 (1986). In *Papasan*, the Court stated that it had “not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review.” *Id.*


\(^{154}\) *Robinson*, 117 F. Supp. 2d at 1148 (quoting *Papasan*, 478 U.S. at 286) (holding that the plaintiffs “failed to allege the facts necessary, under *Papasan*, in order to receive a heightened standard of review under their Equal Protection claim”). The court did not note the fact that the plaintiffs did not learn educational basics, but instead commented that the state had made some attempt to teach them these basics. *Id.*

\(^{155}\) 51 F. Supp. 2d 611, 625–26 (E.D. Pa. 1999), aff’d, 230 F.3d 582 (3d Cir. 2000) (reasoning that the state’s “radical abridgement of classroom hours” did not give rise to a *Papasan* analysis since there was no denial of education).
son are powerful examples of the federal courts’ reluctance to decide the unsettled fundamental right to a minimally adequate education.¹⁵⁶

Though the standard for alleging the denial of the fundamental right to a minimally adequate education may be daunting, at least one federal district court has found the threshold surmountable.¹⁵⁷ In *Donnell C. v. Illinois State Board of Education*, the court found that the plaintiffs successfully pled the deprivation of education rights guaranteed under the Due Process Clause.¹⁵⁸ This contrasts with the other district court dismissals of plaintiffs’ suits in *Robinson* and *Brian B.* ¹⁵⁹ Moreover, *Louisiana ex rel. S.D.* cited *Donnell C.* as standing for the proposition that a “lack of instruction gave rise to claim under substantive due process” and that “juveniles in correctional facilities have a federal constitutional right to an adequate educational program.”¹⁶⁰ There is a practical difficulty with looking to *Donnell C.* and *S.D.* as supporting a right to a minimally adequate education, because few courts have recognized such a right.¹⁶¹ However, the cases are powerful proof that some courts will decide the open question posed by *Papasan* in the affirmative.¹⁶²

If the *Papasan* Court thought enough of education to leave unsettled the right to a minimally adequate education, and if federal courts have sometimes recognized the fundamental right to a minimally adequate education, then it is reasonable to suggest that the Court will confer non-fundamental “liberty interest” status upon a minimally

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¹⁵⁷ *See Donnell C. v. Ill. State Bd. of Educ.*, 829 F. Supp. 1016, 1018 (N.D. Ill. 1993). In *Donnell C.*, among other claims, the plaintiffs alleged that the state did not provide pretrial detainees in need of special educational services with such classes, and that pretrial detainees received instruction in only reading and math. *Id.*

¹⁵⁸ *Id.* (reasoning that “the Court cannot say that no relief could be granted plaintiffs”).

¹⁵⁹ *Robinson*, 117 F. Supp. 2d at 1149–50; *Brian B.*, 51 F. Supp. 2d at 625–26; *Donnell C.*, 829 F. Supp. at 1018. Unfortunately for legal observers, the *Donnell C.* case settled out of court, leaving open the question whether the purported claim would have been successful at trial. *See Saffer,* *supra* note 12, at 1007.


¹⁶¹ *Donnell C.*, 829 F. Supp. at 1018; *S.D.*, 832 So. 2d at 423–35; *see also Galdikas*, 342 F.3d at 689; *Wagner*, 255 F. Supp. 2d at 915; *Johnson*, 233 F. Supp. 2d at 241. Also, the context of *Donnell C.*, a prison detainee dispute, is not entirely analogous to disputes over the quality of a public school education. *See Donnell C.*, 829 F. Supp. at 1018. Moreover, *Donnell C.* recognized a lack of education instruction, not substandard educational results, as the reason for the claim. *See id.*

¹⁶² *See Donnell C.*, 829 F. Supp. at 1018; *S.D.*, 832 So. 2d at 423; *Saffer,* *supra* note 12, at 1009 (arguing that *Donnell C.* “helped define the contours” of a fundamental right to a minimally adequate education “if it were to be recognized”).
adequate education. Considering the sympathetic treatment that education generally receives from the Court, the Court seems poised to recognize the non-fundamental liberty interest in a minimally adequate education.

This liberty interest may seem, on its face, to be an awkward fit in the Court’s largely “privacy”-dominated substantive due process jurisprudence. Lawrence and Casey, however, suggest that autonomy, not privacy concerns, motivate the Court’s recent substantive due process decisions. The Lawrence Court makes plain that the Due Process Clause safeguards interests “central to personal dignity and autonomy” and core to “one’s own concept of existence . . . .” Moreover, the closing words of Lawrence focus on violations of autonomy interests, not simply privacy interests:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific . . . . They knew times can blind us to certain truths and later generations can see that

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165 See Lawrence, 539 U.S. at 574 (reasoning that “[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do”); Helen M. Alvare, Saying Yes Before Saying “I Do”: Premarital Sex and Cohabitation as a Piece of the Divorce Puzzle, 18 Notre Dame J.L. Ethics & Pub. Pol’y 7, 67 n.276 (2004) (reasoning that “the Lawrence Court declared that the constitutional right of privacy protected consensual sexual behavior”); Falco, supra note 84, at 750 (arguing that the “due process right to privacy . . . was brought before the Supreme Court in Lawrence, and it was ultimately successful”); James A. Gardner, State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions, 91 Geo. L.J. 1003, 1042 (2003) (reasoning that Lawrence safeguards “a personal right of private sexual autonomy”).
When schools fail to provide a minimally adequate education, the children lose the opportunity to be autonomous “in a way unlikely ever to be undone.”

Such a loss of autonomy is indeed the loss of “an important constitutional value.” Even if the non-fundamental liberty interest in a minimally adequate education is a non-privacy application of substantive due process, the failure of such claims is not necessarily assured. The liberty interest asserted in this Note targets only grossly underperforming schools, and therefore, only seeks a judicial remedy for a narrowly defined subset of schools. The more perplexing issue is whether this liberty interest would survive Lawrence’s brand of scrutiny.

2. Application of Lawrence’s Global Brand of Scrutiny

Lawrence portends a “careful scrutiny” of certain socially valuable, albeit non-fundamental, liberty interests by taking into account international authority. Under this global brand of scrutiny, the Court may recognize a non-fundamental liberty interest in a minimally adequate education against the State’s interest. The State’s interest is assuredly the preservation of “local control” over the financing of

\[\text{\textsuperscript{168}} \text{ See Lawrence, 539 U.S. at 578–79; see also Hon. Diarmuid O'Scannlain, Rediscovering the Common Law, 79 Notre Dame L. Rev. 755, 761 n.17, (2004) (reasoning that Lawrence stands for the substantive due process right to sexual autonomy); Bogen, supra note 96, at 335 n.4 (arguing that Lawrence creates a “fundamental right to autonomy in intimate choices”).}

\[\text{\textsuperscript{169}} \text{ See Brown, 347 U.S. at 494.}

\[\text{\textsuperscript{170}} \text{ See Michael Heise, Equal Educational Opportunity and Constitutional Theory: Preliminary Thoughts on the Role of School Choice and the Autonomy Principle, 14 J.L. & Pol. 411, 452 (1998) (reasoning that autonomy “remains an important value to consider in determining the nature, shape, and contour of normative constructions of our constitutional doctrine”).}

\[\text{\textsuperscript{171}} \text{ See Michael J. Phillips, The Nonprivacy Applications of Substantive Due Process, 21 Rutgers L.J. 537, 598 (1990) (arguing that “substantive due process’s non-privacy applications are less likely to offend majoritarian values . . . [because] many of them involve institutions—e.g., prisons, public schools and universities, mental institutions, public employers—that are only indirectly subject to majority control in the first place”).}

\[\text{\textsuperscript{172}} \text{ See Civil Liberties for Urban Believers v. City of Chi., 342 F.3d 752, 769 (7th Cir. 2003) (Posner, J., dissenting) (reasoning that “discrimination against sensitive uses is to be given more careful, realistic, skeptical scrutiny by the courts than discrimination against purely commercial activities”).}

\[\text{\textsuperscript{173}} \text{ See Lawrence, 539 U.S. 577–79; Plyler v. Doe, 457 U.S. 202, 244 (1982); Brown, 347 U.S. at 493.}
education, similar to the justification asserted in Rodriguez.\(^{174}\) “Local control” may appear off-limits, but many thought the same of “morals based” legislation.\(^{175}\) The Court in Lawrence was apparently not persuaded by either the implications of declaring morality an illegitimate interest\(^{176}\) or the ramifications of the decision on principles of federalism.\(^{177}\) The Court in Lawrence, however, was moved by the international recognition of the liberty interest.\(^{178}\)

With this dramatic step, the Court opened the door to a hitherto unavailable argument for reconsidering Rodriguez, namely that the courts and governments of western countries overwhelmingly support a right to a minimally adequate education, if not a right to education in and of itself.\(^{179}\) The Court in Lawrence cast aside the most obvious problem that comes from importing authority from foreign jurisdic-

\(^{174}\) See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 54 (1973) (reasoning that “local taxation for local expenditures” is a sufficiently legitimate state interest); City of Pawtucket v. Sundlun, 662 A.2d. 40, 62 (R.I. 1995) (reasoning that “the preservation of local control [over education] is a legitimate state interest and that the current financing system is rationally related to that legitimate interest”).

\(^{175}\) See Lawrence, 539 U.S. at 577–78 (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)). Further, Justice Stevens’s dissent argued that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice . . . .” 478 U.S. at 216 (Stevens, J., dissenting); see Ryan, supra note 15, at 7–8 (arguing that Justice Kennedy makes a “historically odd claim” in Lawrence that “the state has no legitimate interest in barring conduct because it is deemed to be deviant or immoral”).

\(^{176}\) See Lawrence, 539 U.S. at 586 (Scalia, J., dissenting) (arguing that the breadth of this holding could signal the end to all morals-based legislation); Cenite, supra note 143, at 25 (suggesting that Lawrence points “toward elimination of obscenity law entirely”).

\(^{177}\) See Rodriguez, 411 U.S. at 54; Rizzo v. Goode, 423 U.S. 362, 380 (1976) (stating that “principles of federalism . . . play such an important part in governing the relationship between federal courts and state governments”).

\(^{178}\) Lawrence, 539 U.S. at 576–77. There is an overlap between American due process jurisprudence and European codified rights. See, e.g., Costello-Roberts v. United Kingdom, 247 Eur. Ct. H.R. (ser. A) 47 (1993). In Costello-Roberts, the European Court of Human Rights decided that a seven-year-old who received corporal punishment could not claim a violation of article 3 (right against inhuman and degrading treatment), article 8 (right of privacy), or article 13 (right to effective remedy) of the European Convention. Id. at 54-57; see also Goss v. Lopez, 419 U.S. 565, 574 (1975). The European Court in Costello-Roberts looked to the fact that “the English courts would have been in a position to grant him appropriate relief.” 247 Eur. Ct. H.R. (ser. A) at 57. Reaching the same result, the U.S. Supreme Court in Goss also relied in large part on the fact that the student had a remedy in state civil court. See 419 U.S. at 574.

\(^{179}\) See Charter of Fundamental Rights, supra note 21, art. 14, at 11. One European nation with a separate constitutional right to education is Greece. Greece Const. art. 16, § 2. The provision in the Greek Constitution reads, “[e]ducation constitutes a basic mission for the State and shall aim at the moral, intellectual, professional and physical training of Greeks, the development of national and religious consciousness, and at their formation as free and responsible citizens.” Id.
tions into the analysis of American constitutional rights, namely that this law is simply different. Nonetheless, the Court departed from prior substantive due process jurisprudence, suggesting that international authority helps establish a constitutional liberty interest.

Belgian Linguistics, decided by the European Court of Human Rights thirteen years before Rodriguez, demonstrates important international authority supporting the right to a minimally adequate education. For the French-speaking parents living in Belgium, Belgian Linguistics struck down Belgium legislation that refused public funding to any French language school in a Flemish dominant-language region. The European Court of Human Rights stated that the right to education "would be meaningless if it did not imply, in favour of its beneficiaries, the right to be educated in the national language or in one of the national languages, as the case may be." Not only has the EU codified a fundamental right to education, but its governing

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180 For instance, the courts of South Africa and the European Union require considerably greater socioeconomic rights than does the Supreme Court. See Mark S. Kende, The South African Constitutional Court’s Embrace of Socioeconomic Rights: A Comparative Perspective, 6 Chap. L. Rev. 137, 160 (2003) (contending that the "Supreme Court and American scholars could learn much from the South African Constitutional Court’s socio-economic decisions"); W. Kent Davis, Answering Justice Ginsburg’s Charge That the Constitution Is ‘Skimpy’ in Comparison to our International Neighbors: A Comparison of Fundamental Rights in America and Foreign Law, 39 S. Tex L. Rev. 951, 990 (1998). Davis responds to a speech by Justice Ginsburg that characterized the U.S. Constitution as “skimpy” on human rights, whereas foreign jurisdictions offer more expansive fundamental rights. Id. at 951. Davis believes that turning to international law to resolve American fundamental rights could be a disastrous enterprise in that fundamental rights “vary because of vast differences in socioeconomic, historical and cultural backgrounds among the world’s nations.” Id. at 990.

181 See Lawrence, 539 U.S. at 572-73, 576-77; Leo, supra note 113. For an interesting analysis of the many international treaties affirming the right to education that are signed by the United States, see Bitensky, supra note 11, at 318.


184 Id.; see Kjeldsen, Buck Madsen, & Pederson v. Denmark (Pederson), 23 Eur. Ct. H.R. (ser. A) 3, 20 (1976), (reasoning that governments must provide “a right of access to educational institutions existing at a given time”).

185 See Charter of Fundamental Rights, supra note 21, art 14, at 11.
courts attach certain minimal obligations for governments to meet to preserve this right.186

Furthermore, the EU Charter clearly establishes the right of all persons, regardless of age, to education—a right far broader than a mere liberty interest in a minimally adequate level of education.187 The current right to education for the European Union reads:

Everyone has the right to education and to have access to vocational and continuing training. This right includes the possibility to receive free compulsory education. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.188

Belgian Linguistics and the EU Charter, therefore, have created a “positive right,” an unsettling proposition for those who hold the U.S. Constitution to be a “charter of negative rather than positive liberties.”189

The European Court’s decision in Belgian Linguistics, however, establishes a middle ground between Rodriguez and the recognition of a positive right to education.190

In deciding that certain governmental obligations attach to education, both the European Court of Human Rights and the EU Charter recognize a liberty interest in a minimally adequate education.191

As one commentator writes, the right to education found in international jurisdictions has evolved “progressively, in stages.”192

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186 See Belgian Linguistics, 6 Eur. Ct. H.R. (ser. A) at 25, 66; Dove v. Scottish Ministers, 2002 Sess. Cas. 257 (Scot. Extra Div.). In Dove, a Scottish court concluded that the EU’s right to education should not extend to the management of the school, but only to the effectiveness of the instruction. 2002 Sess. Cas. at 265. The Court noted that “art 2 relates to the content of the education provided, rather than administrative arrangements for its provision.” Id. at 266.

187 See Charter of Fundamental Rights, supra note 21, art. 14, at 11.

188 Id.

189 See DeShaney v. Winnebago County, 489 U.S. 189, 196 (1989) (reasoning that the Due Process Clauses confers “no affirmative right to government aid, even when such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual”); Jackson v. Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983).

190 See Belgian Linguistics, 6 Eur. Ct. H.R. (ser. A) at 25, 66 (reasoning that a student must be taught in the national language of the country in which the school is located).


192 Bitensky, supra note 11, at 617.
gars of our educational system—those who attend grossly underperforming schools in America—cannot be choosers. The Supreme Court’s first step must be the step the European Court took in *Belgian Linguistics*—to establish a baseline level of education.\(^{193}\) Under *Lawrence*’s global brand of scrutiny, therefore, the Court should recognize the non-fundamental liberty interest in a minimally adequate education by relying upon the international authority of the EU Charter and cases like *Belgian Linguistics*.\(^{194}\)

**B. When Precedent Doesn’t Bind: Applying *Lawrence*’s Stare Decisis Test to *Rodriguez***

Under the final remarkable aspect of *Lawrence*, the Court’s new stare decisis test, the *Rodriguez* decision does not bind the Supreme Court in deciding the constitutionality of a liberty interest in a minimally adequate education.\(^{195}\) To be sure, the stare decisis test poses the same logistical risk faced by all multifactor balancing tests—namely, which factors weigh the most.\(^{196}\) However, the two principal factors in *Lawrence*’s stare decisis test—the impact of subsequent Supreme Court decisions and the degree that states have detrimentally relied on the decision—demonstrate that stare decisis privileges should not apply to *Rodriguez*.\(^{197}\)

Two decisions post-dating *Rodriguez* militate against employing stare decisis in our analysis of the liberty interest in a minimally ade-

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\(^{193}\) See 6 Eur. Ct. H.R. (ser. A) at 66. Bitensky, *supra* note 11, at 622 (reasoning that the positive right to education “as an international human rights norm has the potential to breathe a more complete and rational meaning into the language of these constitutional provisions”).


\(^{195}\) See *Lawrence*, 539 U.S. at 573–78.

\(^{196}\) See *id.* The Court referred to a third factor—the “substantial and mounting criticism”—in its analysis, but only used this reasoning to buttress its other claims. *Id.* This Note considers the other two factors to be more efficacious, but there has been “substantial” criticism of the *Rodriguez* decision. See generally Bitensky, *supra* note 11; Foley, *supra* note 151.

quate education. 198 Both Papasan and Plyler resulted in “serious erosion” of Rodriguez’s broad holding that no fundamental right to education exists in the Constitution. 199 Papasan considered “unsettled” the narrower right to a minimally adequate education. 200 After Papasan, it is reasonable to suggest that the net of Rodriguez does not cast as widely as once thought. 201 Therefore, a more limited right to education, such as the liberty interest in a minimally adequate education, warrants discussion rather than blind deference to precedent. 202 Seemingly, Rodriguez also would have been dispositive of the issue in Plyler, the right to education for undocumented schoolchildren. 203 Instead, the Court again embraced a more relaxed view of Rodriguez. 204 Plyler, like Papasan, demonstrates that the Rodriguez holding is weakest at its margins. 205 Similar to the way that Casey and Romer eroded Bowers, Papasan and Plyler have eroded Rodriguez. 206 The subsequent decisions of the Court, therefore, certainly do not foreclose a challenge that asserts the liberty interest in a minimally adequate education, a curtailed right to education at the margins of Rodriguez. 207


199 See Lawrence, 539 U.S. at 576; Papasan, 478 U.S. at 285; Plyler, 457 U.S. at 223 (noting the “stigma of illiteracy” would mark the plaintiffs “for the rest of their lives” if the law was not changed).

200 478 U.S. at 285.

201 Id.

202 See id.

203 See Plyler, 457 U.S. at 221 (noting the “importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child”).

204 Id. at 221–23; see Eric P. Christofferson, Note, Rodriguez Reexamined: The Misnomer of “Local Control” and a Constitutional Case for Equitable Public School Funding, 90 Geo. L.J. 2553, 2575 (2002) (arguing that the importance of education in Plyler demonstrates how “Rodriguez did not foreclose heightened scrutiny in education cases”).

205 Plyler, 457 U.S. at 221 (noting that “education has a fundamental role in maintaining the fabric of our society”); see Roni R. Reed, Note, Education and the State Constitutions: Alternatives for Suspended and Expelled Students, 81 Cornell L. Rev. 582, 591 n.74 (1996) (reasoning that Plyler “enunciated the importance of education and rested not only on the strength of the education right, but also on the consequences of the denial of education to the children affected”).

206 See Plyler, 457 U.S. at 221; Papasan, 478 U.S. at 285.

207 See Lawrence, 539 U.S. at 573–78; Michael Heise, State Constitutions, School Finance Litigation, and the “Third Wave”: From Equity to Adequacy, 68 Temp. L. Rev. 1151, 1156–57 (1995) (reasoning that “whether the U.S. Constitution ensures a minimal amount of educational services remains the subject of continued debate,” and that Plyler “fuels this debate”).
Perhaps Justice Kennedy’s strongest argument for abandoning *Bowers*, and stare decisis in the process, was that state governments had not relied to their detriment upon the seventeen-year-old decision.\(^{208}\) Justice Kennedy implies that only thirteen state court systems detrimentally relied on *Bowers* in deciding the merits of state law challenges to anti-sodomy laws.\(^{209}\) In the context of a liberty interest in a minimally adequate education challenge, therefore, *Lawrence* calls for a determination of the degree to which states detrimentally relied on *Rodriguez*.\(^{210}\)

Strong, pervasive reliance on *Rodriguez* by state courts would militate against overturning this precedent, whereas scant reliance on *Rodriguez* enables the Court to modify the precedent of *Rodriguez* and recognize the liberty interest in a minimally adequate education.\(^{211}\)

A survey of state court decisions indicates no significant detrimental reliance on *Rodriguez*, and therefore, that no stare decisis privileges should apply.\(^{212}\) State courts typically turn to *Rodriguez* when

\(^{208}\) See *Lawrence*, 539 U.S. at 573–78.

\(^{209}\) Id. at 577 (reasoning that “there has been no individual or societal reliance on *Bowers* of the sort that could counsel against overturning its holding once there are compelling reasons to do so”); cf. Bill Swinford, *Shedding the Doctrinal Security Blanket: How State Supreme Courts Interpret Their State Constitutions in the Shadow of Rodriguez*, 67 Temp. L. Rev. 981, 992 n.61 (1995) (noting that “[i]n every case brought before a state supreme court after *Rodriguez* that involved education finance, the state court found *Rodriguez* to be controlling in claims under the Fourteenth Amendment”).

\(^{210}\) See *Lawrence*, 539 U.S. at 573–78. One commentator recently also noted how “state courts have the ability to influence indirectly the content of nationally guaranteed liberties through their rulings under cognate provisions of state constitutions.” Gardner, *supra* note 165, at 1042.

there are challenges to state systems for the funding of public education based on state constitutional provisions.\textsuperscript{213} For example, the California Supreme Court grappled with the \textit{Rodriguez} decision and ultimately rejected its reasoning in the post-\textit{Rodriguez} ruling on school finance, the \textit{Serrano v. Priest (Serrano II)} decision.\textsuperscript{214} The court noted, "We do not think it open to doubt that the \textit{Rodriguez} majority had

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\textsuperscript{213} See, e.g., \textit{Serrano II}, 557 P.2d at 929. Rodri
guez did not close the door on challenges to state funding systems. See id. The progenitor of this type of challenge was \textit{Serrano I}, in which, prior to \textit{Rodriguez}, the California Supreme Court found that the state’s funding of education disproportionately affected those students living in low-tax generating school districts. See \textit{Serrano I}, 487 P.2d at 1241.

States sometimes turn to \textit{Rodriguez} when there are alleged violations of state fundamental rights and find \textit{Rodriguez} to be instructive in deciding whether a certain right is "fundamental." See, e.g., Hammond v. Comm’r of Corr., 792 A.2d 774, 791 (Conn. 2002) (holding that credit for pre-sentence incarceration is not a fundamental right, and citing \textit{Rodriguez} for the principle that "'[i]t is not the province of [the courts] to create substantive constitutional rights in the name of guaranteeing equal protection of the laws’"); Doe v. Superintendent of Schs., 653 N.E.2d 1088, 1097-98 (Mass. 1995). The state courts observe \textit{Rodriguez} as an example of judicial restraint in the area of fundamental rights, but do not find the restraint exercised in \textit{Rodriguez} as the motivating reason for not recognizing fundamental rights in state law. See, e.g., Webster v. Ryan, 729 N.Y.S.2d 515, 433 n.15 (Fam. Ct. 2001) (holding that a child had a fundamental right to maintain contact with person who held a parent-like relationship with the child and citing \textit{Rodriguez} for the principle that "some things that most people would probably consider as a constitutional (or fundamental) right are not so at all”).

\textsuperscript{214} 557 P.2d at 951.
considerable difficulty accommodating its new approach to certain prior decisions, especially in the area of fundamental rights.\footnote{Id.}

Admittedly, \textit{Serrano II} is the exception to these state funding cases in its express rejection of the \textit{Rodriguez} methodology.\footnote{Id. Yet state supreme courts have at most seen \textit{Rodriguez} as mildly persuasive in deciding whether a state funding scheme violates the respective state constitution.\footnote{See Matanuska-Susitna Borough Sch. Dist., 931 P.2d at 402 (reasoning that although the Alaska Constitution “is stricter in its protection of individual rights than its federal counterpart,” the plaintiffs failed to show that they had been disparately affected, unlike the “plaintiffs in . . . \textit{Rodriguez} did”); \textit{Lujan}, 649 P.2d at 1016–17 (disagreeing with the \textit{Rodriguez} fundamental rights test, but agreeing with the decision’s approach to the right to education as a prerequisite to the right to vote); \textit{Horton I}, 376 A.2d at 371 (reasoning that significant factual similarities with \textit{Rodriguez} and referring to the decision as persuasive authority “very relevant”); \textit{McDaniel}, 285 S.E.2d at 167 (deeming \textit{Rodriguez} to be an “important” case that provides “guidance to the states”); \textit{Thompson}, 537 P.2d at 646 (agreeing with \textit{Rodriguez’s} cautionary language that if state funding systems are to fall, then other services such as police or fire protection “might be subjected to the same fate”); \textit{Chañ}, 376 S.E.2d at 117–18 (reasoning that individual districts could utilize excess levies for education without running afoul of the state equal protection clause and citing \textit{Rodriguez’s} rational basis review as persuasive).}

\textit{Northshore School District No. 417} v. \textit{Kinnear}, the case that relies most heavily on \textit{Rodriguez}, however, is suspect after \textit{Seattle School District No. 1 of King County v. State}.\footnote{See \textit{Seattle School District No. 1}, 585 P.2d 71, 76–77 (Wash. 1978); \textit{Northshore Sch. Dist. No. 417}, 530 P.2d at 200.} In \textit{Seattle School District No. 1}, the Washington Supreme Court did not consider \textit{Rodriguez} to be a “leading” or “controlling” case as it...
had in Northshore School District No. 417. Instead, Seattle School District No. 1 implicitly rejected Rodriguez, finding that “there can be compliance with the State’s [constitutional] duty only if there are sufficient funds derived through dependable and regular tax sources to permit school districts to carry out a basic program of education.”

If decisions such as Northshore School District No. 417 represent a high-water mark for state courts’ reliance on Rodriguez, that mark has never been surpassed. The remaining decisions regarding state funding systems can be loosely categorized, with each category marked by less and less reliance placed on Rodriguez. The first grouping consists of decisions that find Rodriguez informative, yet unpersuasive in determining the constitutionality of state funding schemes. These decisions typically acknowledge the legal reasoning in Rodriguez, such as Justice Powell’s level of scrutiny, but ultimately disregard this aspect. A second tier observes the federal approach to the fundamental right to education, but rejects the Rodriguez approach as inapplicable to the analysis of state constitutions. In this category, the

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220 See Seattle Sch. Dist. No. 1, 585 P.2d at 75-76; Northshore Sch. Dist. No. 417, 530 P.2d at 200-01.


222 See infra notes 221–225 and accompanying text.

223 See Alabama Coalition for Equity, Inc., 1993 WL 204083, at *57 (reasoning that “Rodriguez does not control” because “the question is instead, the nature of the right to education under the constitution of Alabama” and that the present system of public schools in Alabama violates the state constitution); Lake View Sch. Dist. No. 25, 91 S.W.3d at 499 (following the rational basis level of review of Rodriguez but ultimately finding that the current public school funding system violated the state constitution); Claremont II, 703 A.2d at 1358–59 (noting the Rodriguez approach to fundamental rights, but finding a “[s]tate funded constitutionally adequate education is a fundamental right” under the state constitution); Fair Sch. Fin. Council of Okla., Inc., 746 P.2d at 1149 (rejecting the Rodriguez fundamental rights tests as “inappropriate,” but finding that equal expenditures per pupil was not guaranteed by express terms of the state constitution); Edgewood III, 826 S.W.2d at 494 (citing Rodriguez for the principle that education plays a vital role in society, but ultimately finding that state funding scheme based on ad valorem tax violated state constitution); Vincent v. Voight, 614 N.W.2d 388, 414 (Wis. 2000) (noting Rodriguez in that there is no fundamental right to education under the Constitution and finding that existing state financing scheme did not violate state constitution); Kukor v. Grover, 436 N.W.2d 568, 579 (Wis. 1989) (upholding state financing scheme as “consistent with principles articulated by the United States Supreme Court in Rodriguez”).

224 See, e.g. Edgewood III, 826 S.W.2d at 494.

225 See Serrano II, 557 P.2d at 951 (reasoning that state funding of education in violation of state constitution and sharing the curiosity of Justice Marshall’s dissent in Rodriguez); Pauley, 255 S.E.2d at 864 (reasoning that examination of Rodriguez reveals “an embarrassing abundance of authority . . . by which the majority might have decided that education is a fundamental right of every American”).
particular state court cuts its own fundamental rights path without regard to the federal approach.\textsuperscript{226} Third, there are decisions in which the state court merely observes the federal approach in \textit{Rodriguez} without comment, thereby implying very little reliance on \textit{Rodriguez}.\textsuperscript{227} Similarly and lastly, some state courts ignore \textit{Rodriguez} completely.\textsuperscript{228}

\textsuperscript{226} See Serrano II, 557 P.2d at 951; Pauley, 255 S.E.2d at 864.
\textsuperscript{227} See Roosevelt Elementary, 877 P.2d at 814 (noting that \textit{Rodriguez} stands for only the principle that the U.S. Constitution does not recognize a right to education, but that the Arizona Constitution does); Green II, 212 N.W.2d at 714 (noting that \textit{Rodriguez} does not foreclose state constitutional challenges and finding that state funding does not violate state constitution); Skeen, 505 N.W.2d at 313 (reasoning that interpretation of state constitution is not limited to those rights the Supreme Court deems fundamental); \textit{Abbot I}, 495 A.2d at 389 (holding that the Commissioner of Education should first consider the merits of the plaintiffs’ allegation, but dismiss the wealth-based classification in light of \textit{Rodriguez}); \textit{Bismarck Pub. Sch. Dist. No. 1}, 511 N.W.2d at 255 (limiting \textit{Rodriguez} to federal challenges and recognizing that the “state constitution may afford broader rights than those granted under the equivalent provision of the federal constitution”); \textit{City of Pawtucket}, 662 A.2d at 49 (citing \textit{Rodriguez} for the proposition that the delegates at the 1986 state constitutional convention were cognizant of the fundamental right to education, but ultimately such a right was rejected); \textit{Tenn. Small Sch. Sys.}, 851 S.W.2d at 152 (citing \textit{Rodriguez} for the principle that “local control” is a sufficient reason for a disparate state spending scheme); \textit{Brigham}, 692 A.2d at 391 (citing \textit{Rodriguez}, but limiting the decision’s importance to the U.S. Constitution to when there is a “virtual absence” of an education clause); \textit{Buse}, 247 N.W.2d at 147 (striking down a redistribution of property tax revenues to poor school districts and observing that \textit{Rodriguez} is not controlling since the state constitution has an education clause); \textit{Washakie County Sch. Dist. No. One}, 606 P.2d at 319 (reasoning that the state financing system violated state constitution, but noting the decision in \textit{Rodriguez}).

\textsuperscript{228} See \textit{Coalition for Adequacy & Fairness in Sch. Funding, Inc.}, 680 So. 2d at 408 (reasoning that the state system did not violate state constitution because plaintiff failed to define “adequacy” as a judicially cognizant term); \textit{Council for Better Educ., Inc.}, 790 S.W.2d 186 (Ky. 1989) (holding that state’s common school system violated state constitution); \textit{Charlet}, 713 So. 2d at 1199 (reasoning that state’s scheme of funding public schools did not violate state constitution); \textit{McDuffy}, 615 N.E.2d at 516 (holding that the state constitution obligated the Commonwealth to provide an adequate education); \textit{CEE II}, 967 S.W.2d at 62 (reasoning that educational funding system did not violate state constitution); \textit{Helena Elementary Sch. Dist. No. 1}, 769 P.2d at 684 (reasoning that public school funding violated state constitutional guarantee of equal educational opportunity); \textit{Gould}, 506 N.W.2d at 349 (dismissing challenge to statutory funding scheme because of procedural error); \textit{Campaign for Fiscal Equity, Inc.}, 655 N.E.2d at 661 (reasoning that challenge to state funding scheme constituted a viable cause of action); \textit{DeRolph}, 677 N.E.2d at 733 (reasoning that public funding violates constitutional provision of a thorough and efficient system of common schools throughout the state); \textit{Danson}, 399 A.2d at 360 (reasoning that school funding scheme did not violate provisions of the state constitution); \textit{Abbeville County Sch. Dist.}, 515 S.E.2d at 535 (reasoning that school funding scheme challenge was not a cognizable equal protection claim); \textit{Richland County}, 364 S.E.2d at 470 (reasoning that school funding scheme did not violate state constitution by taking into account individual wealth of each school district); \textit{Edgewood IV}, 917 S.W.2d at 717 (reasoning that public school financing system did not violate state constitution); \textit{Edgewood I}, 777 S.W.2d at 391 (holding that local district financing showing a 700 to 1 ratio between districts violated state constitution); \textit{Scott}, 445 S.E.2d at 138 (reasoning that state constitution did not mandate “substantial
This absence suggests that the outmoded approach of the federal government matters little, if at all, to the states.

In sum, these decisions support the conclusion that there has been scant detrimental reliance specifically placed upon the Court’s 1973 decision in Rodriguez. As a result, the Lawrence stare decisis test, as applied to Rodriguez, suggests that the Court need not be bound to Rodriguez when evaluating the liberty interest in a minimally adequate education. With Rodriguez not foreclosing less sweeping educational rights, the Court may be more willing to recognize a liberty interest in a minimally adequate education.

Conclusion

For the last thirty years, San Antonio v. Rodriguez has stood as the white elephant in the debate over the fundamental right to minimally adequate education; Rodriguez gloomily forecasted that the Due Process Clause did not protect this right. Lawrence v. Texas, however, suggests that only a mere shadow of the elephant still remains. If the Supreme Court follows Lawrence’s global brand of scrutiny and its reconfigured stare decisis test, the Court could recognize a non-fundamental liberty interest in a minimally adequate education, and in the process, modify the rigid holding of Rodriguez. To be sure, this liberty interest would not be a panacea for schools such as C.O. Greenfield Middle School, but it would raise awareness, and more importantly, provide some tangible remedy for America’s forgotten schools.

equality” of funding between districts); Seattle Sch. Dist. No. 1, 585 P.2d at 77 (reasoning that “there can be compliance with the State’s [constitutional] duty only if there are sufficient funds derived through dependable and regular tax sources to permit school districts to carry out a basic program of education”); Lincoln County Sch. Dist. No. One, 985 P.2d at 964 (upholding transition limits placed on wealthy school districts as rationally related under equal protection clause of state constitution); Campbell County Sch. Dist., 907 P.2d at 1238 (reasoning that state funding scheme violated state constitution because distribution formula resulted in disparity).

229 See Swinford, supra note 210, at 1001 (noting how “most courts also distanced themselves . . . from the United States Supreme Court’s specific application of the test in the context of claims against state systems of education finance”).
MAJOR LEAGUE PROBLEMS: BASEBALL’S BROKEN SYSTEM OF CUBAN DEFECTION

Matthew J. Frankel*

Abstract: Since the 1991 defection of Cuban pitching star Rene Arocha, dozens of Cuban baseball players have defected in order to play professionally in the United States. The system of Cuban defection poses considerable humanitarian risks for defecting players and their families, including physical danger, family dissolution, and an entangling web of immigration and repatriation laws. Despite these dangers, Cuban ballplayers—boxed in by a complex combination of historical, political, and legal forces outside of their control—have no choice but to defect if they wish to play professionally in America. This Note argues that the prevailing system of Cuban defection clearly violates important humanitarian concerns and should be abandoned. It concludes, however, that defection by Cuban baseball players will likely continue until the fall of the Castro regime and end of the U.S. embargo of Cuba.

INTRODUCTION

The defections began on July 10, 1991, when Cuban pitching star Rene Arocha simply had to “find an exit sign” at Miami International Airport.1 Arocha made his daring, if unspectacular, escape during a layover after having played for the Cuban national team in an exhibition tournament in Tennessee.2 That day, Cuba’s third-best pitcher cast off more than just his teammates; he left behind his family, his homeland, and over 125 years of Cuban baseball history.3 Arocha had

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* Note Editor, Boston College Third World Law Journal (2004–2005). I’d like to offer my sincere thanks to the Journal staff for their invaluable editorial support; to the Boston Red Sox for an unforgettable 2004 season; to Red Sox Director of Player Development Ben Cherington for taking the time out of a busy spring training schedule to speak to me; and to Kate and the rest of my family for their unconditional love, patience, and support. I dedicate this paper to my father, Arthur Frankel, a lifelong baseball player and fan who not only prodded me toward this topic, but offered great advice along the way.


2 See Wulf, supra note 1, at 60.

3 See Robb, supra note 1.
become the first Cuban to defect from his country to play baseball in America.\textsuperscript{4}

By defecting, Arocha single-handedly ended Castro’s monopoly on Cuban baseball talent and catalyzed a revolution on both sides of the Straits of Florida.\textsuperscript{5} In Cuba, young players, disgruntled by economic malaise and lured by the promise of American professional baseball, began to view defection as a viable option.\textsuperscript{6} The Cuban government, humiliated over Arocha’s defection, denounced the pitcher for committing “high treason against the revolution.”\textsuperscript{7} But the Cuban populace, especially aspiring baseball players, followed his career in the United States.\textsuperscript{8} After Arocha signed a contract with the St. Louis Cardinals of Major League Baseball (MLB)—and neither he nor his family were threatened with retribution—a wave of defection among Cuban ballplayers began that continues to this day.\textsuperscript{9}

In America, the Arocha defection and those that followed forced MLB to develop, on the fly, a series of imperfect policies to govern the recruitment and signing of Cuban players.\textsuperscript{10} The defections also complicated the U.S. government’s policies regarding enforcement of the Cuban embargo, domestic immigration law, and repatriation treaties.\textsuperscript{11} MLB’s ad hoc approach and the longstanding policies of the United States have fostered a broken system that encourages Cuban players to abandon their families, risk life and limb, place themselves at the mercy of self-interested agents, and circumvent or even break immigration laws to play in America.\textsuperscript{12}

\textsuperscript{4} Kevin Baxter & Fernando Dominguez, Baseball Si, Cuba No, SPORTING NEWS, Mar. 21, 1994, at 12.
\textsuperscript{5} See id.
\textsuperscript{6} See id.; Barry Horn, Cubans Travel Long Road to Join Rangers, DAILY OKLAHOMAN, July 11, 1993, at 7.
\textsuperscript{7} See Kevin Baxter & Fernando Dominguez, supra note 4.
\textsuperscript{8} See Milton H. Jamail, FULL COUNT: INSIDE CUBAN BASEBALL 77 (2000).
\textsuperscript{9} See id. at 76–101. Cuban sports journalist Gilberto Dihigo noted that after Arocha’s defection, “[e]mpieza el cosquilleo de ‘yo puedo’” [then the ‘I can do it too’ attitude began]. Id. at 77. Dihigo maintained that most defecting players were driven by a desire to compete at the highest level, rather than a desire to make a political statement. Id.
\textsuperscript{11} See Cwiertny, supra note 10, at 391–411, 417–21.
\textsuperscript{12} See Kevin Baxter, Throwing Cuban Players a Lifeline: Agent Joe Cubas Has Turned Paupers in Princes—But Not Without Raising a Sea of Disturbing Questions, SPORTING NEWS, Aug. 10,
There can be no doubt that the policies of the Castro regime are primarily responsible for the current dilemma. But there can also be no doubt that MLB rules and American foreign policy exacerbate an extremely complicated problem.

Perhaps the complexity of the issue is the reason that out of dozens of scholarly articles dealing with MLB’s relationship with Latin American countries, only four effectively tackle the intersection of

13 See Jamail, supra note 8, at 7 (noting that the “two main problems facing Cuban baseball are, ironically, Cuba’s abundance of players with little possibility of advancement and the unwillingness of the Cuban government to provide the necessary economic stimulus for players to remain in the country”). Cuba’s current economic crisis began in the early 1990s when the collapse of the Soviet Union portended the end of large amounts of economic aid from the communist superpower. See, e.g., Steve Fainaru & Ray Sánchez, The Duke of Havana: Baseball, Cuba, and the Search for the American Dream 42–44 (2001); Marifeli Pérez-Stable, The Cuban Revolution: Origins, Course, and Legacy 174–201 (1999). Castro’s regime, though adept at sports development, has failed to ameliorate the dire economic conditions or find another significant source of foreign aid. See, e.g., What Follows Fidel?, ECONOMIST, Jan. 2, 1999, at 31 (“The [Cuban] economy is in a mess. Corruption is rife. Prostitution is rampant. . . . [C]rime is rising. The country’s infrastructure is crumbling.”); Steve Wulf, Running on Empty, SPORTS ILLUSTRATED, July 29, 1991, at 60, 60, 64 (“Cubans lack for certain things—foodstuffs, fuel, foreign friends—but pride is not one of them. . . . The fact that the government has chosen sports as its vehicle for survival is not surprising, given Cuba’s rich athletic tradition.”). The Cuban government legalized the circulation of U.S. dollars in 1993 to halt the economic free fall, which allowed those who could obtain dollars to spend them on valuable commodities such as food and medicine. Jamail, supra note 8, at 5–7. Yet, according to author Milton Jamail, the situation for most baseball players deteriorated further:

The bottom line is that since Cuba legalized dollars in 1993, the position of baseball players in Cuban society has gone from privileged to underprivileged. Cuban players receive only a small salary, less than the equivalent of $30 a month, but it takes at least $120 a month to sustain a basic level of comfort in Havana. Cuban musicians and artists are allowed to come and go—and to bring dollars back into the country. University professors and medical doctors can become waiters in tourist hotels, hawk wares to tourists on the street, or bake cookies to sell to neighbors—and earn dollars. Baseball players are effectively excluded from this sector of the economy, and if they receive money from the United States, they become suspect for fear they are planning to defect. They must remain poor and above suspicion.

MLB, American foreign policy, and Cuba. The first of these articles, by Jason Weiss, is a wide-ranging survey of baseball’s intersection with various legal issues pertaining to Cuban players. The second, by Matthew Greller, focuses primarily on “baseball diplomacy”—that is, changing the current framework of rules and laws governing Cuban ballplayers so as to improve diplomatic relations between the United States and Cuba. The third article, by Scott Cwiertny, argues that MLB must change its rules governing Cubans in order to avoid giving teams an incentive to violate American foreign policy and MLB regulations. And the fourth, by Professor Andrea Kupfer Schneider, discusses the political and legal ramifications of the March 1999 series between the Baltimore Orioles and the Cuban national team, and dissect a legal dispute involving the free agent status of a Cuban defector.

While all four articles deal with important questions and argue persuasively, none specifically or substantially address the visceral issue of defection. Several discuss the possibility of MLB adopting a worldwide draft, which would alter the system for Cuban players, and others discuss the proposed Baseball Diplomacy Act, House Bill 189, which would eliminate defection as a prerequisite for Cuban ballplayers to play in America. Only Greller calls decisively for a series of changes that, if enacted, would eliminate defection altogether, but limits his discussion to the context of better baseball diplomacy.

This Note, by contrast, frames the need to jettison the current defection system in humanitarian terms. It argues that the current defection system ignores the basic safety and welfare of young Cuban

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16 See generally Weiss, supra note 15.
17 See generally Greller, supra note 10.
18 See generally Cwiertny, supra note 10.
19 See generally Schneider, supra note 10.
20 See generally Cwiertny, supra note 10; Greller, supra note 10; Schneider, supra note 10; Weiss, supra note 15.
21 See Cwiertny, supra note 10, at 425–27; cf. Greller, supra note 10, at 1702–05 (suggesting the incorporation of Cuban players into the domestic amateur draft, which would have a virtually identical effect on Cuban players as would implementing a worldwide draft).
23 See Greller, supra note 10, at 1708–10.
24 See infra Section II.
ballplayers and their families.\(^{25}\) Part I surveys the basic historical, political, and legal framework in which the current system operates, the evolution of that system, and how it functions today. Part II explains why the current system is irreparably flawed from both a humanitarian and immigration law standpoint. Part III examines the viability of possible alternatives to the current system, including the desirability and probable impact of both a worldwide draft and the Baseball Diplomacy Act. This Note concludes that until the Castro government falls and the Cuban embargo is lifted, there is little chance that the defection system will be materially altered or eliminated.

I. THE CURRENT DEFECtion SYSTEM

The current system of Cuban baseball defection is a direct result of the tumultuous relationship between Cuba and the United States in the post-Cuban Revolution era. This section traces the historical, political, and legal context of the defection system. Furthermore, this section analyzes the evolution of Cuban baseball defection and how it functions today.

A. THE HISTORICAL, POLITICAL, AND LEGAL FRAMEWORK

1. The United States, Cuba, and Baseball: History and Politics

Despite the rancorous relationship between Cuba and the United States today, baseball served as a common tie between the two countries for nearly a century before the Cuban Revolution of 1959.\(^{26}\) Baseball was first played during the 1840s in the shadow of New York City, but it did not take long to reach Cuba.\(^{27}\) Over the next several decades, burgeoning sea commerce brought baseball to port cities throughout North America and the Caribbean.\(^{28}\) In Cuba, the game was primarily popularized by American sailors, both military and merchant, and Cubans returning from American universities.\(^{29}\) Key port

\(^{25}\) See infra Section II.
\(^{26}\) See Greller, supra note 10, at 1685.
\(^{28}\) See Echevarría, supra note 27, at 82.
\(^{29}\) See id. at 83, 90; Louis A. Perez, Jr., Between Baseball and Bullfighting: The Quest for Nationality in Cuba, 1868–1898, 81 J. Am. Hist. 495, 499–500 (1994) (describing how “Cubans
cities in Cuba’s sugar trade, Havana and Matanzas, became hotbeds for the new sport.\textsuperscript{30} In December 1874, clubs from the two cities squared off in what is thought to be the first recorded Cuban ballgame, with Havana winning 51–9.\textsuperscript{31}

Much like its American counterpart, Cuban baseball has always been tightly intertwined with history, politics, and social change.\textsuperscript{32} In the latter third of the nineteenth century, native Cubans, or criollos, used baseball to express discontent with the colonial Spanish authority and distinguish themselves as “a people apart and a nation distinct from Spain.”\textsuperscript{33} Through baseball, Cubans rejected the rigid class structures and pervasive racism of the colonial power.\textsuperscript{34} The sport became “a form of opposition to the ideas of Spain: to play baseball was to be criollo, to be criollo was to be Cuban.”\textsuperscript{35} Thus, since its inception, baseball has been considered “part of the nacionalidad cubana [Cuban national identity].”\textsuperscript{36}

In addition, baseball became a cultural bridge between Cuba and the United States, with ballplayers constantly in transit from one country to the other.\textsuperscript{37} From the 1870s and continuing until the Cuban Revolution, Cuban stars were free to leave their country to participate at all levels of American professional baseball.\textsuperscript{38} Between 1947 and the early 1960s, Cuba was the primary source of Latin-American
talent for the majors, producing such stars as Orestes “Minnie” Miñoso, Tony Oliva, and Tony Pérez. Concurrently, MLB organizations sent players to Cuba to participate in the professional Cuban League. Because the league operated during the winter, major leaguers were able to hone their skills during the off-season, and Cuba’s top players gained an opportunity to compete against America’s best. Some MLB teams also chose Cuban sites for their spring training camps, further exposing Cuba’s enthusiastic fans to America’s all-stars.

But the symbiotic relationship between American and Cuban baseball came to an unfortunate halt with the Cuban Revolution of 1959. Guerrilla leader Fidel Castro seized power after the collapse of the authoritarian Batista regime, which was weighed down by corruption, ineptitude, and popular opposition. Castro quickly implemented wide-ranging socialist policies, most notably agrarian reform, ostensibly geared toward empowering the clases populares. But the United States, which opposed Castro’s nationalization of key industries and the appropriation of American property in Cuba, sought to replace the new regime with one friendlier to American interests. For the Cuban government—moving rapidly toward communism and faced with increasing hostility from the United States—aligning with the Soviet Union, America’s Cold War rival, was a natural next step.

In this tumultuous Cold War context—typified by the Bay of Pigs fiasco and the near-disastrous Cuban Missile Crisis—baseball relations between Cuba and the United States effectively ended. Two major developments were, and continue to be, responsible for this breach: Castro’s ban on professional sports and the United States’ embargo of...

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39 Id.
40 See Jamail, supra note 8, at 22.
41 See id.
42 See id. at 18–22. The New York Giants trained in Havana in 1937, and the Brooklyn Dodgers trained there in 1941, 1942, and 1947. Id. at 18. The 1947 trip was designed to provide Jackie Robinson a more relaxed and receptive atmosphere than he would have found in Florida. Id.
43 See id. at 16–28.
44 See Pérez-Stable, supra note 13, at 52–60; see also Echevarría, supra note 27, at 302–304 (describing Batista as “a fairly ludicrous small-time populist dictator” who was not as corrupt as Trujillo in the Dominican Republic or the Somoza family in Nicaragua).
45 See Pérez-Stable, supra note 13, at 61–81.
46 See id. at 79–80.
47 See id. at 80–81.
48 See Jamail, supra note 8, at 8–10, 20–28.
Cuba. In 1961, as part of a wide-ranging sports reform program emphasizing socialist values, Castro abolished professional baseball in Cuba. Declaring *el triunfo de la pelota libre sobre la pelota esclava*—the triumph of free baseball over slave baseball—Castro began to develop the most successful amateur baseball system in the world. This highly developed system is now the symbolic centerpiece of the revolution, and Castro, master of propaganda, portrays the sport and its players as embodying the socialist ideal.

At roughly the same time, the United States instituted the Cuban embargo, driving another devastating wedge between Cuban and American baseball. In the years 1960–61, the Eisenhower administration imposed a partial embargo, prohibited American exports to Cuba, and severed diplomatic relations. The embargo’s chief purposes were to isolate the Castro regime economically so as to accelerate its demise and further American security interests by undermining Castro’s relationship with the Soviet Union. The Kennedy administration and subsequent administrations expanded and strengthened the embargo, prohibiting virtually all commerce and travel between the nations. MLB teams necessarily ceased all activities in Cuba, and by the end of the 1980s the number of Cuban players in the league had dwindled to a handful. Of course, since Rene Arocha’s trendsetting 1991 defection, the Cuban presence in MLB has grown. Yet, despite its failure to topple Castro and the end of the Cold War, the em-

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49 See id. at 129–30.
51 See Jamail, *supra* note 8, at 29. Ironically, for all but the most ardent proponents of coercive state power, “free baseball” would certainly entail allowing a player to contract freely with any team willing to pay his price, whereas “slave baseball” might more accurately describe a system in which meagerly compensated players are compelled to play for their government. See id. at 141 (“Fidel is still stuck on *la pelota esclava*—only now the slaves are the players trapped on the island.”); cf. Echevarría, *supra* note 27, at 361–68 (discussing the advantages and disadvantages of the Cuban amateur system).
52 See Jamail, *supra* note 8, at 133–34.
53 Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, 22 U.S.C. §§ 6021–6091 (2003); see Jamail, *supra* note 8, at 129 (calling the embargo “the fundamental barrier impeding improved baseball relations between Cuba and the United States”).
56 See id. at 2–3.
58 See Echevarría, *supra* note 27, at 388–91 (listing players who defected after Arocha and played in MLB).
bargo is as strong and wide-ranging as ever, continuing to undermine baseball relations between Cuba and the United States.  

Perhaps the most dexterous and durable dictator on the planet, Castro has also used Cuban amateur baseball and the existence of the embargo to further his political ends. The Castro regime fashions national heroes out of its star ballplayers; they symbolize the “success” of the revolution and are critical to government propaganda. Additionally, the embargo provides Castro with a convenient excuse for his failed economic policies. By using the embargo to stir up nationalism and anti-American fervor, Castro “distracts the Cuban people from their real problem: [his] authoritarian system.”

For Americans, perhaps the most visible effect of Castro’s authoritarian, economically failing system is the constant wave of Cuban immigrants seeking a better life in the United States. During and immediately following the revolution of 1959, many Cubans fled to South Florida in response to the appropriation of their property and the threat of persecution under the new regime. Since then, thousands of Cubans have come to the United States each year. Because illegal immigration from Cuba to the United States is pervasive, the federal government has implemented strict immigration controls governing Cuban immigrants. Federal law imposes serious criminal penalties for immigrant smuggling, a widespread practice, and trea-

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59 See Jamail, supra note 8, at 129.
60 See id. at 150 (“Fidel, Cuba’s owner-manager, understands how to use baseball to achieve his political goals.”); Schwab, supra note 54, at x–xii (noting that the “politically astute and talented” Castro has “for 40 years . . . stood against the United States in its very own backyard”).
61 See Jamail, supra note 8, at 93, 130, 141, 148–50.
66 Id. at 93; see Matias F. Travesio-Diaz, Immigration Challenges and Opportunities in a Post-Transition Cuba, 16 Berkeley J. Int’l L. 234, 240–51 (1998).
ties with Cuba limit the ability of Cubans to enter the United States legally and illegally.⁶⁸

Most Cubans who come to America settle in and around Miami, eagerly awaiting—and oftentimes working toward—the downfall of the Castro regime.⁶⁹ Miami’s stridently anti-Castro Cuban-American population is a powerful political voice, especially given Florida’s reputation as an important swing state in presidential elections.⁷⁰ The result is an American foreign policy toward Cuba that is largely beholden to the Cuban-American population in Florida, making reform controversial and extremely difficult to enact.⁷¹

While Cuban Americans may loathe Fidel Castro, they love baseball defectors like Rene Arocha, who buck his repressive system to play baseball in America.⁷² But for most defectors, politics is, at best, secondary.⁷³ Deciding to defect is always anguishing, and doing so is often physically dangerous.⁷⁴ Cuban baseball players who want to play in America are caught in a system—one rooted in historical, political, and legal forces far outside of their control—that offers no good choices.

2. U.S. Foreign Policy and Regional Treaty Law Affecting Cuban Players and MLB

The most salient aspect of U.S. foreign policy toward Cuba is the forty-five year old embargo, which tightly regulates virtually all com-

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⁶⁹ See Olson & Olson, supra note 65, at 92, 95–96 (noting that as of 1995, 60% of Cuban Americans lived in Florida, that 650,000 lived in Dade County, which includes Miami, and that “most Cuban Americans [are] opposed to the Castro regime but disagree[] over . . . how best to see that democracy is achieved in Cuba”).

⁷⁰ See id. at 96—97; see also, e.g., Bush v. Gore, 531 U.S. 98, 100–03 (2000) (discussing the facts underlying the 2000 presidential election dispute in Florida); Ken Fireman, Presidential Campaign: Bush Returns to Florida Battleground, Newsday, Mar. 21, 2004, at A32 (calling Florida “the ultimate swing state”).


⁷² See George Diaz, Cuban Defector Testing the Majors, Orlando Sentinel, Oct. 4, 1991, at D1 (“There is . . . continued adulation from Miami’s Hispanic community that embraced [Arocha] as a hero who embarrassed Castro.”).

⁷³ See Jamail, supra note 8, at 77.

merce between the United States and Cuba. From a U.S. policy perspective—in other words, putting aside Castro’s failed policies—the embargo is the primary reason for the preservation of the broken system of Cuban baseball defection. In its current, codified form, the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1994—commonly known as the Helms-Burton Act, in reference to its chief sponsors—the embargo is more intense and sweeping in scope than ever.

The subject of withering academic criticism, the Helms-Burton Act seriously impacts MLB and Cuban defectors alike. The Act mandates strict enforcement of the Cuban Assets Control Regulations (CACRs), which provide the basic governing rules of the embargo. As they pertain to MLB clubs and Cuban players, the CACRs prohibit "transactions incident to travel to, from, and within Cuba" as well as any "payment or transfer" to any Cuban national. The broad terms of the embargo prohibit MLB organizations from conducting any business in Cuba, such as scouting or signing players. Cuban players who sign lucrative contracts in America are technically prohibited

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73 See French, supra note 55, at 1–4.
76 See Jamail, supra note 8, at 129–30.
78 See Jamail, supra note 8, at 129; see also Dhooge, supra note 62, at 633 (arguing against the Helms-Burton Act because, among other reasons, it “jeopardizes the leadership role of the United States in various international institutions” and may “serve to prolong the very regime it is designed to topple”); French, supra note 55, at 24–25 (arguing that the embargo is inappropriate from an ethical point of view and that the Helms-Burton Act likely violates international law); Andreas F. Lowenfeld, Congress and Cuba: The Helms-Burton Act, 90 Am. J. Int’l L. 419, 433–34 (1996) (arguing that the Act “hampers the discretion of the executive branch; it purports to micromanage a transition whose contours no one can predict; it places too much emphasis on property issues almost two generations old; it perverts our immigration and travel laws; and it seeks to impose American policy judgments on nationals of friendly foreign states in a manner that is both unlawful and unwise”). But see David M. Shamberger, Note, The Helms-Burton Act: A Legal and Effective Vehicle for Redressing U.S. Property Claims in Cuba and Accelerating the Demise of the Castro Regime, 21 B.C. Int’l & Comp. L. Rev. 497, 501 (1998) (arguing that the Act will “bring[] an end to Castro’s human rights abuses, and expedite[] the rise of democracy in Cuba”).
80 31 C.F.R. §§ 515.305, 515.309(a), 515.415(a)(1). An exception to this general rule allows Cuban emigrants and others to send $300 every three months to Cuban households. 31 C.F.R. § 515.570(a).
81 See Jamail, supra note 8, at 129.
from sending all but a small portion of their earnings back to Cuba.\textsuperscript{82} Because the embargo prevents MLB team officials from traveling to Cuba and transacting with any Cuban national, players must not only leave Cuba, but also defect—that is, renounce Cuban citizenship—to play for an MLB club.\textsuperscript{83}

Federal immigration policy also has serious implications for Cuban ballplayers who choose to defect.\textsuperscript{84} For Cuban defectors who establish residency in a country other than the United States and sign professional contracts—the most common scenario—the immigration process is relatively simple.\textsuperscript{85} With the aid of their new team, these players are able to apply for and obtain visas pursuant to immigration laws regulating foreign athletes who want to play in America.\textsuperscript{86}

For players who defect by sea, however, U.S. immigration law is considerably more entangling.\textsuperscript{87} At the heart of the United States’ Cuban immigration policy is the so-called “wet feet, dry feet” rule, by which the United States generally returns Cuban immigrants interdicted at sea to Cuba, while allowing those who reach U.S. soil to remain.\textsuperscript{88} This rule is enforced pursuant to a 1995 bilateral agreement between the United States and Cuba, prompted by the Cuban refugee crisis of 1994.\textsuperscript{89} The treaty requires the United States to allow 20,000 Cubans to immigrate legally each year, and to return to Cuba all illegal Cuban immigrants interdicted at sea.\textsuperscript{90} Given the repressive nature of the Cuban government, however, the United States allows Cubans plucked from the sea to apply for asylum if they credibly fear persecution upon their return.\textsuperscript{91}

\textsuperscript{82} See 31 C.F.R. § 515.570; Jamail, supra note 8, at 129. Cubans in MLB routinely violate the rule limiting remittance to $300 per three months. See Fainaru & Sánchez, supra note 13, at 111–12, 138–39 (noting that Livan Hernandez, after revealing in a newspaper interview that he sent money in excess of the limitations back to Cuba, was directed to cease and desist by the U.S. Treasury Department). Those convicted of violating the embargo restrictions can face up to $100,000 in fines and/or ten years in prison. 31 C.F.R. § 515.701.

\textsuperscript{83} Cf. Greller, supra note 10, at 1661–66 (noting that a combination of U.S. immigration policies and MLB rules compel players to defect if they want to play in MLB).

\textsuperscript{84} See id. at 1655–61.

\textsuperscript{85} See id. at 1655–66.


\textsuperscript{87} See Cwiertny, supra note 10, at 415–19.

\textsuperscript{88} See Brown, supra note 67, at 276–78; Sawczyn, supra note 67, at 346–49.

\textsuperscript{89} See Joint Statement, supra note 68, at 327; Travieso-Díaz, supra note 66, at 243–44.

\textsuperscript{90} See Joint Statement, supra note 68, at 328, 330; Brown, supra note 67, at 276.

\textsuperscript{91} See Immigration and Nationality Act (INA) § 208, 8 U.S.C. § 1158 (2004); Brown, supra note 67, at 277.
Furthermore, because the “wet feet, dry feet” policy places a premium on reaching American soil, some illegal immigrants resort to professional smugglers for transport from Cuba to Florida. Recognizing this problem, in the 1995 agreement both the United States and Cuba pledged to take “prompt and effective action to prevent the transport of persons to the United States illegally.” Congress has instituted severe criminal penalties for engaging in or aiding an immigrant smuggling operation. Most Cuban ballplayers who defect by sea must confront and overcome these rigid U.S. immigration policies.

Lastly, agreements between Cuba and its neighbors, particularly the Bahamas, the Dominican Republic, and Costa Rica, present possible problems for Cuban defectors. All three countries have repatriation treaties that generally require the return of Cuban refugees. If detained in any of these countries, a defector may face deportation to Cuba, where poverty and persecution usually await.

3. MLB Rules Governing Cuban Players

Aside from the above legal constraints, MLB subjects Cuban players to a more complex set of rules than it does other foreign amateur players. Ballplayers residing within the United States, its territories

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92 See id. at 278–82.
93 Joint Statement, supra note 68, at 329.
95 See infra notes 214–283 and accompanying text.
96 See Cwiertny, supra note 10, at 419–21.
97 See id.
99 See Schneider, supra note 10, at 480–81; see also MAJOR LEAGUE BASEBALL, THE OFFICIAL PROFESSIONAL BASEBALL RULES BOOK, R. 3, 4 (2003) [hereinafter MLB Rules Book]. The MLB Commissioner “has broad power to approve contracts; resolve disputes between clubs and between clubs and players; discipline players, clubs, and club owners; and make rules governing the administration of the baseball enterprise.” ROGER I. ABRAMS, LEGAL BASES: BASEBALL AND THE LAW 96 (1998). Thus, the Commissioner’s office formulates and enforces all rules governing the entrance of players into the league, including Cubans and other foreigners. See Cwiertny, supra note 10, at 411–12. Federal judge Walter C. Lindley, in a 1931 case involving the Commissioner’s power of investigation, famously described the Commissioner as “a benevolent but absolute despot [with] all the disciplinary powers of the proverbial pater familias.” Milwaukee Am. Ass’n v. Landis, 49 F.2d 298, 299 (N.D. Ill. 1931). Legal challenges to the Commissioner’s actions rarely succeed, as courts generally do not disturb the Commissioner’s decisions absent a clear violation of his duties under the MLB charter. See Abrams, supra, at 113. See generally Matthew B. Pachman, Note, LIMITS ON THE DISCRETIONARY POWERS OF PROFESSIONAL SPORTS COMMISSIONERS: A HISTORICAL AND LEGAL ANALYSIS OF ISSUES RAISED BY THE PETE ROSE CONTROVERSY, 76 VA. L. REV. 1409 (1990).
and possessions, and Canada are subjected to the June amateur draft.\textsuperscript{100} Once an MLB team drafts a player, that franchise holds exclusive negotiating rights to that player until just before the following year’s draft.\textsuperscript{101} Usually, the team will sign the drafted player to a contract at the minor league level, where the player will have the opportunity to prove himself and, if he is good enough, to move up to the majors.\textsuperscript{102}

For players residing in a foreign country, however, the equation changes.\textsuperscript{103} Foreign players are not drafted; their entrance into the league is governed instead by a simple minimum age requirement.\textsuperscript{104} As long as this requirement is met, foreign ballplayers are free agents who can sign with any team willing to pay.\textsuperscript{105} Free agency tends to produce larger contracts for these players, a result of bidding wars between teams vying for their services.\textsuperscript{106} Therefore, agents advise foreign players to remain outside the United States until they are signed, as establishing U.S. residency would subject them to the amateur draft and generate less lucrative contracts.\textsuperscript{107}

In conjunction with the embargo, MLB policy further complicates this scenario for Cuban players hoping to play professionally in

\textsuperscript{100} MLB Rules Book, supra note 99, R. 4(a).
\textsuperscript{101} Id. at R. 4(d)-(f); Geller, supra note 10, at 1662 n.59. A player who is eligible for the draft but is not drafted can negotiate with any team as a free agent. MLB Rules Book, supra note 99, R. 4(i); Schneider, supra note 10, at 480.
\textsuperscript{102} See, e.g., Jerry Crasnick, Ordonez Is Off to Succeed the Wizard, Denver Post, Apr. 7, 1996, at C15 (discussing Cuban defector Rey Ordonez’s path from Cuba, through the New York Mets minor league system, to his debut for the Mets on opening day, 1996); Horn, supra note 6 (discussing how two early Cuban defectors, Osmani Estrada and Alexis Cabreja, were drafted and signed to minor league contracts by the Texas Rangers).
\textsuperscript{103} See Geller, supra note 10, at 1662.
\textsuperscript{104} MLB Rules Book, supra note 99, at R. 3(a)(1)(B). The minimum age for a player to sign with a team is sixteen years, as long as the player turns seventeen “prior to either the end of the effective season for which the player has signed or September 1 of such effective season, whichever is later.” Id.
\textsuperscript{105} See Geller, supra note 10, at 413–14; David Beard, ‘El Duque,’ Friends Get Visas, Sun-Sentinel (Ft. Lauderdale, Fla.), Jan. 7, 1998, at 12A. But see Diana L. Spagnuolo, Comment, Swinging for the Fence: A Call for Institutional Reform as Dominican Boys Risk Their Futures for a Chance in Major League Baseball, 24 U. Pa. J. Int’l Econ. L. 263, 264 (2003) (arguing that current rules encourage teams to “exploit[ ] Dominion boys to serve as a source of cheap labor for MLB”); Cwiertny, supra note 10, at 414 (explaining how the Dodgers used the foreign player free agency rule to “impose low-paying contracts on [two players residing in the Dominican Republic] by not giving the players the opportunity to retain agents”).
America. An April 1977 letter from the then-Commissioner Bowie Kuhn to all MLB clubs, the so-called Kuhn Directive, sets forth the cornerstone of MLB’s Cuba policy. The directive forbids any club from recruiting or negotiating with any player in Cuba. Cuban players must therefore establish residency outside of Cuba if they wish to play in MLB. Thus, MLB rules work with the political and legal considerations discussed above to effectively compel Cuban players to defect if they want to play American baseball.

B. The Evolution of the Defection System

1. Early Defections: Draft Variants

Until December 1995, MLB dealt with the still relatively unusual dilemma of Cuban defection by subjecting the defecting player to the June amateur draft or some variant thereof, such as a special lottery. Thus, after Rene Arocha’s unprecedented 1991 defection, MLB formulated an ad hoc policy for Cuban nationals who had established residency in America. Rather than subject Arocha to the regular amateur draft, MLB held a special lottery open to any team interested in signing him.

MLB did not always follow this model, however, in dealing with the Cubans who followed Arocha’s lead. In 1992, Cuban national shortstop Osmani Estrada and left fielder Alexis Cabreja defected while in Mexico and later walked across the border into the United States. Although both sought free agent status, MLB balked at the notion of allowing illegal immigrants to sign with the highest
bidder.\textsuperscript{118} Instead, MLB subjected both players to the domestic amateur draft.\textsuperscript{119}

During this period, MLB vacillated between these two approaches when dealing with other defectors.\textsuperscript{120} When Rey Ordonez, a future shortstop for the New York Mets, defected in 1993, MLB subjected him to a special lottery similar to Arocha’s.\textsuperscript{121} Pitcher Ariel Prieto’s entry in the 1995 amateur draft following his defection in April 1994 was the last instance in which a high-profile Cuban player came directly to the United States and was subjected to a draft or draft variant.\textsuperscript{122} By the fall of 1995, sports agent Joe Cubas, a self-described “enemy of the Castro Government,” had begun to use a different approach for shuttling Cuban ballplayers from their homeland to the majors.\textsuperscript{123}

2. Current Defections: Joe Cubas’ “New Route”\textsuperscript{124}

Cubas pioneered his technique while representing two highly-touted prospects, pitchers Osvaldo Fernandez and Livan Hernandez, who had defected in Tennessee and Mexico, respectively, during the summer and fall of 1995.\textsuperscript{125} Cubas, the American-born son of Cuban immigrants, realized that by assuming the role of agent and aiding players’ defections, he could simultaneously exploit the market for Cuban talent in MLB and embarrass Castro.\textsuperscript{126} Instead of having his players seek residency in the United States as previous defectors had done, Cubas took the pair to the Dominican Republic for six months to establish residency.\textsuperscript{127}

\textsuperscript{118} See Greller, supra note 10, at 1672.
\textsuperscript{119} See id. at 1672–73; Estrada and Cabreja were eventually drafted and signed by the Texas Rangers. See id. Similarly, pitchers Michael Tejera and Hanzel Izquierdo, both members of the Cuban junior national team, defected in Miami in 1994 and were subjected to the 1995 domestic amateur draft. Jamail, supra note 8, at 82.
\textsuperscript{120} See Greller, supra note 10, at 1668–73.
\textsuperscript{121} See Baxter & Dominguez, supra note 4.
\textsuperscript{123} Dave Anderson, El Duque’s Man Stashes Two More, N.Y. Times, Feb. 11, 1999, at D5; Chass, supra note 107; see also Jamail, supra note 8, at 82–85.
\textsuperscript{124} Chass, supra note 107.
\textsuperscript{125} See Baxter, supra note 12.
\textsuperscript{127} See id.
Cubas had discovered the foreign player “loophole” in MLB’s rules. By establishing residency for Fernandez and Hernandez in the Dominican Republic rather than the United States, Cubas avoided subjecting his players to the amateur draft or a draft variant. MLB ruled that the Cuban-born players’ foreign residency allowed them to sign with any team as free agents. Thus, the players could secure more lucrative contracts than had they been drafted and required to negotiate exclusively with one team.

Cubas’ “new route” is now the model for Cuban baseball defectors and their agents. Whether the players defect in the United States or elsewhere, they invariably seek to establish residency in a Caribbean or Central American nation to obtain free agent status.

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128 See Chass, supra note 107; see also Cwiertny, supra note 10, at 412–16; supra notes 98–111 and accompanying text discussing MLB rules.

129 See Chass, supra note 107.

130 See id. Note that the Kuhn Directive did not apply to the players because they had established legal residence outside of Cuba and renounced Cuban citizenship. See Greller, supra note 10, at 1664 n.69.

131 See Chass, supra note 107. Naturally, the new route was a financial boon to Cubas as well, as he took at least five percent of both Fernandez’s $3.2 million deal with the San Francisco Giants and Hernandez’s $4.5 million deal with the Florida Marlins. See Berkow, supra note 126; Thomas Stinson, Baseball ‘96: National League: The Rookies: Cubans Will Make Contributions, ATLANTA J. CONST., Mar. 31, 1996, at 23F. Although there is no maximum percentage an agent is permitted to take, the Major League Baseball Players’ Association (MLBPA) guidelines for registered player agents sets the average at four to five percent. See Fainaru & Sánchez, supra note 13, at 100; Berkow, supra note 126. After a bitter fallout between Hernandez and Cubas in July 1996, Hernandez claimed that Cubas had tried to charge him 25% of his earnings, an allegation that Cubas denied. See Fainaru & Sánchez, supra note 13, at 117.

132 See Greller, supra note 10, 1678–79. Although Cubas was widely credited for pioneering this new method of defection, then-director of Latin-American scouting for the New York Yankees, Rudy Santín, claimed to have been developing the method for years. See Fainaru & Sánchez, supra note 13, at 68. Santín and Cubas, childhood friends, entered into an unofficial agreement: Cubas would represent Cuban defectors, set up foreign residence for them, and then funnel the players through Santín to the Yankees organization. See id. at 65–68. Thus, the players would land big contracts, Cubas would make hefty commissions, and Santín and the Yankees would have a monopoly on Cuban talent. See id. Only the misguided intervention of infamous Yankees owner George Steinbrenner foiled the arrangement. See id. at 93. After the Yankees’ stunning loss to the Seattle Mariners in the first round of the 1995 playoffs, Steinbrenner “launched a purge that was staggering even by his lofty standards,” including the firing of scouting director Bill Livesey, Santín’s boss. See id. Santín resigned, lamenting that his “whole plan went down the drain,” but Cubas zealously continued to pursue Cubans interested in attempting this new method of defection. See id. at 93–94.

133 See, e.g., Richard Justice, New Nation, Old Feelings: Cuban Defector Arrojo Reflects on Previous Career, WASH. POST, May 2, 1999, at D10 (noting that Cuban defector Rolando Arrojo established residency in Costa Rica before signing with the Tampa Bay Devil Rays); Tyler Kepner, Mining for Riches on the Farm, N.Y. TIMES, Feb. 5, 2003, at D1 (noting that Jose Con-
Yet, the formidable financial benefits that some players reap from this method of defection do not necessarily offset the negative aspects of the current system.¹³⁴ For defectors and their families, the system is fraught with anguish, danger, corruption, and legal landmines.¹³⁵

II. HUMANITARIAN PRINCIPLES VIOLATED

Although criticized on a number of grounds by other commentators, the defection system’s negative effects on Cuban ballplayers and their families have received scant attention.¹³⁶ Important humanitarian principles, however, may provide the most compelling incentives to overhaul the current system.¹³⁷ Players who navigate the defection process are systematically denied protections afforded by international human rights law, which finds its modern basis in the Universal Declaration of Human Rights (Declaration).¹³⁸ Moreover, the system undermines immigration agreements between Cuba and the United States which “seek to address safety and humanitarian concerns and to ensure that migration between the countries is safe, legal, and orderly.”¹³⁹

Despite the Declaration’s guarantee that “[e]veryone has the right to leave . . . and to return to his country,” Cuban baseball defectors must relinquish this right if they wish to play baseball in America.¹⁴⁰ Furthermore, despite the Declaration’s assertion that the “fam-
ily is the natural and fundamental group unit of society and is entitled to protection by society and the State,” every Cuban defector must abandon his family indefinitely—and sometimes forever.\footnote{UDHR, supra note 138, at art. 16 § 3; see infra notes 165–213 and accompanying text; see also Gerassimos Fourlanos, Sovereignty and the Ingress of Aliens 87–117 (1986). This internationally recognized principle of family unity, as it is commonly known, may not technically be an individual right; rather, as the principle is generally understood, individuals benefit from the State’s duty to refrain from undertaking measures causing dispersion of families, and to facilitate reunification of already separated families. Fourlanos, supra, at 109–11. However, like the right of return discussed in note 140, supra, the defection system clearly violates the underlying policy of family unity. See id.}

Additionally, the significant minority of defectors who can only escape by sea risk serious injury or death, as well as the possibility of repatriation to Cuba.\footnote{See infra notes 214–283 and accompanying text.} In encouraging such action, the defection system runs counter to Cuba’s and the United States’ “common interest in preventing unsafe departures from Cuba which risk loss of human life.”\footnote{Joint Statement, supra note 68, at 328.} Sea defectors, along with the families of all Cubans defectors, are also likely candidates for dangerous human smuggling operations from Cuba to the United States that can result in criminal sanctions.\footnote{See infra notes 246–283 and accompanying text.} The current system’s encouragement of players and their families to take part in smuggling operations also cuts against the two countries’ “pledge[] . . . to take prompt and effective action to prevent the transport of persons to the United States illegally.”\footnote{Joint Statement, supra note 68, at 329.}

A. \textbf{Defection as Rejection of Patria}

For most Cuban baseball players, the decision to defect is extremely difficult because “defection implies a rejection of \textit{patria},” or homeland.\footnote{Jamail, supra note 8, at 78.} By forcing players with Major League dreams to leave Cuba forever, the current system places tremendous strain on the young men who confront the decision to defect.\footnote{See id. at 73–78.} Cubans are undeniably fierce in both their nationalism and their love of baseball, yet
the system requires that these passions remain mutually exclusive.\textsuperscript{148} Even though a few Cuban players manage to secure multi-million dollar contracts once they defect, every defector must leave his homeland forever.\textsuperscript{149} By defecting, players relinquish their basic human right to return home, a right “fundamental [to] exercising one’s personal autonomy.”\textsuperscript{150}

The Cuban government reinforces the implication that defecting players have rejected all things Cuban by laboring mightily to create a public façade of intransigence, anger, and disgust.\textsuperscript{151} After the requisite denunciations of the defectors—who are labeled traidores al béisbol, or “baseball traitors”—the government acts as if the departed players no longer exist, never mentioning them again in the state-controlled press.\textsuperscript{152} In official record books, baseball defectors have asterisks by their name; the explanation reads, abandonó el país, or “left the country.”\textsuperscript{153}

The government’s public denunciations of defectors, however, have only a limited effect on the Cuban public’s perceptions of departed players.\textsuperscript{154} Almost any Cuban citizen understands how deprivation could drive a ballplayer to seek a better life in America, and few begrudge the defectors’ decision to leave.\textsuperscript{155} Most Cubans reject using the verb “to defect”—desertar—to describe departed ballplayers because of its negative military connotation.\textsuperscript{156} Many high-profile defectors have become folk heroes to Cuban fans, who follow their careers in America despite the dearth of MLB information in Cuba’s official media outlets.\textsuperscript{157} Yet, some cases exist in which the circumstances surrounding a player’s defection create animosity among Cuban fans.

\textsuperscript{148} See id. at 77–78; see generally Echevarría, supra note 27 (discussing Cuban baseball’s illustrious history); Perez, supra note 29 (discussing baseball’s relation to the birth of Cuban nationalism).

\textsuperscript{149} See Jamail, supra note 8, at 78.

\textsuperscript{150} See Hannum, supra note 140, at 4.

\textsuperscript{151} See, e.g., Fainaru & Sánchez, supra note 13, at 115 (describing how Castro denounced defector Rolando Arrojo as “a Judas who sold himself for twelve gold coins”); Jamail, supra note 8, at 78 (noting that government officials dubbed Arocha a traitor after his defection).

\textsuperscript{152} See Jamail, supra note 8, at 88; McKinley Jr., supra note 12.

\textsuperscript{153} Jamail, supra note 8, at 77.

\textsuperscript{154} See id. at 47 (noting that Cubans followed defector Liván Hernandez during the 1997 World Series despite a media blackout).

\textsuperscript{155} See id. at 55.

\textsuperscript{156} See id. at 77.

\textsuperscript{157} See id. at 47–48; see McKinley Jr., supra note 12.
and, to a greater extent, the player’s teammates.\footnote{See, e.g., Fainaru & Sánchez, supra note 13, at 115 (quoting Cuban national team pitcher Lázaro Valle, criticizing Rolando Arrojo for defecting on the eve of the Olympics: “It was the way he did it. . . . He betrayed everyone. . . . Even if he makes a hundred million dollars, he’ll never be a hero in Cuba because he was like a Judas. He sold everybody out.”); Jamail, supra note 8, at 55 (quoting Aurelio Alonzo, a member of an officially registered baseball fan organization in Cuba: “We do not question [Liván Hernandez’s] decision to leave. . . . That is his personal choice. We only question the method by which he chose to leave: while representing his country abroad.”).}

Players who defect while representing Cuba in a foreign tournament are often the targets of derision and scorn.\footnote{See supra note 158 and accompanying text.}

While no player has ever publicly expressed regret about his decision to defect, it is clear that rejecting the patria—leaving Cuba forever—is tormenting for the young players who decide to do so.\footnote{See Jamail, supra note 8, at 73–89.} As Rene Arocha eloquently put it:

[Defecting] is a very difficult decision. . . . You have to have an inner strength—it’s incredible the strength you have to have to leave behind not only your family—although leaving your family is difficult—but to leave your roots, something that is yours, and to understand that you don’t know when you will be able to return.\footnote{Id. at 78.}

Until the system is altered, baseball defectors can never return to Cuba.\footnote{See id. at 73–89.} And “the idea that they may never return home,” author Milton Jamail posits, is something that “Cuban defectors . . . don’t get over.”\footnote{Letta Tayler, Price of Defection: Contreras’ Daughters, Wife Battle Loneliness, Newsday, July 29, 2003, at A76.} Worse yet, defection often leads to the prolonged separation of a player from his family.\footnote{See McKinley Jr., supra note 12.}

**B. Defection and the Separation of Families**

For Cuban defectors and their families, the most devastating aspect of the current system is that it forces virtually every player to abandon his family indefinitely.\footnote{See, e.g., id.; Wright Thompson, The Long Road from Las Martinas, Kan. City Star, Mar. 30, 2003, at II22.} A select few are able to leave with
their family, often by boat.\textsuperscript{166} Among the rest, only a small proportion reunite with loved ones shortly after defecting, while others may be reunited after months or even years.\textsuperscript{167} For many Cuban defectors, however, the separation goes on indefinitely, with no way of knowing if, or when, it will end.\textsuperscript{168} Thus, the system egregiously violates the principle of family unity, a principle that requires countries to avoid implementing policies that cause the dispersion of families.\textsuperscript{169}

The tragic case of Chicago White Sox pitcher Jose Contreras, originally signed by the New York Yankees after his October 2002 defection, is instructive. Although news accounts at the time typically emphasized Contreras’ $32 million contract, his chief concern centered around reuniting with his wife and children.\textsuperscript{170} Throughout the negotiations during the fall of 2002 and winter of 2003, the pitcher “stressed the importance of his family” and “asked teams for help in getting [them] out of Cuba.”\textsuperscript{171} Contreras had left his wife, two daughters, ages ten and two, and an extended family.\textsuperscript{172} The Yankees, powerless to intervene in immigration matters, were unable to guarantee Contreras a family reunion.\textsuperscript{173}

Contreras kept secret his plan to defect from his family, and his wife was furious when he first called home after defecting.\textsuperscript{174} As spring training began in 2003, Contreras explained that his separation from his family had been “very difficult. . . . [T]he only time I don’t think about my family is when I’m on the mound.”\textsuperscript{175} Toward the end of spring training, the pitcher was informed that his father—a proud supporter of Castro—had been rushed to the hospital.\textsuperscript{176} Contreras’ subdued response was, “I can’t do anything about it. . . . I can only

\begin{itemize}
\item See Rafael Hermoso, \textit{Teams in the Majors Waiting for 2 Cubans}, Grand Rapids Press, Dec. 17, 2003, at C8 (noting that Maels Rodriguez and Yobal Duenas defected by boat with their wives).
\item See, e.g., Fainaru & Sánchez, supra note 13, at 113–14 (describing Arrojo’s reunion with his wife and daughters, who had been smuggled out of Cuba the same day Arrojo defected); id. at 299 (describing El Duque’s reunion with his mother and daughters in October 1998, approximately ten months after his defection).
\item See Fourlanos, supra note 141, at 109.
\item See Kepner, supra note 133.
\item Id.
\item See Thompson, supra note 165.
\item See Kepner, supra note 133.
\item See Thompson, supra note 165.
\item Taylor, supra note 163.
\item Gordon Edes, \textit{For Contreras, a No-Decision}, Boston Globe, Mar. 4, 2003, at F1; see Thompson, supra note 165.
\end{itemize}
wait.” He communicated with his family by writing letters and by phone—when he could get through—but these limited contacts failed to explain his prolonged absence to his youngest daughter. As Contreras’ first season in the majors progressed, he wired money home so that his wife could afford luxuries such as red meat and soap. The payments were of little consolation to his wife, who said, “It’s been horrible since he left. . . . I have plenty of money. . . . But I pay the price with loneliness.”

That is not the only price that Contreras’ wife had to pay for her husband’s defection. Despite their denunciation of Contreras and a record of harassment and intimidation of other defectors’ relatives, the Cuban authorities did not harass the pitcher’s family, and allowed them to keep the car they had been given two years earlier. But the authorities’ magnanimity was illusory, for they had other ways of expressing their displeasure with Contreras. In January of 2004, the Cuban government refused permission for Contreras’ wife and children to leave for the second time. They would have to wait four more years before applying again. Contreras was indignant: “I have not committed any offense, any crime. I took the decision to leave the island. It was a personal decision, and my daughters and my wife should not have to pay any price. They aren’t guilty of anything. . . .” Although the fate of Contreras’ family was unclear as he began spring training 2004, his wife and daughters eventually escaped to the United States by boat the following June.

177 Edes, supra note 176.
178 See Thompson, supra note 165.
179 Tayler, supra note 163.
180 Id.
181 See Contreras Can’t Get Family, supra note 168.
182 See Tayler, supra note 163.
183 See Contreras Can’t Get Family, supra note 168.
184 See id.
185 Id.
186 Id.
187 Id.

188 See id. Contreras’ wife and daughters, along with sixteen other defectors, piled onto a motor boat that outran the U.S. Coast Guard for three hours. See Kevin Baxter, Worst Is Over For Pitcher Comforted with His Family, MIAMI HERALD, June 24, 2004, at A1; Sam Borden, A Happy Homecoming for Jose, N.Y. DAILY NEWS, Aug. 24, 2004, at 30. The boat reached shore at Florida’s Big Pine Key just before dawn on June 21, and Contreras and his family were reunited soon after. See Baxter, supra. Contreras declined to discuss details of the defection, but voiced his belief that the Yankees aided in his family’s escape. See Borden, supra. The Yankees denied any involvement. See id. Contreras, who was expected to improve on the mound after his family reunion, never pitched up to the Yankees expectations, and he was traded to the Chicago White Sox just before the 2004 trading deadline.
As the Contreras episode demonstrates, the separation of a Cuban defector from his loved ones is perhaps the most egregious consequence of the current system.\textsuperscript{188} Defecting players with wives and children must abandon them—usually without warning, a plan for reunification, or a means of contacting them once they escape.\textsuperscript{189} The effects of defection are often difficult for players’ wives and children to overcome.\textsuperscript{190} For some families, the initial shock and the extended period of separation that follows lead to estrangement.\textsuperscript{191} However, most players maintain contact with their families, to whom they send money through licensed travel agents or an established system of underground couriers.\textsuperscript{192} Almost all such remittances exceed the $300-per-three-months legal limit, providing badly needed cash to the players’ immediate and extended families.\textsuperscript{193}

In most cases, the defector, usually with his agent’s aid, works toward finding a way for his family to escape from Cuba.\textsuperscript{194} Legal methods of emigration generally are preferred because they are safest.\textsuperscript{195} But the families of defectors, like Contreras’, are unlikely to receive the permission of Cuban authorities to leave legally.\textsuperscript{196} Ultimately, if all legal avenues are closed, the player and his family must decide whether they will remain apart or attempt some sort of illegal escape. In the latter instance, whether the family attempts to escape by boat or hires a smuggler for transport, the route is hazardous and can result in repatriation and continued separation.\textsuperscript{197}

The current system also creates unique problems for younger players who leave their families in Cuba and must single-handedly

\textsuperscript{188} See McKinley Jr., supra note 12.
\textsuperscript{189} See Fainaru & Sánchez, supra note 13, at 194 (“El Duque betrayed his [defection] plans to no one, not even his mother.”); Thompson, supra note 165.
\textsuperscript{190} See Thompson, supra note 165.
\textsuperscript{191} McKinley Jr., supra note 12.
\textsuperscript{192} Id.
\textsuperscript{193} See Fainaru & Sánchez, supra note 13, at 112; McKinley Jr., supra note 12.
\textsuperscript{194} See Fainaru & Sánchez, supra note 13, at 106 (noting Arrojo and Cubas decided to find a way to smuggle Arrojo’s family out of Cuba); id. at 284–85 (noting how a Cubas associate began the effort to get El Duque’s family out of Cuba).
\textsuperscript{195} See Contreras Can’t Get Family, supra note 168; Cuban Defector in Minors Awaits Word from Family, Patriot Ledger (Quincy, Mass.), Aug. 17, 1994, at 35 [hereinafter Word from Family] (describing how Rey Ordonez’s wife and child sought permission from Cuban authorities to leave legally); infra notes 214–283 and accompanying text (detailing the dangers involved in illegal defections by sea).
\textsuperscript{196} See, e.g., Contreras Can’t Get Family, supra note 168; Word from Family, supra note 195.
\textsuperscript{197} See infra notes 214–283 and accompanying text.
confront American capitalism and the fast-paced world of professional baseball.  

These players, some only teenagers, must leave parents, siblings, and extended family at a particularly tumultuous and challenging time in their lives. They must make a wrenching choice: either remain with their families or pursue the increased freedom and prosperity of a professional baseball career. Often, those players choosing freedom and prosperity are ill-equipped to make the transition from their prior life in Cuba, which had neither.

Agents often compound this problem by enticing players to defect, inflating their capabilities, helping them sign a professional contract, and abruptly moving on to the next big catch. Few constraints exist to prevent agents from surrendering an unprepared player to the demanding world of professional baseball once they cash in on their commission—and some agents do just that. Many players have great difficulty adjusting to their new environment, and their inability to visit and draw strength from their families further hampers this process.

Family separation is even more tragic when one considers the high rate of failure among MLB prospects. Most Cuban defectors never play a game at the major league level, and those who do reach MLB can be hampered by injuries or, for older players, age-related decline. Thus, though every defector leaves his family behind for a chance at the big leagues, few actually cash in on that chance. And though the political and economic freedoms in America far surpass

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188 See Fainaru & Sánchez, supra note 13, at 109–12.
190 See id.
190 See id.
201 See Jamail, supra note 8, at 78.
202 See Fainaru & Sánchez, supra note 13, at 111. Al Avila, scouting director for the Florida Marlins, explains Liván Hernandez’s period of adjustment:

> It was very tough for him in the beginning. . . . People were trying to get him. It’s no easy task for a young man, twenty years old, when all you know is a fucking dictator, a country where there is practically no information, and all of a sudden you’re thrown into this big old world. I mean, imagine what it was like for this guy. He just left Cuba, and now he’s in the United States and he’s got nobody. It’s like, “Who the fuck do I trust?”

Id.
203 See Fainaru & Sánchez, supra note 13, at 109; Jamail, supra note 8, at 83.
204 See Fainaru & Sánchez, supra note 13, at 109–11.
205 See Kevin Baxter, For Cuban Athletes Who Defect, Success in Sports is Elusive, Miami Herald, June 2, 2002, at 1A.
206 See id.
207 See, e.g., Jamail, supra note 8, at 73–80; Baxter, supra note 204.
208 See Baxter, supra note 204.
those in Cuba, it is questionable whether players would be as eager to leave Cuba if given a realistic assessment of their chances of success.208 Yet, asking whether or not the trade-off—giving up one’s family for a chance to play professionally in America—is worthwhile seems to be the wrong question to ask.209 A better question might be why Cubans are the only ballplayers on the planet who are forced to choose between their families and professional baseball.210 The very fact that young Cuban ballplayers must make this forced choice is ample evidence that the system is broken and needs to be overhauled.211

Even more soberingly for some Cuban defectors, choosing to leave their family behind is only the beginning of their travails.212 For those who defect by sea, the biggest obstacles still lie ahead.213

C. Defection by Sea: Danger in the Straits of Florida

Sea defections are notoriously fraught with danger, a fact evidenced by the numerous press accounts of desperate Cubans risking life and limb for a chance to reach Florida’s shores.214 For baseball fans, Orlando “El Duque” Hernandez’s defection is perhaps the best-known tale of a baseball player taking to the sea to escape from Cuba.215 Yet most defecting players do not resort to such drastic measures.216 Since most defectors play for Cuban teams who travel outside of the country, they need only find an opportune time to walk away.217 Consequently, only a select few of the approximately sixty Cuban baseball defectors have resorted to escape via boat or raft.218

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208 See id.
209 Cf. Jamail, supra note 8, at 132 (noting Congressman José Serrano’s opinion that Cuban ballplayers ought not have to defect at all).
210 See id. North Korean athletes also must defect if they wish to play sports in America, but so far no baseball players have emerged from that country. See id. at 165 n.7.
211 See id. at 132.
212 See Fainaru & Sánchez, supra note 15, at 191–221.
213 See id.
215 See Fainaru & Sánchez, supra note 13, at 203–12 (recounting El Duque’s arduous voyage); see also Olney, supra note 133.
216 See Jamail, supra note 8, at 77.
217 See id. As discussed above, Rene Arocha walked out of an airport during a layover. Robb, supra note 1. Pitching star Rolando Arrojo escaped from his team’s hotel while playing in the United States. See Berkow, supra note 126.
218 See Jamail, supra note 8, at 77 (explaining that most Cuban ballplayers who wish to defect do not take to the sea, because most play for Cuban teams that frequently compete outside of the country); Baxter, supra note 204 (noting that approximately sixty baseball players have defected since Rene Arocha).
When the Castro regime bans those it suspects of planning defection from playing for traveling Cuban teams, however, it eliminates the “walk away” defection option. For the banned players who want a shot in professional baseball, the dangerous water route becomes their only escape from an impoverished life devoid of baseball. So long as the Cuban government maintains its strict policy of banning from baseball those suspected of defecting, there will be players willing to risk sea voyage.

Tales of defection by sea are harrowing. El Duque and his companions spent nearly four days on a remote deserted island in the Bahamas after a failed rendezvous with the boat that was supposed to transport them the rest of the way to Florida. The defectors subsisted on Spam, sugar, and boiled conch that had been peeled off of rocks before they were rescued by the U.S. Coast Guard and taken to a detention center in Freeport, Bahamas.

Alex Sanchez, the current center fielder for the Detroit Tigers, was eighteen years old when he and ten others boarded a rickety raft

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219 See, e.g., Paul Gutierrez, They Have Found the Way Home, L.A. TIMES, Aug. 14, 2001, at D3 (describing how prominent Cuban players Evel Bastida and Mayque Quintero made their decision to defect by boat after being suspended amid suspicion they were planning to defect); Serge F. Kovaleski, Cubans Rescued By Fishing Crew in Nick of Time, WASH. POST, Mar. 24, 1998, at A12 (reporting on four Cuban baseball players in a Bahamian detention camp who had defected by boat after being banned amid suspicion they were planning to defect).

220 See Gutierrez, supra note 219 (explaining that Bastida and Quintero “left because they had no other options” after being suspended from baseball). Bastida is quoted as saying:

I played baseball since I was 9 years old and I had no other way to support my family. . . . My mother-in-law helped, but I was still feeling pressure. . . . It was painful, but it won’t be in vain. I hope to have them here soon.

Id. The story of Bastida’s and Quintero’s voyage is not atypical, as they joined 25 strangers on an unreliable motor boat. See id. The boat’s engine failed the first night, forcing the crew to paddle the rest of the way. See id. After almost three days, the boat landed safely in Key West, Florida. See id. Foiled by MLB in their attempt to sign contracts as free agents, the players established residency in Mexico while playing in the Mexican League. See id. They eventually signed with the Sonoma County (Cal.) Crushers, a professional team in the independent Western League. See id.

221 See Jamail, supra note 8, at 90 (noting that El Duque “had no choice but to get out of Cuba” and remarking that the author was naive to think that “Cuban authorities might just give [El Duque] an exit visa and let him leave”).

222 See, e.g., Fainaru & Sánchez, supra note 13, at 203–12 (recounting El Duque’s voyage); Charles F. Gardner & Ana M. Menendez, Hope Floats, MILWAUKEE J. SENTINEL, Apr. 5, 2002, at 1C (recounting then-Milwaukee Brewers’ centerfielder Alex Sanchez’s journey).

224 Id. at 206–11.
held together with tire tubes, bolts, and ropes. As Sanchez tells it, "We spent three days at sea, and it was a pretty dangerous trip. From there, the U.S. Coast Guard picked us up and took us to the base at Guantanamo, and I was there 16 months."

Cuban national team first baseman Jorge Luis Toca, along with three other players, a coach, and four crew members, were also lucky to have escaped disaster during their flight from Cuba. But for the keen eyes of some Bahamian lobstermen who noticed a small light several hundred yards away, the entourage likely would have been lost. When they were rescued in the darkness, the Cubans’ dilapidated, single-engine boat was ankle deep in water and sinking fast. The defectors had brought little more than fresh water for provisions and had no navigational equipment. The lobstermen turned the nine Cubans over to Bahamian authorities the next day, who took the group to a detention center in Nassau.

The stories of El Duque, Sanchez, and Toca also highlight how repatriation treaties between Cuba and its neighbors often cause serious problems for sea defectors. Primarily, players that are interdicted or turned over to authorities are placed in notoriously unpleasant detention camps, sometimes for months on end. Moreover, because the Bahamas, the Dominican Republic, and the United States have each agreed to repatriate Cuban refugees that are denied asylum, such players may be returned to Cuba. This was precisely the fate of Toca’s four companions after their detention in the Bahamas. After several months in a detention camp, the defectors—along with dozens of others—were denied asylum and returned to Cuba per the Bahamian repatriation agreement. After their re-

225 Gardner & Menendez, supra note 222.
226 Id.
227 See Kovaleski, supra note 219.
228 See id.
229 See id.
230 See id.
231 See id.
232 See, e.g., Fainaru & Sánchez, supra note 13, at 210–17; Jamail, supra note 8, at 95–96; Gardner & Menendez, supra note 222; see also Cwiertny, supra note 10, at 417–21.
234 See Fainaru & Sánchez, supra note 13, at 212; Cwiertny, supra note 10, at 419–20.
235 See Jamail, supra note 8, at 95–96. Because Toca had a Japanese wife, he was granted permission to leave the Bahamas and go to Japan. See id. His four companions were forced to remain in detention until they were repatriated. See id.
236 See id.
turn, the defectors were banned from playing baseball, allegedly threatened, and placed under surveillance. Only their daring "re-defection" several months later—by small boat, of course—allowed the group to escape further persecution by the Castro regime.

Repatriation, however, is not always a foregone conclusion. American authorities are more inclined to grant asylum to Cuban baseball players due to legal, political, and humanitarian motivations. Because Cuban baseball players have a prominent political role in their homeland, repatriated ballplayers are prime targets for post-repatriation persecution. Furthermore, the high profile of defectors in Florida’s Cuban-American community ensures that any decision to deny asylum would subject the U.S. government to biting criticism.

As much as the current defection system complicates enforcement of regional immigration law, it weighs far more heavily on the impoverished Cubans who risk everything for a chance to play in America. There is no doubt that defection by sea poses significant risks for those who attempt it, and not all sea escapes end as success-

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237 See Pressley, supra note 13.
238 See Jamail, supra note 8, at 97; Pressley, supra note 13.
239 See, e.g., Fainaru & Sánchez, supra note 13, at 210–17; Gardner & Menendez, supra note 222.
240 See Fainaru & Sánchez, supra note 13, at 215–16; Pressley, supra note 13; see also supra notes 7, 61 and accompanying text.
241 See Pressley, supra note 13; supra notes 7, 61 and accompanying text.
242 See Fainaru & Sánchez, supra note 13, at 215–16 (noting that while he was detained in the Bahamas, El Duque’s predicament became a “cause célèbre” and that the Cuban-American community “mobilized its all-star team of anti-Castro hard-liners” to lobby the U.S. government to extend humanitarian parole immediately). Despite these considerations, the United States has repatriated Cuban ballplayers interdicted at sea. See Scorecard: Defector Sent Home: Cuban Throwback, Sports Illustrated, June 19, 2000, at 34. Favorable treatment for ballplayers, even if they do face a greater risk of persecution in Cuba, raises difficult questions of fairness and partiality vis-à-vis “average” detainees. See Commentary, The Cubans Who Don’t Play Baseball, Wash. Times, Mar. 25, 1998, at A20 [hereinafter Commentary, The Cubans Who Don’t Play Baseball]; cf. Fainaru & Sánchez, supra note 13, at 217 (“Also looking on were dozens of other rafters who had drifted to the Bahamas in much the same fashion [as El Duque]. Many had been there for months. As television cameras filmed El Duque’s exit [from the Bahamian detention camp], one refugee held up a towel bearing a hand-scrawled message: freedom for all the Cubans.”). Dealing with Cuban baseball detainees is a very delicate issue for American authorities, who want to offer asylum but wish to avoid the appearance of a double-standard. See Commentary, The Cubans Who Don’t Play Baseball, supra; cf. Fainaru & Sánchez, supra note 13, at 293–94 (noting how State Department officials were worried that if they allowed El Duque’s family to come into the country, the press would “write how Mr. Six Million Dollars can get his kids into the United States and José in Miami can’t”).
243 See Cwiertny, supra note 10, at 419–20; McKinley Jr., supra note 12.
fully as those documented above. There is also little doubt that such defections will continue. But even if players avoid the physical dangers of sea defection and the possibility of detention and repatriation—other legal landmines, particularly those associated with immigrant smuggling, may await.

D. The Unique Problem of Immigrant Smuggling

Smuggling is an increasingly popular method of illegally transporting immigrants from Cuba to Florida. Instances of human smuggling have risen in conjunction with the growing failure of “amateur” boaters and rafters to evade American patrols in the Straits of Florida. To avoid repatriation under the United States’ “wet feet, dry feet” policy, Cuban emigrants resort to the only consistently reliable method for reaching dry land: professional smuggling. Professional smugglers have navigational expertise, underground logistical networks in both Cuba and Florida that allow for effective coordination, and superior vessels for avoiding the authorities.

Professional smuggling differs in many respects from amateur escape attempts via boat or raft. While amateur escapes carry a greater risk of repatriation, injury, or, at worst, death, virtually none result in prosecutions under federal law. The reverse is true of smuggling operations, which probably carry a lower risk of repatriation, injury, or death, but are blatantly illegal and often prosecuted.

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244 See Brown, supra note 67, at 273–74 (detailing the December 2001 capsizing of an overcrowded boat filled with Cubans that killed thirty); Pingeton, supra note 64, at 329 (noting that Cubans risk their lives to cross the “treacherous” Straits of Florida and that only an estimated one in four rafters survives the journey).
245 See Jamail, supra note 8, at 89; Hermoso, supra note 166 (describing how those who defected by boat with Maels Rodriguez and Yobal Duenas “asked that their exact route remain private to protect future Cuban defectors who might take a similar route”).
246 Brown, supra note 67, at 274 (noting that human smuggling has flourished in the Straits of Florida since 1998).
248 See Joint Statement, supra note 68, at 328; Brown, supra note 67, at 279.
249 See id.
250 Sue Anne Pressley, Faster Boats Carry Cubans, Haitians to Florida, Wash. Post, Dec. 31, 1998, at A2 (noting that “fast-moving motor vessels” are replacing Cuban emigrants’ “flimsy rafts” and discussing the implications of this change).
251 See Brown, supra note 67, at 278 (noting that “U.S. Forces efficiently detect, recover, and return most rafters to Cuba”); Pingeton, supra note 64, at 329.
252 See Brown, supra note 67, at 280 (noting that smuggling operations are “presumed to be very successful”); id. at 280–90 (discussing the prosecution of suspected smugglers); see also, e.g., United States v. Rodriguez-Lopez, 363 F.3d 1134, 1135 (11th Cir. 2004) (dis-
Moreover, despite the conventional wisdom that smuggling is safer and more likely to be successful than amateur defection, there are nonetheless serious physical dangers involved. Since maximizing profit is the only true concern of professional smugglers, boats are often overcrowded and lack basic safety equipment such as life jackets. Some smuggling operations have gone terribly awry, resulting in dozens of deaths.

Baseball’s defection system promotes the practice of human smuggling in two ways. First, touted Cuban ballplayers, financed by wealthy agents, are themselves candidates to be smuggled across the Straits of Florida. Second, a defector’s family may be smuggled into the United States for reunification purposes. Although aiding a player in his quest for freedom and reuniting families might seem like noble goals, the dangers and unregulated nature of human smuggling outweigh its benefits. Put simply, human smugglers “are not humanitarians. They’re criminals.”

Despite the unsavory nature of trafficking in human cargo, Cuban ballplayers—especially those who cannot or do not journey abroad with a traveling squad—remain prime candidates for a smuggling operation. Although the passage is by no means safe, traveling

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253 See Brown, supra note 67, at 280.
254 See id.; Pressley, supra note 250 (quoting a Coast Guard officer: “A big concern we see quite often is when we stop them at sea and we notice grossly overloaded vessels. Most of those vessels do not have life jackets, and conditions can change so drastically out there”).
255 See Brown, supra note 67, at 273–74; Pressley, supra note 250 (noting that in 1998, three smuggling operations involved the loss of life, including one case in which at least eight passengers perished after an overcrowded boat capsized on December 17).
256 See Fainaru & Sánchez, supra note 13, at 106 (“As Cuba’s notoriety grew, the smugglers, recognizing a lucrative new market, began to come out of the woodwork to offer the agent deals to pull the valuable ballplayers out of Cuba.”).
257 See id. (noting that Cuba’s associate planned “to hire a smuggler to sail to Cuba, pick up Arrojo’s wife and children under the nose of the Cuban coast guard, and then ferry them to a drop-off point in the Florida Keys.”).
259 Cherif, supra note 258 (quoting Elena Freyre, executive director of the Miami office of the Cuban Committee for Democracy).
260 See Fainaru & Sánchez, supra note 13, at 106. As discussed above, those who are banned from playing baseball in Cuba have virtually no option but to escape by sea. See supra notes 219–221 and accompanying text. Because these players are of great potential value to their agents, the agents are more likely to advocate and finance smuggling the player out of Cuba rather than allow the player to make a riskier, amateur escape. Cf. Fai-
with a seasoned smuggler who knows the route and claims to possess a reliable boat seems far less risky than the ad hoc escapes attempted by El Duque, Sanchez, and Toca. Furthermore, agents—who stand to benefit handsomely from prospective defectors’ contracts—will likely be willing to front the otherwise prohibitive cost of the smuggling operation.

The families of ballplayers are also likely candidates to be smuggled out of Cuba, since most defectors must leave their family behind. It is virtually impossible for players who have defected to get their families out of Cuba legally. Defection, considered a grievous crime against the revolution, renders Cuban authorities unlikely to allow the families of players to leave freely. Most players, therefore, have little choice but to turn to smuggling if they wish for their families to escape.

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NARU & SÁNCHEZ, supra note 13, at 181–82 (discussing a Joe Cubas plan—which ultimately fizzled—to pay a smuggler $10,000 to get El Duque out of Cuba).

See supra notes 249–252 and accompanying text.

See supra note 13, at 106–08. According to interviews conducted by authors Steve Fainaru and Ray Sánchez for their book The Duke of Havana, the cost of smuggling is somewhere in the range of $3,000 to $20,000 per person. See id. at 107. Newspaper reports document a narrower range: $7,000 to $10,000 per person. See Cherflis, supra note 258; Pressley, supra note 250. By 1996, Joe Cubas was well known in Miami, allegedly receiving two to three calls a week from potential smugglers hoping to ferry one of his Cuban prospects to Florida. FAINARU & SÁNCHEZ, supra note 13, at 106. One such smuggler was even armed with the telephone numbers of references in case Cubas and his associates wanted to research the smuggler’s “great track record.” Id.

See FAINARU & SÁNCHEZ, supra note 13, at 106; see also, e.g., McKinley Jr., supra note 12 (describing how Rey Ordonez left his family behind to defect); Thompson, supra note 165 (describing how Jose Contreras left his family behind to defect).

See, e.g., FAINARU & SÁNCHEZ, supra note 13, at 286 (noting the difficulty of getting El Duque’s family out of Cuba, considering the pitcher’s highly publicized fallout with Cuban authorities and subsequent defection); Contreras Can’t Get Family, supra note 168 (reporting that Jose Contreras’ family had been refused permission to leave twice and would have to wait four more years before reapplying).

See supra note 13, at 286; Contreras Can’t Get Family, supra note 168. In the exceptional case of El Duque, the pitcher’s politically powerful allies managed to convince Castro to allow his family to come to America. See FAINARU & SÁNCHEZ, supra note 13, at 284–300. With the help of Professor Pamela Falk from the City University of New York, El Duque obtained the valuable aid of longtime Castro acquaintance Cardinal John O’Connor, the Roman Catholic archbishop of New York. See id. at 285, 287. Cardinal O’Connor wrote a formal request to Castro to allow El Duque’s ex-wife, two daughters, and mother to come to the United States. See id. at 289. After some prodding by the archbishop’s Hispanic liaison during a meeting in Cuba, Castro consented. See id. at 289–93.

See supra note 13, at 106, 114 (discussing the smuggling of Arrojo’s family); McKinley Jr., supra note 12; see also Brown, supra note 67, at 278–80 (discussing smuggling’s emergence as the preferred method of illegal immigration from Cuba to the United States).
Thus, ballplayers and their agents sometimes arrange and pay professional smugglers—operating almost exclusively out of Miami—to bring the players’ families from Cuba to Florida. The smuggling operation carries attendant dangers beyond the physical risk to those aboard the boat. By planning and providing payment for the activities, the players and their agents expose themselves to serious criminal penalties under federal law. Conspiring with or abetting an immigrant smuggler is punishable by a hefty fine and up to ten years in prison. If disaster strikes during the trip and results in death to any passenger, those responsible for arranging or funding the voyage could be punished by life imprisonment, or even death.

No baseball player has ever been charged for violating immigrant smuggling laws, nor is such a situation likely, for two principle reasons. First, recurring evidentiary dilemmas make smuggling prosecutions extremely difficult. Smuggling operations involving players and their families remain, for obvious reasons, concealed by a shroud of secrecy. Those privy to sensitive information almost invariably deny any knowledge of the operation. This is done as much to avoid the scrutiny of American authorities as it is to protect allies and sources in Cuba, where the possibility of detection, and the resulting penalties, are even more acute. Second, the United States Attorney’s Office for the Southern District of Florida usually pursues only cases of for-profit trips involving death or bodily injury. South Florida juries are notoriously more sympathetic to smugglers who are at-

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\[267\] See Brown, supra note 67, at 286 n.68; McKinley Jr., supra note 12.
\[268\] See Cherills, supra note 258.
\[270\] See id. § 1324(a)(1)(A)(v), (a)(1)(B).
\[271\] See id. § 1324(a)(1)(B)(iii)–(iv).
\[272\] Cf. Brown, supra note 67, at 286–90 (discussing the difficulty of prosecuting smugglers).
\[273\] See id. at 287–88.
\[274\] See McKinley Jr., supra note 12.
\[275\] See Fainaru & Sánchez, supra note 13, at 114 (“Years later, Cubas and Arrojo, both aware of the criminal implications, would deny ever smuggling the pitcher’s family into the United States.”) Despite this official denial, Cubas—enamored with his delusional “007” image—never kept the smuggling operation much of a secret, spilling details to various journalists and associates. See id.
\[276\] See id. at 114, 187 (describing alleged smuggler René Valle’s run-in with the Cuban authorities while he was attempting to transport members of his family, resulting in three years in a Cuban prison); McKinley Jr., supra note 12 (describing the Cuban government’s heavy surveillance and intense scrutiny of three defectors’ wives before they were successfully smuggled to Florida).
\[277\] See Brown, supra note 67, at 286.
tempting to help Cubans flee from the widely detested Castro regime.278 Given this truth, it is extremely unlikely that a jury would convict a professional baseball player for arranging to reunify his family.279

Yet, the mere improbability that a player or his agent will be charged for immigrant smuggling does not merit disregard of the problem.280 The law prohibiting human trafficking need not be systematically and vigorously enforced—especially against sympathetic ballplayers—for the safety-oriented policies underlying the law to have value.281 At the very least, the strong likelihood that professional baseball players have engaged in criminal behavior under federal law warrants MLB’s attention.282 MLB should feel compelled to attempt system-wide change for the physical safety of Cuban players and their families. The league’s failure even to begin to address this life-or-death issue further attests to its broken Cuban policy.283

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278 See id. at 287–88; see also David L. Marcus, Legal Chaos Leaves Cuban Refugees Adrift, BOSTON GLOBE, Aug. 2, 1998, at A1 (quoting a Miami-based federal prosecutor: “There are many cases that we know in our heart of hearts are good cases, but you pick these jurors and none of them want to convict. . . . Jurors say, ‘We’ve got violent crime, we’ve got drugs, we’ve got kilos of cocaine falling out of the sky, and you’re going to give me someone smuggling some poor people out of Cuba?’”).


280 Cf. id. at 287–90 (discussing the difficulties in prosecuting smuggling cases but also examining various methods for improving law enforcement efforts in this area).

281 Cf. id. at 289–90 (arguing in favor of a comprehensive program to reduce immigrant smuggling that would result in fewer “day-to-day interdictions, but more comprehensive prosecutions and substantial penalties in future cases”).

282 Cf. Cwiertny, supra note 10, at 409–11 (discussing MLB’s swift reaction to the Los Angeles Dodgers’ violation of the Cuban embargo law and MLB rules).

283 Cf. id. at 423–25 (asserting that MLB has been aware of violations of the Kuhn Directive and the embargo but has taken no action to resolve the problem). The most publicized violation of the embargo and the Kuhn Directive was the Los Angeles Dodgers’ involvement with Cuban prospects Juan Carlos Diaz and Josue Perez. See, e.g., Joe Christensen, Dodgers Lose Two Cubans, PRESS ENTER. (Riverside, Cal.), June 29, 1999, at C1; Steve Fainaru, LA Loses Minor Leaguers: Dodgers Punished for Holding Secret Tryouts, BOSTON GLOBE, June 28, 1999, at D1; Bill Plaschke, Liberty—And Justice—For All, L.A. TIMES, June 30, 1999, at B1. Dodgers’ officials held secret tryouts in Cuba for the two players, helped them to defect, and instructed them to lie about it if asked. Christensen, supra. MLB’s unprecedented punishment of the club included a $200,000 fine, a six-month ban on signing foreign players, and stripping the club of the two illegally scouted players, who were granted free agency. Hal Bodley, Selig’s Signing Ban Punishes Dodgers, USA TODAY, July 2, 1999, at 8C; see generally Cwiertny, supra note 10.

The Dodgers’ scandal is but one particularly egregious anecdote, but is by no means the only direct involvement by MLB teams in Cuba. See Wright Thompson, A Tough Out: Scouts Lead a Dangerous Life in Cuba, KAN. CITY STAR, Mar. 30, 2003, at 124. Among baseball officials, little doubt exists that undercover MLB scouts currently operate in Cuba. Id. Ac-
According to sports agent Joe Kehoskie, “I’ve heard of 50 different scouts going to Cuba on the sly, still in violation of Major League Baseball rules . . . but I’ve never heard of a long-term payroll type of situation.” Id. (noting that Cuban baseball expert and author Peter Bjarkman believes that while teams have no full-time scouts “who collect benefits and walk around with a stop watch,” many have sources—so-called “bird dogs”—in Cuba).

Agent-affiliated scouts, or agents acting as scouts themselves, also scour the countryside to find the next player to bring in a multi-million dollar contract. See Fainaru & Sánchez, supra note 13, at 139 (explaining how a former associate of Cubas, Juan Ignacio Hernandez Nodar began to “explore his own business opportunities” in Cuba, meeting with players in their home, handing out money, and urging them to defect); Thompson, supra. These “agent-scouts,” rather than those from MLB teams, attract the most attention from Cuban authorities because they often have ties to anti-Castro elements in Miami and are associated with players who have already defected. See Fainaru & Sánchez, supra note 13, at 150 (remarking that the judges’ written decision convicting Nodar of tampering with baseball players noted his connection to anti-Castro agent Joe Cubas and defector Rolando Arrojo); Thompson, supra. These “agent-scouts,” rather than those from MLB teams, attract the most attention from Cuban authorities because they often have ties to anti-Castro elements in Miami and are associated with players who have already defected. See Fainaru & Sánchez, supra note 13, at 139 (describing Nodar’s aggressive tactics); . cf. id. at 119 (describing how Cubas and an associate bribed officials and prepared phony passports and birth certificates for players they were transporting from the Dominican Republic to Costa Rica).

Even if Cuban authorities deny any focus on MLB scouts, these scouts almost certainly continue to violate the Kuhn Directive and Cuban embargo. See Cwiertny, supra note 10, at 401; Thompson, supra. And because the Cuban authorities are infamously unpredictable and harsh, MLB scouts in Cuba risk imprisonment. See Fainaru & Sánchez, supra note 13, at 138–52 (recounting Nodar’s arrest, trial, and conviction); Thompson, supra (quoting Cuban Commissioner Rodriguez: “[Scouts that come to Cuba] are violating our laws, and they end up in jail”). Nodar, the notoriously conspicuous cousin of Joe Cubas, was engaged in freelance scouting when the Cuban government arrested him. See Fainaru & Sánchez, supra note 13, at 138–42. He was tried for tampering with players, convicted, and sentenced to fifteen years in a Cuban prison. See id., at 145–60; Thompson, supra.

Although the risks of scouting in Cuba seem to outweigh the possible benefits, rudimentary knowledge of the island’s top prospects is indispensable for every MLB team, so as to prepare the team to compete for players’ services if and when they escape. See Jamail, supra note 8, at 119–20; Thompson, supra. Ultimately, however, teams are anticipating the collapse of the Castro regime and the inevitable Cuban baseball “gold rush.” See id. (quoting Fred Claire, the former general manager and executive vice president of the Dodgers: “If the talent was available in Cuba, and all clubs could go in and scout, and sign or draft, I can only envision a gold rush”); Thompson, supra. The extent and depth of the baseball talent in Cuba is staggering; although it is impossible to ascertain how many Cuban ballplayers would play professionally in America, Cuba could become the primary provider of foreign talent to American professional baseball. . See Jamail, supra note 8, at 120. The Dominican Republic, with a population of nearly nine million, has about fifteen hundred players signed to professional contracts in America. U.S. Central Intelligence Agency, World Factbook 155 (2004) [hereinafter World Factbook]; Jamail, supra note 8, at 120. Cuba, with its more highly-developed baseball system and population of over eleven million would, over time, almost certainly produce more professional ballplayers. World Factbook, supra, at 139; see Jamail, supra note 8, at 120. Therefore, as long as the defection system is operative, scouts will continue to circumvent, even break, league rules and
III. Can the Current System Be Fixed?

Most commentators agree that the defection system is flawed—albeit for different reasons—and some have offered suggestions for its cure.\textsuperscript{284} One critic, Cwiertny, suggests instituting a worldwide draft that would include players of foreign residency.\textsuperscript{285} Additionally, Greller proposes a four-part process that would: (1) end exclusionary practices by MLB, the United States, and Cuba; (2) include Cubans in the domestic amateur draft; (3) impose a contract tax on teams that sign Cuban players to support Cuban baseball infrastructure and scouting; and (4) change federal law to allow Cubans to play professionally in America without having to defect.\textsuperscript{286} Although creative and ably supported, neither proposal has a realistic chance of solving the defection problem in the near future.

A. A Worldwide Draft: Implications for Cuban Defectors

The rapid influx of foreign ballplayers into the MLB ranks during the 1990s prompted calls from team officials and outside commentators alike for the implementation of a worldwide draft.\textsuperscript{287} Theoretically, the plan would integrate foreigners into the domestic amateur draft, thus restricting eligible foreign players to negotiations only with the team that drafts them.\textsuperscript{288} Advocates typically promote the worldwide draft concept for its potential to improve parity by giving small-market teams an opportunity to draft and sign top foreign

\textsuperscript{284} See Cwiertny, supra note 10, at 425–27; Greller, supra note 10, at 1700–12; see also Jemail, supra note 8, at 131–41.
\textsuperscript{285} See Cwiertny, supra note 10, at 425–27.
\textsuperscript{286} See Greller, supra note 10, at 1700–12.
\textsuperscript{287} See Bill Madden, Moving Toward a World Draft: Baseball Looks to Keep Big Market Teams from Stockpiling Cheap Talent,\textit{Daily News} (N.Y.), May 26, 1999, at 67; see also Weiss, supra note 15, at 129–133.
\textsuperscript{288} See Cwiertny, supra note 10, at 426–27.
prospects.\textsuperscript{289} Cwiertny, however, advocates establishing a worldwide draft to reduce or eliminate incentives for teams and agents to violate the Kuhn Directive and the Cuban embargo.\textsuperscript{290}

A worldwide draft would greatly affect the current defection system.\textsuperscript{291} Under a worldwide draft, Cubans would have no cause to establish foreign residency because all players would be forced to enter the draft, regardless of residency.\textsuperscript{292} Eliminating automatic free agency for foreign ballplayers would have several important effects on Cuban defectors.\textsuperscript{293} First, the end of free agency would reduce the financial incentives for agents and scouts to aggressively and illegally pursue players in Cuba.\textsuperscript{294} Second, it would eliminate bidding wars for Cuban free agents living abroad, thus reducing incentives for agents to inflate players’ capabilities so as to entice them to defect.\textsuperscript{295} Third, a worldwide draft would reduce incentives for MLB team scouts to violate the Kuhn Directive and the Cuban embargo.\textsuperscript{296} Since all clubs would have access to every foreign player, individual teams might not benefit from planning or aiding defection.\textsuperscript{297} Thus, a worldwide draft would make it more likely that players will defect entirely of their own volition.\textsuperscript{298} Without prodding by self-interested scouts or agents and their oftentimes dubious promises of glory and million dollar con-

\begin{itemize}
\item \textsuperscript{289} See Madden, supra note 287. As it stands now, big-market teams—such as the New York Yankees, the Los Angeles Dodgers, and the Boston Red Sox—have the financial ability not only to set up more sophisticated Latin American scouting operations, but also to outbid less wealthy teams when foreign players begin taking contract offers. See id.; see also Greller, supra note 10, at 1679-84 (describing how foreign free agency undermines competitive balance in MLB). Some experts, however, do not believe a worldwide draft would resolve the competitive balance issue. See Dave Sheinin, Player Draft Remains Unsettled, Wash. Post, June 3, 2003, at D4. According to Jim Callis, the executive editor of Baseball America, “[Now, a small-market team] could find a [Latin American future star] and sign him for cheap. [Under a worldwide draft], they’d have to draft him and negotiate a big signing bonus.” Id. Because of the high profile of Cuban baseball defectors, however, it is nearly impossible for teams to sign Cuban prospects cheaply and “under the radar” without resorting to illegal tactics like those of the Dodgers. See Cwiertny, supra note 10, at 401–11.
\item \textsuperscript{290} See Cwiertny, supra note 10, at 426–27.
\item \textsuperscript{291} See id.
\item \textsuperscript{292} See id. at 426; Sheinin, supra note 289.
\item \textsuperscript{293} See Cwiertny, supra note 10, at 426; Greller, supra note 10, at 1702–05.
\item \textsuperscript{294} See Cwiertny, supra note 10, at 426.
\item \textsuperscript{295} See id.; see also Jamail, supra note 8, at 83.
\item \textsuperscript{296} See Cwiertny, supra note 10, at 426.
\item \textsuperscript{297} See id.
\item \textsuperscript{298} See id. at 427.
\end{itemize}
tracts, players might be better equipped to determine whether defection is the right choice for themselves and their families.\textsuperscript{299}

But a worldwide draft could also cause negative consequences for Cuban ballplayers. From a humanitarian standpoint, a worldwide draft is not likely to improve the current system materially.\textsuperscript{300} Cwiertny aptly notes that under a worldwide draft system, MLB and the Major League Baseball Players’ Association (MLBPA) would have to regulate agents dealing with Cuban players more vigorously to reduce agent profiteering and corruption.\textsuperscript{301} Together, stricter agent regulation and reduced-value contracts\textsuperscript{302} will almost certainly deter agents from helping players to defect.\textsuperscript{303} Without the help of an agent—or, more specifically, his bank account—many players will lack the financial resources needed to defect successfully.\textsuperscript{304} Some players may attempt an “amateur” escape by sea, a far more dangerous option than alternative methods financed by a connected agent.\textsuperscript{305} Thus, by chilling agent involvement in Cuba, a draft might have the unfortunate effect of trapping more young ballplayers in their economically failing, authoritarian country. It is conceivable that a global draft will “create[,] more problems than it solves.”\textsuperscript{306}

\textsuperscript{299} See Jamail, supra note 8, at 83; Baxter, supra note 204.
\textsuperscript{300} Cf. Cwiertny, supra note 10, at 426–27 (omitting any mention of humanitarian benefits to players that might flow from implementation of a worldwide draft).
\textsuperscript{301} See Cwiertny, supra note 10, at 426.
\textsuperscript{302} See supra notes 1087, 131 and accompanying text (noting that players signed as free agents typically sign more lucrative contracts than those who are drafted).
\textsuperscript{303} Cf. Cwiertny, supra note 10, at 427 (noting that his proposal would “allow Cubans to defect on their own, if they chose to take such a risk”) (emphasis added).
\textsuperscript{304} Cf. supra note 262 and accompanying text (noting that agents are willing to pay for smuggling operations which would otherwise be unaffordable for Cuban ballplayers).
\textsuperscript{305} See supra notes 222–231 and accompanying text.
\textsuperscript{306} Sheinin, supra note 289 (quoting Baseball America editor Jim Callis). Despite the possible benefits for MLB, it is highly questionable whether a worldwide draft will be implemented in the near future—or ever. See Gary Klein, Global Draft Is A Foreign Notion Still, L.A. Times, June 3, 2003, at D6. Strong pockets of opposition to a worldwide draft within the professional baseball world make the ultimate institution of the draft an uncertainty. See Sheinin, supra note 289. Many MLB officials, agents, and the MLBPA have registered their philosophical opposition to the implementation of a global draft. See id. Naturally, big-market teams oppose the change, fearing an erosion of their long-cultivated scouting advantages in Latin America. See John Delcos, Baseball Feels a Draft Coming on, Journal News (Westchester Cty., N.Y.), Mar. 31, 2003, at 8K; Sheinin, supra note 289. Also, many scouting directors question whether a worldwide draft would even resolve the competitive balance problems it is intended to address. See Sheinin, supra note 289; Telephone Interview with Ben Cherington, Director of Player Development, Boston Red Sox (Mar. 1, 2004) [hereinafter Cherington Interview]. Furthermore, agents and ballplayers represented by the MLBPA dissent on a restraint-of-trade basis, since the draft would inevitably deflate contract and signing bonus values. See Klein, supra.
B. The Four-Step Plan: Realism or Idealism?

As it stands, the defection system is primarily the product of two policies with origins on either side of the Straits of Florida: Castro’s ban on professional sports and the United States’ embargo on Cuba. Greller’s four-part plan calls for, among other things, the revocation of Castro’s ban and the modification of portions of the embargo affecting Cuban ballplayers. The plan certainly touches all the right bases, especially in light of recent Congressional actions that

A worldwide draft also faces serious logistical hurdles. Sheinin, supra note 289. For instance, owners and the MLBPA disagree over the appropriate number of rounds for a global draft. Klein, supra. MLB has also not decided whether, or how, it will reconcile different minimum age requirements for American, Canadian, and Puerto Rican players on the one hand and foreign players on the other, and experts question the feasibility of tracking and registering teenagers in developing countries that lack basic governmental and baseball-related infrastructure. See Sheinin, supra note 289 (quoting agent Andy Mota: “I think the logistics of trying to track these kids down, especially in the Dominican Republic, will make it hard to implement . . . How are you going to keep track of all these 16-year-olds?”).

Even if MLB can overcome philosophical and logistical opposition to a global draft, the league must contend with the real question of whether the draft is legal and enforceable. See Delcos, supra. The United States already has a treaty in place with Japan, the Republic of Korea, and Taiwan that prohibits “roster raiding” between the professional baseball leagues in each country. Id. These three Asian nations believe the treaty’s provisions apply to amateur ballplayers, as well, making it likely that they would be excluded from any worldwide draft system. See id. With respect to those countries that would not be excluded from the draft by treaty, MLB would be treading on politically sensitive ground. Cherington Interview, supra. Various labor- and foreign policy-related conflicts could arise from drafting players in foreign countries, especially those with developed professional baseball leagues. Id. MLB would be hard pressed to extend the draft to countries such as Mexico and the Dominican Republic, where rules already closely regulate whether and how teams from outside the country can sign native ballplayers. See Jamail, supra note 8, at 139; Cherington Interview, supra. As Yankees Assistant General Manager Jean Afterman explains, “I don’t think there’s any country out there that believes it would be subject to a worldwide draft.” Delcos, supra. Thus, non-cooperation or outright hostility from other countries might be the most serious impediment to successfully implementing a global draft. See id. (quoting Afterman: “[T]he Dominican Republic . . . is pitching a fit [that] they would be subject to a draft.”).

Perhaps the strong philosophical opposition to, as well as the inherent logistical and legal problems of a new system explain why MLB has made little progress in moving toward a worldwide draft. See Delcos, supra; Klein, supra; Sheinin, supra note 289; MLB Weighs Expo Decision, CINCINNATI POST, Jan. 16, 2004, at C3 [hereinafter MLB Weighs Expo Decision]. Despite the August 2002 agreement between club owners and the MLBPA to explore the concept, as of spring training 2004 MLB was no closer to a new system, and MLB owners have abandoned attempts to implement a worldwide draft for now. See Klein, supra; Expo Decision, supra (quoting executive vice president for baseball operations in the MLB commissioner’s office, Sandy Alderson: “At this point, the clubs have indicated that they are not in a majority favoring a worldwide draft.”).

307 See Jamail, supra note 8, at 129–141.
308 Greller, supra note 10, at 1700–02.
indicate bipartisan support for relaxing the embargo’s restrictions on travel to Cuba. But even if the United States were unilaterally to alter the embargo in the manner that Greller envisions, it is highly improbable—the Castro regime’s public statements to the contrary notwithstanding—that Cubans will be allowed to play in America. Absent a stunning reversal of Castro’s long-standing socialist ideology and animus toward America—or, of course, his overthrow or death—Cuban baseball defection is not likely to become a relic of history anytime soon.

1. Changing MLB Policy to Accommodate Cuban Players

The first three steps of Greller’s plan consist chiefly of modifications of MLB rules with respect to Cuban players. Step one calls on MLB to revoke the Kuhn Directive, which prohibits teams from scouting and signing players in Cuba. Since the Directive is best viewed simply as MLB’s reiteration of the restraints imposed by the Cuban embargo, such action would be relatively ineffectual. That is, the Directive only prevents clubs from engaging in activities that would otherwise be prohibited by the Cuban embargo. Given the amount of untapped Cuban talent and the financial interests at stake for the league, MLB will almost certainly revoke the directive if and when Congress either alters the embargo to allow Cubans to play in America or lifts it altogether. Therefore, it would only be a sym-

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310 See Jamail, supra note 8, at 131–37. Cuban Commissioner Humberto Rodriguez’s public comment that Cuba would be “receptive to any proposal by the major leagues as long as it respects the principles of Cuban socialist sports” caused speculation in the press of a new relationship between Cuba and MLB. *Cubans May Play in Majors*, Sun-Sentinel (Ft. Lauderdale, Fla.), Oct. 31, 1998, at 7C. But Milton Jamail calls this claim “ludicrous,” noting that Cuban officials want to give the impression of flexibility, when in reality any kind of opening would undermine the government’s authoritarian grip on the country. See Jamail, supra note 8, at 131–32.
311 See Jamail, supra note 8, at 138 (“Those interested in the return of Cuban players to major league baseball need to look to a Cuba . . . without Fidel.”).
312 See Greller, supra note 10, at 1700–08.
313 Id. at 1700–02.
314 Cherington Interview, supra note 306.
315 See Cwiertny, supra note 10, at 401–09 (explaining how the Dodgers’ recruitment and signing of players in Cuba—the very actions prohibited by the Kuhn Directive—violated the embargo).
316 Cherington Interview, supra note 306; see supra note 306 and accompanying text.
bolic gesture to revoke the Kuhn Directive before the embargo is sub-
stantively altered to accommodate Cuban ballplayers.  

Step two proposes that MLB incorporate Cuban players into the
domestic amateur draft by amending the Official Professional Base-
ball Rules 3 and 4. Ostensibly, this would render the Cubas model
of defection irrelevant, since Cubans would not be eligible to become
free agents by moving to another country. From a practical stand-
point, this reform would have an identical effect on Cuban ballplayers
as the worldwide draft, discussed above. While incorporating Cu-
bans into the domestic amateur draft would also reduce incentives for
teams and agents to violate the embargo, by itself it would do nothing
to end defection. And, like the worldwide draft, such a proposal, by
discouraging agent involvement in the defection process, may cause
players to choose more dangerous methods of defection, or not to
defect at all. As long as Cubans must defect to play in MLB, incorpor-
ating them into the domestic amateur draft might simply create
problems to replace those it solves.  

The third step calls for MLB to impose a “Cuban contract tax”
upon teams that sign Cuban players. A small percentage of the total
dollar value of each Cuban contract would be redirected to an MLB
fund designed to support Cuban baseball infrastructure and MLB
scouting and development in Cuba. Greller asserts that the resul-
tant funds would “not go to the Cuban government, but rather will
remain under the auspices of MLB while directly going to the Cuban
people through baseball.”  

Unfortunately, this tax plan would be impossible to enact in its
current form, because it ignores the dominance of the Castro gov-
ernment over Cuban baseball. Because the government exerts con-
rol over every sports academy, baseball field, piece of equipment—

317 Cherington Interview, supra note 306.
318 Greller, supra note 10, at 1702–05.
319 See id. at 1703.
320 See Kwiatkowsky, supra note 10, at 1702 (noting that a worldwide draft would eliminate
free agency for foreign players); Greller, supra note 10, at 1703 (noting that incorporating
Cuban players into the draft would eliminate Cubas’ method of defection); supra notes 287–306 and accompanying text.
321 See supra notes 291–299 and accompanying text.
322 See supra notes 300–306 and accompanying text.
323 See supra note 306 and accompanying text.
324 Greller, supra note 10, at 1705–08.
325 See id. at 1705.
326 Id. at 1706.
327 See Jamail, supra note 8, at 29–46.
and, sadly, every player and coach, as well—MLB could never operate a baseball-oriented fund independently of Castro. This alone virtually dooms the project’s chances, given the influence of hard-line anti-Castro groups in America.

The idea of a Cuban contract tax, nevertheless, holds some promise. As Greller notes, by allowing Castro to divert money earmarked for baseball toward more important things, like food and medicine, the tax could be a boon for both Cuban baseball and Cuba’s people. In a post-Castro, post-embargo Cuba, such a tax might help baseball teams expedite the creation of necessary infrastructure to begin scouting and training more players. But so long as the Castro regime retains control, the imposition of a Cuban contract tax is an extremely unlikely scenario.

2. Changing U.S. Foreign Policy to Accommodate Cuban Players

Step four—changing U.S. foreign policy by eliminating defection as a prerequisite for Cubans to compete in MLB—is, as Greller acknowledges, integral to his plan’s success. As long as Castro remains in power, the United States is unlikely to lift the embargo in its entirety. Thus, with regard to U.S. policy, ending Cuban defection requires the passage of either of two bills currently under consideration.

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328 See id.
329 See supra notes 69–71 and accompanying text.
330 See Greller, supra note 10, at 1707–08.
331 See id.
332 Cf. Cherington Interview, supra note 306 (commenting that it would take some time for clubs to get their Cuba operations up and running once the country opened to MLB).
333 See supra notes 327–329 and accompanying text.
334 See Greller, supra note 10, at 1708–09 (“These changes by MLB and Cuba [steps one through three] will not succeed unless efforts begin at home. The United States must change its immigration policies to . . . illustrate that [it] no longer will force Cuban baseball players to defect in order to compete in MLB.”).
335 See Ratliff & Fontaine, supra note 71, at 3–4. The authors make an impassioned and well-reasoned argument to lift the embargo:

Too often today the main issues raised, particularly by the most militant politicians and political activists who support sanctions, seem to be driven by an understandable but misguided and counterproductive vendetta against Fidel Castro that smacks of hysteria and cold war politics. . . . Those who urge the lifting of sanctions are often said to be “soft” on Castro. . . . Too many embargo supporters seem to have studied strategy and tactics with Don Quixote; they simply brandish slightly updated versions of old leftist/rightist clichés to tilt with windmills guarded by straw men. The tragic commentary on U.S. policy toward Cuba is that Don Quixote invariably wins.

Id.
in the House of Representatives. The Baseball Diplomacy Act (BDA), last introduced by Representative José Serrano (D-N.Y.) in January 2003, would allow Cubans to come to America to play professional baseball and return to Cuba with their earnings.\footnote{H.R. 189, 108th Cong. (2003); see Greller, supra note 10, at 1708–10.} Another of Rep. Serrano’s proposals, the Bridges to the Cuban People Act (BCPA), a wide-ranging embargo relaxation bill introduced 2003, incorporates language similar to the BDA.\footnote{Bridges to the Cuban People Act of 2003, H.R. 3422, 108th Cong. (2003).} As of fall 2004, the BCPA had fifty-nine co-sponsors in the House and had been referred to the House Subcommittee on Immigration, Border Security, and Claims.\footnote{See H.R. 3422, Bill Summary & Status, 108th Cong. (2003), at http://thomas.loc.gov/cgi-bin/bdquery/D?d108:15:./temp/~bd0zuy:: (last visited Feb. 5, 2005).}

If enacted, the BCPA or the BDA would exempt all Cuban nationals who come to the United States to play professionally from certain restrictions related to the embargo and relevant immigration law.\footnote{See H.R. 3422 § 408; H.R. 189.} Both bills would allow players to obtain visas for the duration of each season they are under contract, and to return to Cuba with their earnings.\footnote{See H.R. 3422 § 408; H.R. 189.}

The chances of either bill’s passage are relatively poor, despite recent indications of support for reforming the embargo.\footnote{See Jamail, supra note 8, at 132 (discussing opposition to and failure of Baseball Diplomacy Act in 1996 and 1998); Susan Kepecs, Cuba Embargo on Its Last Legs?, CAPITAL TIMES (Madison, Wis.), Jan. 4, 2003, at 1B (quoting former House speaker Dick Armey: “If [the trade and travel restrictions] last a year, it will be the last year they last.”). In the fall of 2003, an amendment to a transportation appropriations bill, which would have lifted the ban on Americans traveling to Cuba, gained the support of a wide bipartisan majority in both houses of Congress. Young, supra note 309. President Bush’s threat to veto any bill that tinkered with the embargo, however, led the House Republican leadership to ditch the amendment in conference. Id. A similar showdown between the Bush Administration and Congress ensued in the fall of 2004, as the House voted to deny funding changes that would have tightened travel restrictions to Cuba, despite threats of a White House veto. See Bachelet, supra note 309. The restrictions promulgated by the White House in the summer of 2004, and rejected by the House, would limit visits to Cuba by immediate family members to once every three years—the current rule is once per year—and ban travel by more distant relatives such as aunts and cousins. See id.} The mere possibility that Castro might seize millions of dollars from returning ballplayers is unpalatable to anti-
Castro politicians. Perhaps if the BDA or section 408 of the BCPA included guarantees that no player’s salary would find its way into Castro’s hands—how to guarantee such a thing is a difficult question—then Congress might be apt to adopt the proposed legislation. But unless these changes are made, or the political tenor in Washington changes drastically, neither the BCPA nor the BDA will garner enough support to solve the crisis of Cuban baseball defection.

3. “Fidel, Inc.”—Would Castro Let Ballplayers Come to America?

The existence of the defection system is primarily attributable to the policies of Fidel Castro. Even if the United States unilaterally altered its policies to allow Cubans to contract with MLB clubs and travel freely back to Cuba, Castro’s long-standing practices make the demise of defection unlikely.

Cuban ballplayers are essential to Castro’s propaganda. The regime trumpets the successes of the amateur system and the national team, declaring them victories for the revolution and the Cuban people. As Cuba’s economy falters, success in baseball is one of few accomplishments to which the government can cling. The high level of amateur competition in Cuba, goes the government’s myth, shows that baseball can succeed while it retains its socialist character. According to this myth, money is irrelevant—players compete for love of the game and, of course, their country.

Castro’s need to maintain this myth further indicates that he will probably never permit Cubans to play in America. Cubans playing in MLB would be “symbol[s] of the freedom, the wealth and the pos-

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343 See Jamail, supra note 8, at 132.
344 See Greller, supra note 10, at 1710 (“Admittedly, preventing the Castro government from seizing the salaries of [returning] players may prove difficult.”); cf. Jamail, supra note 8, at 132 (noting that opposition to the Baseball Diplomacy Act stemmed from fears that the Cuban government would confiscate player’s paychecks).
345 Fainaru & Sánchez, supra note 13, at 127.
346 See supra note 13 and accompanying text.
347 See Jamail, supra note 8, at 129–30 (quoting Gilberto Dihigo: “Until Fidel dies, I don’t see any way that would allow Cuban players to become professional.”).
348 See Echevarría, supra note 27, at 362 (noting the revolution’s effect on Cuban baseball and the “relentless propaganda about its benefits in the Cuban press”); Jamail, supra note 8, at 133–34.
349 See Jamail, supra note 8, at 133–34, 141.
350 See id. at 133–34.
351 See id. at 133.
352 See id.
353 See id. at 133–34.
sibility for open-ended self-fulfillment that America has long represented to people under [Castro’s] totalitarian control.” Wealthy players returning from America would intolerably challenge Castro’s communist system and anti-American worldview.

Most importantly, Castro’s anti-Americanism extends to the baseball field. Since the heady, early days of the revolution, Castro has believed in waging a battle between Cuban baseball and American baseball—between “la pelota libre” and “la pelota esclava.” The Cuban people have invested [in their baseball players],” the Cuban baseball commissioner explains, “[a]nd no one has the right to take them away.” Considering the doggedness with which Castro has pursued the victory of “la pelota libre,” it is almost inconceivable that the dictator would grant permission for Cuban baseball players to play “la pelota esclava” in America. Castro’s longevity and unwavering devotion to his ideology ensure the continuation of Cuban baseball defection until the day he is overthrown or dies.

Conclusion

Since 1991, Cuban baseball players with dreams of playing Major League Baseball have been stuck in a system that offers no good choices. Longstanding policies of both the Cuban and United States governments have created a broken system that disregards the basic safety and welfare of Cuban ballplayers and their families. The defection system not only ignores these important humanitarian concerns, but also encourages dangerous and illegal immigration practices.

The plight of Cuban defectors exemplifies the untenable state of United States-Cuba relations. Midway through the first decade of the new millennium, Castro continues to rule impoverished, languishing Cuba with an iron fist; the embargo, more stringent than ever, remains in full force; and young baseball players from Cuba, wanting nothing more than the freedom to compete against the world’s best,

355 Cf. id. (noting that the 1999 Baltimore Orioles trip to Cuba would expose Cubans to wealthy, fearless, free American ballplayers, inevitably eroding Castro’s grip on his country).
356 See Jamail, supra note 8, at 134.
357 See id.
358 Thompson, supra note 283.
359 See Jamail, supra note 8, at 134.
360 See id. at 129–35.
must choose between their dreams and their homes. The sorry state of baseball relations between the United States and Cuba is ample evidence of not only Castro’s failed revolution, but also the failure of U.S. foreign policy toward Cuba.


For potential Cuban baseball defectors, any policy changes in the United States would be virtually irrelevant so long as Castro remains Cuba’s leader. The defection system will almost certainly last as long as Castro does. But the greatest travesty for Cuban ballplayers, MLB, U.S.-Cuba relations, and the Cuban people, would be to maintain diplomatic hostility between the two countries after Castro’s demise.

Today’s young Cuban baseball stars—having heard the stories of Rene Arocha and El Duque and José Contreras—wonder whether they, too, will soon confront the wrenching decision to leave behind their homes, families, and lives for a future in American baseball. This generation of Cuban defectors—from the World Series heroes to the rookie league flameouts—has confronted profound adversity with dignity. Hopefully, the next generation of Cuban baseball players, and their families, will not to have face the extremely difficult choices of their predecessors. Americans and Cubans alike must ensure that Cuban baseball defection soon becomes a mere relic in the history of baseball.
“YOUR WIFE SHOULD HANDLE IT”: THE IMPLICIT MESSAGES OF THE FAMILY AND MEDICAL LEAVE ACT

LINDSAY R. B. DICKERSON*


Abstract: In The Mommy Myth, Susan Douglas and Meredith Michaels examine the heightened standards of motherhood that pervade modern American society. They contend that the media has perpetuated an ideal of motherhood that defines women in relation to their children and established a standard of motherhood that is impossible to achieve. This Book Review analyzes the Family and Medical Leave Act as a woman’s first concrete interaction with the mommy myth, and asserts that instead of helping women balance work and family, the Family and Medical Leave Act perpetuates the mommy myth.

INTRODUCTION

Gone are the days of Leave It to Beaver, when the father brings home the paycheck and the mother dutifully stays home to nurture her children.1 Or are they? This popular stereotype portrayed women as happily devoting their lives to their children and the home.2 Under the old stereotype, a mother did not work outside the home because she was totally devoted to her family.3 Today, popular magazines portray women adoringly holding their children and claiming that ultimate fulfillment can be found in having a child.4

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2 Id. at 34. Douglas and Michaels describe the old stereotype as “that of the selfless, never complaining, always happy wife and mother who cheerfully eradicated whatever other identities she might have had and instead put her husband, her children, and the cleanliness of her house first.” Id. Indeed, an assault on women’s confinement in the home was the basis of The Feminine Mystique, Betty Friedan’s seminal work of the 1960s women’s movement. Id. at 33.
3 Id. at 34.
The media urges mothers to be super vigilant and constantly on the lookout for new dangers to their children. From germ-laden toys to dangerous vaccinations, mothers are told not to look away, even for a moment, from the well-being of their children. Leave It to Beaver may not be a relic of the past after all.

At the same time, women from all strata of society comprise a larger proportion of the American labor force than ever before. Yet women still do more of the household work than their male counterparts. Today’s young women face a future where society champions their participation in the labor force and also demands that they spend every moment concentrating on the well-being of their children.

In The Mommy Myth: The Idealization of Motherhood and How It Has Undermined Women, Susan Douglas and Meredith Michaels argue that the modern media has perpetuated a new form of the feminine mystique. Women are inundated with the new “momism,” a set of beliefs and ideals that define women in relation to motherhood. This new momism dictates that women are not true and complete women until they have a child, and to be a decent mother, a woman must devote her entire being and life to her child. In addition, the new momism asserts that women are the best and natural caregivers of children.

Ready for a Baby! The cover story tells of Jennifer Lopez’s marriage to Marc Anthony and cites “baby lust” as a potential reason for her three marriages. Throughout The Mommy Myth, Douglas and Michaels point to the media as the primary way the new momism is communicated to the women of America. Although the authors do not define the boundaries of the media referred to in the book, the primary sources include popular magazines, television shows, the evening news, popular radio broadcasts, and parenting books. See generally Douglas & Michaels, supra note 1.

8 Id. at 299.
9 Id. at 298–99.
10 See discussion infra Part II.B; see also Jeremy Borer, Note, You, Me, and the Consequences of Family: How Federal Employment Law Prevents the Shattering of the “Glass Ceiling,” 50 Wash. U. J. Urb. & Contemp. L. 401, 404–05 (1996) (pointing to the dichotomy of the cultural belief that women are homemakers, but are welcome to attempt the corporate ladder only if the demands of home and family will not conflict).
The Family and Medical Leave Act does not offer legal solutions to rectify the stratified gender norms that it presents, but this Book Review argues that family leave is a logical place to begin, because parental leave is a parent’s first interaction with the demands of balancing work and family, and often a woman’s first personal interaction with the new momism.

The federal leave legislation that attempts to help women navigate the demands of a new family and work is the Family and Medical Leave Act of 1993 (FMLA). Instead of helping mothers, however, the FMLA perpetuates the notion that the mother is the ideal primary caretaker of children. Furthermore, the FMLA contains deeply embedded assumptions and cultural values. California, however, enacted legislation in 2004 that provides compensation to parents who take time to care for a new infant. California’s Paid Family Leave Program offers a viable option to begin to rectify the stratified gender norms that, despite progress, are still present in twenty-first century American society.

Part I reviews the development of the “mommy myth” as presented by Douglas and Michaels. Part I also analyzes the media’s depiction of women as the best primary caregivers of children. Part II then examines how the FMLA, intended to help mothers balance work and family, has actually perpetuated the idea that women should remain the primary caregivers of children. Part II further explores how this continued gender stratification has undermined and undervalued women. Finally, Part III suggests California’s Paid Family Leave as a model for future family leave that values women in their own right and not in comparison to men.

I. The “Mommy Myth”

In The Mommy Myth, Douglas and Michaels argue that the media has promoted a new momism, which is a set of standards and ideals that govern motherhood and define women in relation to their children. The primary tenets of the new momism state that a woman is not truly complete until she has a child, and that to be a good mother, a woman must devote all of her time, energy and attention to her

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16 See Bornstein, supra note 15, at 104.
17 Id. at 81.
19 Douglas & Michaels, supra note 1, at 22.
Additionally, the new momism asserts that women are the best primary caretakers of their children. Motherhood defines women, while the standards for what constitutes a “good mother” are impossible to achieve. The new momism does not demand that a woman stay at home with her children, but instead asserts that women have been to the workforce and now should make the “right” choice to stay at home with their children.

Douglas and Michaels chronicle the development and perfection of the “mommy myth” over the past thirty years. Beginning in the 1970s, the media perpetuated “a set of ideals, norms, and practices . . . that seem on the surface to celebrate motherhood, but which in reality promulgate standards of perfection that are beyond [the mother’s] reach.” The rise of the “celebrity mother” in the 1980s romanticized motherhood. Women who had succeeded in their respective fields stated that their greatest fulfillment came from motherhood; instead women proclaimed the unending joys of children.

The mid-1980s witnessed the media sensationalize the widespread danger to children when the mother’s attention was not focused on the child. The media carried stories of abducted children and child molestation in day care. Many of the stories later proved to be largely fabricated. Nevertheless, these stories scared parents.

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20 Id. at 4.
21 See id.
22 See id. Women’s role models for motherhood are celebrities featured in the media. See id. at 115; see also infra note 27 and accompanying text. The celebrities portrayed as the ideal mothers, however, have infinite resources. See Douglas & Michaels, supra note 1, at 4. Because the average mother does not have these resources, she cannot attain the high standard of motherhood. See id.
23 Douglas & Michaels, supra note 1, at 23.
24 See generally id.
25 Id. at 4–5.
26 Id. at 115.
27 Id. at 116. Douglas and Michaels detail a story from InStyle with Kirstie Alley from February 1994. Id. at 111. In the article, Kirstie Alley, the star of Cheers and Look Who’s Talking, tells of her life in her island home in Bangor, Maine with nannies and cooks, and finding a new way to look at the world through her son. Id.
28 Id. at 116.
29 Douglas & Michaels, supra note 1, at 85.
30 Id. at 93–98.
31 Id. at 95. In 1984, the McMartin Preschool scandal grabbed headlines as one of the biggest child molestation cases on record. Id. at 94. It was claimed that at least 125 children had been molested at a day care center in California. Id. In the end, the scandal turned out to have been largely manufactured by unlicensed “therapists.” Id. at 95.
particularly mothers, into believing that no one could be trusted with their children; the best and safest care was the care of the mother.32

With the romanticization of motherhood and the terror of day care services came a corresponding increase in the rhetoric of family values.33 This rhetoric, coupled with media messages refined the image of the ideal mother, and vilified those who strayed from the new momism.34 The welfare mother was demonized as the epitome of a mother gone wrong.35 Instead of examining the plight and poverty of the mother on welfare, the media emphasized that welfare was the cause of poverty and that “welfare moms” had children simply to increase their payroll.36 The “welfare mom” was not the only type of mother who was demonized for failing to conform to the heightened standard of motherhood.37 Mothers who killed their children were likewise portrayed as the antithesis of the new momism, because they had failed to find unending joy in their children.38 The power of the new momism, which proclaimed motherhood as romantic and perfect, prevented an examination into the ambivalence of motherhood and the real conditions that some mothers faced.39

Concurrently, the media pitted working mothers against mothers who chose to stay home and glorified a return to domesticity.40 A few popular television shows rejected the new momism, but most celebrated intensive mothering and a return of women to the domestic

32 See id. at 98.
33 Id. at 88.

At the same time, the Reagan presidency and the rise of the religious right led to a well-funded and often vehement backlash against feminism, most frequently expressed as “family values,” which meant Dad should be the boss again and Mom should make family heirlooms out of the lint from the clothes dryer.

Id.

34 Douglas & Michaels, supra note 1, 161–68.
35 Id. at 181.
36 See id. at 187.
37 Id. at 162–67.
38 Id. A prime example is the story of Susan Smith. Id. In October 1994, Smith reported to police that an armed carjacker had stolen her car with her two sons still inside. Id. at 162. Smith was featured on television pleading for her children’s return. Id. at 162–63. Less than two weeks after her children’s disappearance, Smith admitted to driving her car into a lake with her two children strapped inside, and jumping out before the van went under the water. Id. The public’s response was disbelief: how could a mother murder her own children? Id. at 164. Although Smith suffered from depression and a history of abuse, the media fixated on perceiving the tragedy as maternal instinct gone wrong. Id.
39 See Douglas & Michaels, supra note 1, at 164, 167.
40 Id. at 204–05.
sphere. At every turn the media broadcast the message that although women could work, the “right” choice for women was to return to the home and care for their children.

Magazines targeting parents and the mainstream media in the 1990s perfected the new mommy myth and the heightened standards of motherhood. New advertising targeted at mothers portrayed a world where “the grim reaper lurks everywhere, just one maternal misstep away.” From the germs on a child’s toy, to defective toys, to fear of Sudden Infant Death Syndrome, mothers were urged to be constantly vigilant for the next potential deathtrap to their child. Furthermore, instead of simply giving a child a stuffed animal to play with, mothers were urged to foster the intellectual development of their children from the time of conception. Radio broadcasters, such as Dr. Laura, urged mothers to be “their kid’s mom,” never hire a babysitter and reject feminism and the advances brought to society by feminism, and instead return to a mother’s best and natural role as the primary caretaker of her children. By the end of the twentieth century, the mommy myth was perfected—children and the standards of motherhood that were impossible to reach defined women.

The Mommy Myth presents a stark portrayal of the popular return to 1950s standards for what constitutes a good woman and mother, and women’s subsequent struggle to maintain a career and balance the needs of her family. The new standards dictate that mothers should be scared to turn away from their child for even a moment, let alone surrender their child to day care. Fathers are nowhere to be

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41 Id. at 209. For example, the popular show Roseanne rejected the new momism, and instead was meant to represent the working class and portray a view of motherhood that was more ambivalent and frank. Id. at 217–19. Indeed, some shows explicitly rejected intensive mothering and depicted the new momism as stuffy and overly obsessive. Id. at 218–19. In contrast to Roseanne were shows like thirtysomething, which celebrated the new momism and intensive mothering. Id. at 217. Thirtysomething depicted the “new traditionalism” where women were not forced to stay home, but instead, elected to return to the home because of her moral obligations to her child. Id. at 209.
42 Id. at 23.
43 Id. at 299.
44 Douglas & Michaels, supra note 1, at 299.
45 Id. at 298–99.
46 Id. at 295. For example, one popular toy, the Mozart Music Cube played Mozart for the toddler when he or she arranged the blocks in the correct order. Id.
47 See id. at 310.
48 See id. at 299.
49 Douglas & Michaels, supra note 1, at 4.
50 Id. at 95–98. In the 1970s, proposals for federally funded child care were turned down on the claim that state-funded day care was akin to turning your child over to the
found in the new momism—the responsibility for children falls squarely on the mother. As a result, mothers are cast as the best primary caretakers for their children, without concern for the father’s role or the mother’s career. *The Mommy Myth* offers few solutions, but maternity leave, a woman’s first encounter with balancing work with her children, is a logical place to begin.

II. **The Discriminatory Effects and Entrenched Assumptions of the FMLA.**

The federal leave legislation enacted to help working families balance the demands of employment and family, the FMLA, perpetuates the gender-stratified norms presented in *The Mommy Myth*. The FMLA was intended to be gender neutral while also promoting the cause of women in the workplace, but its specific provisions, combined with the effects of the legislation do not challenge the discriminatory structures of family and work that were in place prior to its enactment.\(^51\) The effects of the FMLA on paternal leave taking have been the subject of much scholarship, yet the implicit messages sent to women have not been explored in detail.\(^52\)

A. **Brief Background of the FMLA**

In 1993, as his first act as President, William Clinton signed the FMLA into law, declaring an end to the battle between Congress and the White House for family leave legislation.\(^53\) The FMLA is the first federal legislation aimed at helping working families by mandating

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\(^{53}\) See Mitchell Locin, *Family Leave Signed, Hailed as Gridlock End ‘Embrace’ Law*, CHI. TRIB., Feb. 6, 1993, § 1, at 3. Congress sent two bills to the White House prior to the FMLA that addressed family leave. *Id.* The two bills were vetoed by President George H. Bush out of concerns that mandated family leave legislation would be too expensive to the costs of doing business in the United States. *Id.*
family leave. The United States is the last industrialized nation to enact family leave law, and remains the only industrialized nation that does not provide paid family leave.

To be eligible for leave under the FMLA, both the employer and the employee must meet certain requirements. The FMLA requires that employers allow eligible employees to take twelve weeks of unpaid leave in one year to care for a new infant or an adopted child. The provisions that allow parents to care for a new child, expire one year after the birth or adoption of the child. When the employee returns to work, the employer is required to restore the employee to the same or an equivalent position, with the same pay and benefits.

The FMLA excludes certain employers and employees. Employers with fewer than fifty total employees within a seventy-five mile radius of the company are exempt from the FMLA’s provisions. In addition, employees must have been employed by the employer for at least twelve months and worked at least 1,250 hours during the previous year. Further, an employee who is considered a “highly compensated employee” may be denied restoration if the denial is necessary “to prevent substantial and grievous economic injury to the operations of the employer.” Even with these restrictions, the FMLA was heralded for its gender neutrality.

The FMLA is praised because it provides needed family leave without direct reference to gender. The statute neither limits the

54 See id.
57 Id. § 2612(a)(1)(A), (B). The FMLA also provides for eligible employees to take twelve weeks to care for a sick child, spouse or parent, or their own medical conditions. Id. § 2612(a)(1)(C), (D). Discussion of these provisions, however, is outside the scope of this Book Review.
58 Id. § 2612(a)(2).
59 Id. § 2614(a)(1) (A), (B).
60 See id. § 2611(2), (4).
62 Id. § 2611(2)(A)(i), (ii). The 1,250 hour requirement for eligibility correlates to approximately a twenty-four hour work week for the previous year.
63 Id. § 2614(b). A “highly compensated employee” is an employee who is “salaried and among the highest paid ten percent of the employees employed by the employer.” Id. § 2614(b)(2).
64 See Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 729–33 (2003). The Court held that state employees may recover money damages in federal court if the state fails to comply with the family-care provisions of the FMLA. Id. at 724–25. However, businesses feared the impact of the mandatory leave provisions, and the potential negative repercussions for businesses. See Bornstein, supra note 15, at 78–79. Businesses claimed that mandatory family-
leave to the mother of the child nor exempts the father. Congress specifically stated that one purpose of the legislation was to promote equal employment for both men and women and to minimize the potential for gender-based discrimination.

The FMLA has been active law for over ten years, and continues to be touted for its gender neutrality. In *Nevada Department of Human Resources v. Hibbs*, the Supreme Court examined the past discrimination of women, and praised the FMLA for its attempts to rectify past subordination of women. Indeed, the Court considered that when the FMLA was passed, gender discrimination was still pervasive in American society. Closer examination, however, reveals that the FMLA is not gender neutral, and thus fails to halt the perpetual subordination of women that the FMLA was intended to address.

Although the language of the FMLA is gender-neutral, its effect is to promulgate the gender-stratified norms expounded in *The Mommy*

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66 Id. § 2601(b)(4), (5). One stated purpose of the FMLA is:

(4) to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender neutral basis; and (5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.

67 538 U.S. at 729–30. The Supreme Court detailed the history of state-sanctioned subordination of women. Id. The Court looked to prior Supreme Court decisions that limited the rights of women based on the belief that a “woman is, and should remain, ‘the center of home and family life.’” See id. at 729 (quoting Hoyt v. Florida, 368 U.S. 57, 62 (1961)). The Court specifically looked to *Bradwell v. Illinois*, 83 U.S. 130 (1872) and *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948), decisions that upheld state laws prohibiting women from joining the professions of law and bartending. Id. Many women’s groups also supported the FMLA in *Hibbs*, via an amicus brief sponsored by the National Women’s Law Center. Brief of Amici Curiae National Women’s Law Center, et al. at 11–12, *Hibbs* (No. 01-1368). Among the brief’s supporters were organizations such as the America Association of University Women, Center for Women Policy Studies, Equal Rights Advocates, Feminist Majority Foundation, National Employment Law Project, National Organization for Women Foundation, and the National Women’s Law Center. Id. at i. In the brief, the National Women’s Law Center asserts that the FMLA remedies gender discrimination by undermining traditional stereotypes used against women in the workplace by ensuring unpaid leave.

68 *Hibbs*, 538 U.S. at 730.
69 See discussion infra Part II.B.
Myth. This is because the FMLA is based on embedded social norms and unstated assumptions that subordinate women.70 Indeed, the FMLA is a reflection of the social understandings and values of the time when it was enacted.71 The legislation was created within the social context of 1993, a time—which the Supreme Court noted—when gender discrimination was still pervasive within the United States.72 Indeed, a Congressional finding of the FMLA stated that, “responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men.”73 Women continue to be portrayed as the principal caregiver of children—one element of women’s subordination—in part because the FMLA was enacted within a social context that was and still is governed by a patriarchy.74 The FMLA’s entrenched assumptions are not readily apparent, yet they become so when one contrasts the effect of the legislation on both men and women.

B. Parental Leave Taking

The FMLA discourages fathers from taking leave following the birth or adoption of a child, and yet encourages mothers to take family leave.75 The reason why family leave is under-utilized by fathers has

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70 Bornstein, supra note 15, at 91. Indeed, as Professor Bornstein states, “In attempting to analyze the Family and Medical Leave Act, we can employ a public values approach in which norms that both reflect and help constitute social experience are seen as embedded in the legal rules we create.” Id.
71 See id.
74 See Bornstein, supra note 15, at 81, 104.
been the subject of much scholarly debate. Indeed, critics speculate that a combination of social stigma, financial pressures and specific provisions of the FMLA act to keep men from fully utilizing family leave, while encouraging women to take family leave.76

Despite the passage of the FMLA, gendered social norms persist regarding family leave and parenting.77 The ideal worker in American culture is the male worker with no responsibilities outside of the workplace.78 Fathers fear that deviation from this ideal worker norm will endanger their careers.79 Women, however, are expected to deviate from this norm and take unpaid family leave.80 The FMLA does nothing to disrupt this pattern.81 In addition, pervasive norms regarding parenting persist.82 The workplace has become more sensitive to the needs of balancing work and family, but this sensitivity is often directed toward women and against men.83 As one scholar states, “Men’s accommodation requests are often met by, ‘Your wife should handle it.’”84 Though many companies offer paternal leave to appear gender neutral, it is often a hollow policy that is not intended to be utilized by fathers.85 This is because within the workplace, childcare remains the reason men take leave was to care for their own serious illness. Highlights, supra, at 3. For example, 58% of leave taking for men was to care for own illness. Id. While the top reason for women was likewise to care for their own illness, that reason comprised only 49% of leave taking and care for a new child or maternity leave was second at 29%. Id.

76 See supra note 52.
78 See Bornstein, supra note 15, at 95–96.
79 Malin, supra note 52, at 1078. Professor Malin references a research study done by the research group Catalyst during the mid-1980s of family leave policies among large employers. Id. at 1049. The study found that 63% of large employers found it unreasonable for a father to take any parental leave, and 17% found paternal leave reasonable only where the leave was limited to two weeks or less. Id. at 1078. Malin concludes that “[f]athers who take parental leave justifiably fear for their jobs and their families’ financial security.” Id. see also Cahn, supra note 77, at 185 (asserting that “[b]ecause society has traditionally viewed the woman as the primary caregiver, many men are reluctant to step out of their role as providers”).
80 See Malin, supra note 52, at 1089; see also Bornstein, supra note 15, at 102.
81 See Selmi, supra note 51, at 765–66, see also Bornstein, supra note 15, at 81 (arguing that the moral code of the FMLA perpetuates many of the problems that the legislation was intended to rectify).
82 Cahn, supra note 77, at 184. For example, “[w]hen we think of ideal parenting, we typically envision ‘mothering,’ rather than ‘fathering.’” Id. at 183.
83 Malin, supra note 52, at 1077.
84 Id.
85 Bornstein, supra note 15, at 116.
mother’s responsibility. Fathers are playing an increasing role in parenting, but nonetheless, parenthood remains a gendered concept with different standards for mothers and fathers. In parenthood, there is no equality; the mother is the primary parent and the father has the primary career.

In addition to workplace concerns, financial concerns keep men from taking the unpaid family leave provided by the FMLA and encourage women to take the subordinate financial position. Unfortunately, it is still true that men earn more than women in the same occupations across different age groups and professions. Men remain the primary financial providers for their families. When a child is born or adopted, new financial considerations arise. The mother, at least temporarily, is not working and there is an additional person to support. Fathers often respond by working more to compensate for the loss of income and increased expenses.

The FMLA provides for only unpaid leave. Few families can afford to forgo both the income of the mother and the father. Thus,

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86 See Malin, supra note 52, at 1077 (stating that employers are willing to accommodate mothers’ family responsibilities, but employers are unwilling to make similar accommodations for fathers).

87 Cahn, supra note 77, at 188 (stating that despite the increasing role of fathers in parenting, the actual performance of caretaking within the home demonstrates the continued presence of different standards for fathers and mothers).

88 Malin, supra note 52, at 1073–74.

89 Selmi, supra note 51, at 714–15; see also Kathryn Branch, Note, Are Women Worth as Much as Men?: Employment Inequities, Gender Roles, and Public Policy, 1 Duke J. Gender L. & Pol’y 119, 119 (1994) (stating that women are worth less than men in the labor market because traditional gender roles result in the assignment of women to the home). Indeed, in 2002, women earned $0.77 for each dollar that men earned. Professional Women, supra note 8. The wage gap is 67% and 55%, respectively. Id. The wage gap persists across occupations and even in those occupations where women outnumber men. Id. For example, “[f]emale registered nurses earn 12% less than their male colleagues.” Id.


91 Malin, supra note 52, at 1074.

92 Id.

93 Id.

94 Malin, supra note 52 at 1073. As Professor Malin states:

When the leave available to the mother is paid and the leave available to the father is not, it sends a signal to the parents that the mother is expected to take leave and the father is not. It becomes easy for the father not to take leave by reasoning that the children will be cared for with little or no drop in household income if only the mother stays home.

Id.; see also Peterson, supra note 52, at 268 (stating that without wage replacement fathers cannot afford to take family leave).
“[b]ecause men’s wages continue to be significantly higher than women’s, it would be economically rational for a married woman to take the leave alone, as she would forgo a smaller income than her husband would, and his larger income would continue.”95 Therefore, financial concerns constrain fathers from taking unpaid family leave.96

The highly compensated employee provision furthers gendered patterns of leave-taking.97 The provision provides that employers are not required to reinstate highly compensated employees to a similar position when they return from family leave.98 If a mother-to-be is part of the highest paid 10% of employees of an employer, the mother is not guaranteed a restoration of the high position when she returns from maternity leave.99 Fathers who fall into this category are discouraged from taking leave to retain their high position and continue to accrue seniority.100 The effects of the FMLA translate into implicit messages for parents.

C. The Implicit Messages of the Family and Medical Leave Act

The Family and Medical Leave Act sends implicit messages to the women of America.101 These messages, norms, and assumptions embedded within the words and effects of the FMLA are not readily apparent.

The FMLA operates on entrenched assumptions.102 The FMLA, like all legislation, contains the cultural values of the government that enacted it.103 These values are reflected in the assumptions and effects

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95 Bornstein, supra note 15, at 116.
96 Malin, supra note 52, at 1074; see also Bornstein, supra note 15, at 116 (arguing that fathers are less likely to take parental leave without wage replacement).
98 29 U.S.C. § 2614(b) (1999). Highly compensated employees are those who fall into the highest 10% of salaried employees within seventy-five miles of the worksite. Id. § 2614(b)(2).
99 Bornstein, supra note 15, at 118.
100 See Bornstein, supra note 15, at 118–19; Peterson, supra note 52, at 270.
101 See Bornstein, supra note 15, at 91.
102 Id. at 81.
103 Id. As stated by Professor Bornstein, “[t]he Family and Medical Leave Act can be viewed as a proxy for national public values regarding the working family. The provisions
of the FMLA. The FMLA assumes that a secondary source of income exists that allows mothers to take unpaid leave; that is, the FMLA assumes that mothers are dependent on another person. This cultural value embedded within the FMLA operates to value the traditional family structure and ignore single or unconventional parents. Single parents and many women cannot afford unpaid leave. Yet, the FMLA operates on the assumption that mothers can afford to take leave because mothers are not independent.

Moreover, the FMLA casts mothers as the primary caretakers of children. Parenthood in American society is equated with motherhood. This cultural assumption of mother as primary parent begins immediately following the birth of the child. Under the structure set in place by the FMLA, the mother is the most culturally and financially able to take leave following the birth of the child.

Patterns of caretaking begin when a child is born or adopted and are perpetuated throughout the life of the child. Indeed, when the mother is the parent at home caring for the child after its birth, the mother learns about the care and needs of the child. The father does not learn as much as the mother about the child and is immediately placed in a secondary position of care. Both parents come to

of the Act embody and sustain the values that the government is willing to advance on behalf of the working family.” Id.

104 Id.
105 See Young, supra note 50, at 142. One commentator, Angie Young argues that children of single parent families are made vulnerable by provisions of the FMLA that may force a single mother to choose between employment and caring for her child. Id.
106 See Bornstein, supra note 15, at 104. Furthermore, the FMLA requires that the child be “a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis.” 29 U.S.C. § 2611(12) (1999). Therefore, a lesbian or gay parent may be precluded from taking leave to care for a new child because that child is not “legally” their child. Bornstein, supra note 15, at 111.
108 See Cahn, supra note 77, at 193. Professor Cahn points to societal proscriptions in the form of advice books, novels, and other media, as in The Mommy Myth, that equate parenthood with motherhood and tell women how to care for their children. Id.
109 See Malin, supra note 52, at 1055.
110 Id. at 1073–74.
111 Young, supra note 50, at 124.
112 Malin, supra note 52, at 1054–55. The belief that women have a natural maternal instinct that makes them the better caregivers of children has not been supported by scientific, sociological, or anthropological evidence. Id. Indeed, evidence does not support that mothers are better at nurturing or caring for children, but that nurturing and caring for a child is a learned skill. Id. Thus, parenting is a skill developed following the birth or adoption of a child. Id.
113 Young, supra note 50, at 124–25.
perceive the mother as the more capable parent since she has the most knowledge and experience with the child.114 As stated by Professor Young, “[t]hough a first-time mother and father may begin with the same level of parenting skills, the perception that mothers have greater skills can be a self-fulfilling prophecy.”115 By the time the father attempts to fill the role of caregiver, he has been subjugated to a position of visitor with the child and is not a primary caretaker.116

Fathers who do not take leave and participate in the care of the child immediately following the child’s birth or adoption fall behind on the skills needed to care for the child.117 Indeed, “once men step out [of a caregiving role], it becomes hard for them to get back in.”118 The mother is therefore cast as the primary caregiver of the child.119 Because the patterns of care-taking are established in the days and weeks following the birth or adoption of the child, the FMLA ensures that the burden for caregiving falls on the mother.120 Further, the FMLA works to undermine the position of women in the workplace.

The FMLA perpetuates the belief and stereotype that women are less committed to the workplace, because her focus is on the home.121 The sensitive issue of paternal and maternity leave often arises during the crucial years when advancement to partner, tenure, or management is scrutinized and the demand at work peaks.122 Employers rationally assume that their employees will follow prescribed gender norms and that the women will therefore be less committed to the workforce.123 Women are penalized for the perception that they will...

114 Id.; see also Malin, supra note 52, at 1057 (stating that when fathers do not take parental leave following the birth or adoption of a child, the father is marginalized in the child care and the primary burden is placed on the mother).
115 Young, supra note 50, at 124.
116 Malin, supra note 52, at 1056.
117 Id. at 1057.
118 Young, supra note 50, at 125.
119 See id.
120 See Bornstein, supra note 15, at 99, 115.
121 See Cahn, supra note 77, at 193–94. Professor Cahn illustrates the myth by referencing a commentary by a New York Times editor, who stated that a mother will have less energy to expend on her work because her energy is divided between work and home, and she will probably be less successful than her male counterparts. Id.
122 Bornstein, supra note 15, at 97.
123 Id. at 95. As Professor Bornstein stated, “Employers take rational gamble[s] that workers adhere to traditional gender roles in offering career advances and salary increases to men and assigning the responsibility for children and home to women.” Id. (alteration in original); see also Branch, supra note 89, at 127 (stating that men are assigned a greater level of workforce attachment on the gamble that they will adhere to traditional gender roles).
have children and at least temporarily leave the workforce. By ensuring that the mother of the child is the parent who takes family leave, the FMLA substantiates, validates, and reinforces the logical gambles that employers take that women are not committed to the workforce. Although the FMLA was intended to help women balance work and family, it has served to perpetuate the underlying stereotypes that are the basis of workplace discrimination.

The FMLA mandates only unpaid leave. Federally required unpaid leave undermines women in the workplace. Because more women than men take leave under the FMLA, the lack of compensation affects women in greater numbers. Unpaid leave undervalues women by presuming two key details: it not only assumes that women can afford to take the leave because it is not essential to their livelihood, but it also assumes that a mother’s financial contribution and involvement in the workplace are insignificant.

D. The Status Quo is Subordination

In preserving the status quo, the Family and Medical Leave Act perpetuates the legal subordination of women. Scholars have commented that the FMLA does little to help working mothers and families balance the demands of home and the family; nor does the FMLA advance women in the workplace. The FMLA does little to alter the

124 Selmi, supra note 51, at 726. Selmi illustrates that women indeed only leave temporarily by pointing to studies that show that women who worked full time prior to taking leave tend to return to full time work, and it is rare for a woman to move from full time to part time work. Id. at 733. Furthermore, following the birth of a child, the majority of women return to work within six months and between 40 and 65% return within three months. Id. “Even after controlling for differences in characteristics such as education and work experience, researchers typically find a family penalty of 10–15 percent [in earnings] for women with children as compared to women without children.” Waldfogel, supra note 55, at 143.

125 See Young, supra note 50, at 148. “[A]lthough favoring women in parental leaves may help working mothers in the short term by providing for those most in need, such a policy would inevitably perpetuate the stereotype of women as ‘caretakers of newborn infants.’” Id.

126 See Bornstein, supra note 15, at 81, 117–18; Selmi, supra note 51, at 711.


128 See Highlights, supra note 75. Men do take family leave, but it tends to be under provisions of sick leave or personal days. Id.

129 See Bornstein, supra note 15, at 118; Selmi, supra note 51, at 711.

130 See Bornstein, supra note 15, at 91, 118; Selmi, supra note 51, at 710–11; see also Branch, supra note 89, at 151 (stating that a primary reason that no comprehensive family program exists to address family leave and childcare is that such a program would challenge the traditional assumptions about the appropriate gender roles).
position of women except guarantee a minimum level of unpaid leave.\textsuperscript{131} The FMLA does not challenge the workplace or family structures that were in place prior its passage; instead its embedded assumptions, norms and values perpetuate the mother as the only caregiver of children, which is the status quo.\textsuperscript{132} Thus, perpetuation of the status quo is perpetuation of the subordination of women, because the United States has a history rooted in the discrimination of women.\textsuperscript{133} However, mere perpetuation of the status quo does even greater harm to women, because it allows acknowledgement of the problem without necessitating a remedy.\textsuperscript{134} The structure perpetuated by the FMLA is the same as seen and argued in \textit{The Mommy Myth}.

\section*{III. Paid Leave: Toward a Model of Equality}

The new California Paid Family Leave Law offers the viable next step toward the equality of men and women in both the home and at work. Though paid leave will not completely rectify the gendered patterns of leave-taking or the subordination of women, it provides a step in the right direction.

\subsection*{A. Paid Family Leave of California}

On September 23, 2002, California became the first state in the nation to enact a comprehensive paid family leave program.\textsuperscript{135} The law provides eligible employees with 55\% of their weekly earnings, up to a maximum of $728 per week\textsuperscript{136} for six weeks\textsuperscript{137} to care for a new child.\textsuperscript{138} The program is funded entirely by a payroll tax on employees and is built upon California’s existing State Disability Insurance sys-

\textsuperscript{131} Id.
\textsuperscript{132} See Bornstein, \textit{supra} note 15, at 123.
\textsuperscript{133} See Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 729–30 (2003); see also Cahn \textit{supra} note 77, at 186 (pointing to doctrines of coverture and marital rape for the assertion that the law has constructed gendered identities for husbands and wives, while also noting that twenty-five states continue to treat marital rape differently than other forms of rape).
\textsuperscript{134} Bornstein, \textit{supra} note 15, at 91.
\textsuperscript{135} Milkman & Appelbaum, \textit{supra} note 75, at 45. Other states have enacted provisions that provide some assistance to caregivers who work. Bell & Newman, \textit{supra} note 107, at 2. For example, five states and Puerto Rico have stated administered Temporary Disability Insurance (TDI) programs or require employers to offer TDI. \textit{Id.} These programs provide partial pay for workers who are disabled for medical reasons, which includes pregnancy. \textit{Id.} These states include, California, New York, New Jersey, Rhode Island and Hawaii. \textit{Id.}
\textsuperscript{136} CAL. USEMP. INS. CODE § 2655 (West 1986).
\textsuperscript{137} \textit{Id.} § 3301(d) (West Supp. 2004).
\textsuperscript{138} \textit{Id.} § 3302(a)(1).

tem. Californians began paying into the program on January 1, 2004 and the benefits were available on July 1, 2004.

The Paid Family Leave program is more extensive in coverage and purpose than the FMLA. Unlike the FMLA, the Paid Family Leave program is not dependent upon the size of the employer, and covers all private sector employees. Further, the requirements for eligibility are not as stringent as those under the FMLA. Indeed, the employee must only earn $300 during any quarter in the “base period,” five to seventeen months before filing a claim. Furthermore, Paid Family Leave specifically permits leave to care for the birth of a child of the employee’s domestic partner.

The Paid Family Leave program not only includes more families who need to take leave, but also addresses the primary hurdle to taking family leave. In passing Paid Family Leave, the California legislature specifically found that the majority of workers who needed to take family leave were unable to do so because they could not afford leave without pay. The legislature thus aimed to create a program that would help dual income parents, single parents, and non-traditional families, alike, balance the demands of work and family.

Groups that claim paid family leave is essential to help families balance the demands of work and family champion the Paid Family Leave Program, while the businesses of California criticize it for the economic hardships the new law could impose. Supporters of paid

139 Milkman & Appelbaum, supra note 75, at 45. Employee contribution is capped at $55.06 per worker per year for 2004 and at $63.53 for 2005. Id. at 4.
140 Id. at 1, 4. However, the paid family leave program is in some respects less protective of the employee’s job because it does not guarantee reinstatement to the same or an equivalent position. See Cal. Unemp. Ins. Code § 3301. The legislation claims that there are other protections in place to protect the employee’s job such as the FMLA, Pregnancy Discrimination Act, and Title VII. Id. § 3300(d).
141 Milkman & Appelbaum, supra note 75, at 48.
142 See id.
143 Id. at 4 n.5.
145 See id. § 3301(a)(1).
146 Id. § 3300(a).
147 Id. § 3300(a).
148 See Debora Vrana & Gabrielle Banks, New Parents Applaud Paid Family Leave Law, L.A. Times, June 30, 2004, at C1. However, evidence from the Swedish system of paid parental leave is to the contrary. See Arielle Hormann Grill, The Myth of Unpaid Leave: Can the United States Implement a Paid Leave Policy Based on the Swedish Model?, 17 COMP. LAB. L.J. 373, 382 (1996). The Swedish Act on Child-Care Support provides a combined paid leave of one year to parents. Id. at 375. Each parent may take 180 days of leave, and 150 days can be transferred to a spouse. Id. Employers support the policy of paid leave because they believe that they receive direct and indirect benefits from the program. Id. at 382. Indeed,
family leave herald the new legislation for its expansive coverage and seek to inform workers of the new law.\textsuperscript{149} Opponents of the new legislation fear that the economic costs will adversely affect businesses in California, especially those smaller businesses that are exempt from the FMLA.\textsuperscript{150} These fears echo concerns about the FMLA immediately after it became law, which, ten years later, have proved largely unfounded.\textsuperscript{151}

B. Paid Family Leave as a Viable First Step

No perfect or single solution exists to eliminate the gendered patterns of leave-taking, the new momism, or the subordination of women in the home and workplace. Yet paid family leave offers a viable first step towards rectifying the inherent problems of the FMLA, and the California Paid Family Leave Program can serve as a model and test case for the rest of the nation.\textsuperscript{152}

Paid family leave can undermine the stereotype of the mother as primary caretaker, because it will increase the opportunity for fathers to take leave immediately following the birth of a child.\textsuperscript{153} Financial inability is the main reason that fathers cannot do so, because fathers remain the primary breadwinners in most households.\textsuperscript{154} Partial wage replacement, as in the Paid Family Care Program in California, will remove the primary obstacle to paternal leave taking.\textsuperscript{155}

\begin{quote}

productivity increases when employees can take time to care for a child after its birth, and the employers benefit from a stable and happy workforce. \textit{Id.}
\end{quote}

\textsuperscript{149} \textit{Morning Edition: California Workers Have New Paid Family Leave Option} (NPR radio broadcast, July 14, 2004), available at 2004 WL 5613689. However, problems with the Paid Family Leave program are already apparent. Milkman \& Appelbaum, \textit{supra} note 75, at 49. The family leave benefits have been deemed taxable by the Internal Revenue Service. \textit{Id.}

\textsuperscript{150} \textit{See Vrana \& Banks, supra} note 148. Employers cite concerns over replacing workers for extended periods of time, the loss of flexibility and competitive advantage. \textit{Id.}

\textsuperscript{151} \textit{See Bornstein, supra} note 15, at 78.

\textsuperscript{152} \textit{See Bell \& Newman, supra} note 107, at 4-5.

\textsuperscript{153} Selmi, \textit{supra} note 51, at 771. Selmi states that “[p]roviding six weeks of paid leave should induce some fathers to take parental leave, perhaps as much as 20%.” \textit{Id.} Furthermore, in order to alter the existing gender norms of parenting, family leave must address the prevalent social and cultural constructions of motherhood and fatherhood that prevent fathers from becoming a primary caretaker and continue to reinforce the mother as the primary parent. \textit{See Nancy E. Dowd, Family Values and Valuing Family: A Blueprint for Family Leave, 30 Harv. J. on Legis. 335, 349 (1993).}

\textsuperscript{154} \textit{See Bornstein, supra} note 15, at 117.

\textsuperscript{155} Young, \textit{supra} note 50, at 154 (stating that “[b]y offering a reasonable amount of wage replacement, employers can take some of the traditional burden off of men to work longer hours as ‘provider’ and ‘breadwinner’ during the critical period immediately after the birth of a child.”).
Alleviating the fundamental barrier to paternal leave will enable fathers to gain competence in the care of the child and become a primary caregiver. Indeed, the father who takes leave will learn how to care for and nurture the child along with the mother; both parents’ skills will progress at the same rate. The mother will no longer be perceived as the primary caregiver, because her skills, practice, and knowledge of caregiving will be equal with those of the father. Paid family leave will enable fathers to care for a child from its birth, and break the cycle of the more knowledgeable mother as primary caregiver. Paid family leave will help to alleviate the marginalization of fathers in the care of their new children and therefore help fathers become a primary caregiver of the child, along with the mother.

Paid family leave helps to reduce the wage penalty associated with motherhood and will help decrease gender inequality in the work place. Providing paid leave to mothers when they are biologically required to, at least temporarily, leave the workforce allows women to be economically autonomous; women are able to depend on their own wages to support themselves and their new child. Paid leave recognizes the contribution mothers make to the labor market by valuing the time that they have worked in the past and providing assistance when it is necessary to take time to care for family in the present and future.

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156 See Malin, supra note 52, at 1057, 1074.
157 Id. at 1058. “[F]athers who took parental leave were significantly more likely to share in child-care responsibilities and in performing specific child-care tasks, including preparing food, shopping, doing laundry, diapering, bathing, getting up at night, reading, comforting, and taking the child to the doctor.” Id.
158 See id. at 1054–55.
159 See id.
160 See id.
161 Malin, supra note 52, at 1057.
162 Milkman & Appelbaum, supra note 75, at 47. The wage penalty for motherhood exists even after controlling for differences in factors such as education and work experience. Waldfogel, supra note 55, at 143. Also, no such penalty exists for women without children or for men, regardless of whether a man has children. Id. Indeed, married men, most of whom have children, earn more than other men. Further, men benefit from a “marriage premium;” married men earn ten to fifteen percent more than their unmarried counterparts. Id.
163 Bell & Newman, supra note 107, at 1. For example, “[o]ver the course of a lifetime, caregivers sacrifice an average of $566,000 in wages.” Id.
164 See Milkman & Appelbaum, supra note 75, at 47; see also Grill, supra note 148, at 381 (stating that Sweden’s policy of paid leave has “helped Sweden maintain the world’s highest labor market participation rate among females: 91% of women between the ages of twenty-five and forty-nine are employed.”). Paid leave around the birth or adoption of a child has the effect of women working further into their pregnancies and returning to work sooner. Inst. for Women’s Policy Research, Fact Sheet: Paid Family and Medi-
Furthermore, if the state begins to recognize the value that mothers have in the labor market, employers will no longer be able to make the gendered assumption that women are not committed to the workplace and are therefore less deserving of seniority.\textsuperscript{165}

Significantly, Paid Family Leave does not overvalue the traditional family or traditional roles within the family. For low-income women, paid leave is an absolute necessity, because most do not have access to employer-provided paid sick leave.\textsuperscript{166} “More than three in four employees need, but don’t take, family and medical leave because they can’t afford to miss a paycheck.”\textsuperscript{167} Furthermore, working mothers are less likely to have access to paid sick leave in general than employed fathers.\textsuperscript{168} Mothers who shoulder the burden for family caregiving are forced to choose between caring for their families and economic security.\textsuperscript{169} Paid Family Leave recognizes non-traditional families by providing leave to care for a partner or a partner’s child.\textsuperscript{170} The Paid Family Leave program values women by recognizing non-traditional families and single parents. California’s Paid Family Leave provides a viable option for the rest of the states in the nation to facilitate the equality of women and to begin to debunk the mommy myth.

Indeed, California’s Paid Family Leave program can operate as a model and test case for the rest of the states and the federal government.\textsuperscript{171} Because the Paid Family Leave program has been operating...


\textsuperscript{166} See Milkman & Appelbaum, \textit{supra} note 75, at 48.

\textsuperscript{167} Bell & Newman, \textit{supra} note 107, at 1.

\textsuperscript{168} Milkman & Appelbaum, \textit{supra} note 75, at 48.

\textsuperscript{169} \textit{Id}. at 346.


\textsuperscript{171} Although California is the first state to implement a paid leave program, paid leave legislation has been introduced in twenty-one states, and twelve states have held or scheduled hearings on paid family leave. Nat’l P’ship for Women & Families, \textit{State Legislative Round-Up: State Paid Leave Initiatives in 2004 and Prior State Legislatures: Making Family Leave More Affordable} (2004), \textit{available at:} http://www.nationalpartnership.org/portal/p3/library/PaidLeave/StateRoundUp2004ExecSumm.pdf [hereinafter \textit{State Legislative Round-Up}]. The primary hurdles to implementing a paid leave program will be: first, the opposition from businesses; and second, that the Paid Family Leave program in...
for only six months, the success of the program has not yet been determined. Nevertheless, the success of the program in California will have a large effect on the implementation of future paid leave programs throughout the United States. However, the underlying principles, paid leave to more workers and more diverse types of families, offer a viable paradigm for the rest of the nation.

Conclusion

The new momism is seen throughout American society in not only the messages promulgated by the media, but also in the words and effects of the FMLA. The FMLA perpetuates the stereotype of women as the best primary caregiver of children by discouraging fathers from taking leave following the birth or adoption of a child, while also devaluing the contribution mothers make to the labor force by providing for only unpaid leave.

The FMLA was touted as the help that working families needed in modern society, but the benefits of the Act have been largely symbolic. Instead, FMLA has hindered women’s progress in the home and at work, because it does not advocate change of the structure of the family or the workplace. Instead, the FMLA perpetuates the status quo; a standard that devalues mothers and has a history rooted in the discrimination of women.

The California Paid Leave Program advocates for change. Indeed, the first paid leave program of the country values the contribution of women and encourages change. Although there is no simple solution to women’s subordination, legislation cannot simply maintain the discriminatory practices that are seen throughout the American workforce. Legislation and legislators must recognize the changes of modern society and the need for change, and family leave policy must reflect this new understanding.

California is built on an existing state disability insurance program. See Vrana & Banks, supra note 148; See also Milkman & Appelbaum, supra note 75, at 45.

172 Milkman & Appelbaum, supra note 75, at 45.

173 State Legislative Round-Up, supra note 171, at 3 (stating that over twenty states considered paid leave legislation in 2004).
HUMAN TRAFFICKING: PROTECTING HUMAN RIGHTS IN THE TRAFFICKING VICTIMS PROTECTION ACT

JOYCE KOO DALRYMPLE*


Abstract: Trafficking in persons is the most widespread manifestation of modern-day slavery, with an estimated four million people trafficked worldwide every year. Modern technology and globalization enable networks of criminals to operate internationally and prey upon those who are impoverished and vulnerable. Craig McGill’s book describes the various ways in which countries seek to combat illegal immigration and trafficking by strengthening law enforcement, and suggests that these “solutions” do not address the source of the problem. This Book Review argues that anti-trafficking strategies must view trafficking not only from a law enforcement perspective directed to the perpetrators, but also from a human rights perspective by adequately protecting and assisting victims of human trafficking. The Trafficking Victims Protection Act recognizes the need to protect the victims’ human rights, but fails to offer the comprehensive protection policy necessary to be effective.

Introduction

In Human Traffic: Sex, Slaves, and Immigration, Craig McGill examines illegal immigration from the perspective of the smuggled, the smugglers, and law enforcement officials, in order to identify and better understand the “problem” of immigration.¹ The problem, he argues, is not immigration itself, but a lack of “immigration management.”² He also suggests that the problem of immigration may be the unregulated illegal activity of human trafficking, a dangerous and life-threatening practice.³

² Id. at 209.
³ Id.; see Shelley Case Inglis, Expanding International and National Protections Against Trafficking for Forced Labor Using a Human Rights Framework, 7 Buff. Hum. Rts. L. Rev. 55, 55 (2001). Victims are kidnapped, coerced, or sold into work environments from which they cannot escape, leaving them vulnerable to extreme exploitation. Inglis, supra, at 55.

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McGill concludes that societal prejudices cause us to view immigration as a "problem." The public’s attitude toward immigrants is often driven by fear: fear of terrorism, of the loss of national identity, of rising welfare costs, and of a saturated job market. He asserts that in reality, developed Western countries are economically dependent on immigrants to fill both highly skilled positions and unwanted jobs, especially in places where population growth is slowing and workers are needed to support pensioners. Instead of responding to real economic needs, governments react to social fears by passing politically advantageous but unnecessary and inhumane immigration laws.

McGill recounts the attempts of various nations to combat illegal immigration and trafficking principally by strengthening criminal laws and border controls. These law enforcement efforts alone are ineffective, he submits, in part because such strategies do not address the cause—the needs of people who are persecuted, impoverished, and

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4 McGill, supra note 1, at 212.
5 See id. at 206–08.
6 Id. at 207–08. A report from the Labor Market Center at Northeastern University revealed that recent U.S. immigrants accounted for half the new wage earners who joined the labor force in the 1990s. Id. at 207. The former French Interior Minister, Jean-Pierre Chevenement said that Europe will need fifty to seventy-five million immigrants to fill jobs in the next fifty years. Id. at 207–08.
7 See id. at 209. In 2003, responding to the concerns of the British population, British Prime Minister Tony Blair threatened to reject the Human Rights Treaty, which obliges Britain to shelter asylum seekers and refugees. Id.
seeking a safe place to live. People are especially open to abuse by traffickers when they are desperate and vulnerable.

An effective anti-trafficking strategy must address the needs of victims. Any plan that focuses primarily on law enforcement without comprehensively protecting the human rights of victims will fail because victims have no incentive to come forward and assist in prosecutions, as they are promised no protection if they do. By not providing victims with the assistance and security they need to leave traffickers, governments permit the perpetuation of modern-day slavery or involuntary servitude. Furthermore, many countries punish victims by deporting them, effectively subjecting them to re-victimization due to the absence of real assistance in their home country. Governments must understand that trafficking in persons violates the fundamental human

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9 See McGill, supra note 1, at 211. Political (civil unrest), economic (poverty), and social and cultural (low status) insecurity leave people especially vulnerable to trafficking. See Mohamed Y. Mattar, Commentary, Incorporating the Concept of Human Security in National Legal Responses to Trafficking in Persons § 4, at http://www.protectionproject.org/main1.htm (last visited Feb. 23, 2005).

10 McGill, supra note 1, at 209.


13 See Hearing, supra note 11 (statement of Director Wendy Patten). Trafficking victims become enslaved when they are held against their wills by use or threat of violence for exploitative purposes. Kevin Bales, Disposable People: New Slaves in the Global Economy 20 (1999). Because of the glut of potential slaves, they are so cheap that they have become cost-effective in agricultural, factory, domestic, and other kinds of work. Id. at 14. Unlike the old form of slavery, wherein slaves were a long-term investment, now modern-day slaves cost so little that they are not worth securing “legal” ownership. Id. After the slaveholder gets all the work they can from their slaves, they dispose of them. Id.

14 Mattar, supra note 9; Michael R. Candes, Comment, The Victims of Trafficking and Violence Protection Act of 2000: Will It Become the Thirteenth Amendment of the Twenty-first Century?, 32 U. MIAMI INTER-AM. L. REV. 571, 594 (2001). The Trafficking Victims Protection Act recognizes that victims of trafficking “are repeatedly punished more harshly than the traffickers themselves.” Trafficking Victims Protection Act, 22 U.S.C. § 7101(b)(17) (2000). The Act also states that “victims of severe forms of trafficking should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked, such as using false documents, entering the country without documentation, or working without documentation.” Id. § 7101(b)(19).
rights principle that “all human beings are born free and equal in dignity and rights.” Such rights include freedom of movement and residence, free choice of employment, and the right to just and favorable work conditions.

The United States’ Trafficking Victims Protection Act of 2000 (TVPA) would effectively combat trafficking by addressing the needs of trafficking victims with a view towards human rights. Before the promulgation of the Act, the government routinely detained and deported victims to their home countries if they were not material witnesses. By decriminalizing victims and giving them lawful immigration status in the United States, the TVPA grants victims the same civil rights afforded to legal immigrants. This change in the legal status of trafficking victims rightfully recognizes that it is not the trafficked but the traffickers who still are the “problem.”

This Book Review, however, contends that the TVPA does not adequately protect trafficked individuals. Unless the TVPA is altered,

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16 Id. art. 13(1), at 71.
17 Id. art. 23(1), at 71.
18 See 22 U.S.C. § 7101(22), (23). Representative Chris Smith (Rep-N.J.), one of the authors of the TVPA stated, “While it was the intent of the legislation . . . that victims of trafficking should help in the investigation or prosecution of trafficking cases, there should be no doubt that the T visa was primarily intended as a humanitarian tool to facilitate the rehabilitation of trafficking survivors.” Hearing, supra note 11 (statement of Charles Song, Coalition to Abolish Slavery and Trafficking). The TVPA advocates a “Three P” approach to address prevention, prosecution, and protection. See 22 U.S.C. § 7104 (Prevention); id. § 7105 (Protection and Assistance for Victims of Trafficking); id. § 7109 (Prosecution and Punishment of Traffickers). The Reauthorization Act of 2003 also provided some additional protections for victims. See Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108–193, § 4, 117 Stat. 2875, 2877-79 (codified as amended in scattered sections of 8 and 22 U.S.C.).
19 Candes, supra note 14, at 594.
20 Stumpf & Friedman, supra note 12, at 168. Governments should pay special attention to cases involving immigrant women, since they have often been disregarded. See Suzanne H. Jackson, To Honor and Obey: Trafficking in “Mail-Order Brides,” 70 GEO. WASH. L. REV. 475, 566 (2002). Law enforcement and legal doctrines view immigrant women with skepticism, whether trapped in coerced or forced prostitution, oppressive sweatshop labor, exploitative conditions as domestic servants, or abusive marriages. Id. Authorities may stereotype women working as prostitutes, considering prostitution a “victimless crime” not worthy of the time and effort necessary to combat it. Id.
21 See McGill, supra note 1, at 209 (asking if those who traffic others are the “problem of immigration”).
22 See Candes, supra note 14, at 593–94 (suggesting that the Act will harm victims if strictly interpreted); Inglis, supra note 3, at 75–76 (stating that if the visa protections are not broad enough, then victims of trafficking will not be able to remain in the United States permanently).
the number of victims assisted and the number of traffickers convicted will remain appallingly low. According to a 1999 CIA report, fifty thousand women and children were trafficked to the United States every year; in comparison, the number actually “rescued” was alarmingly small, and remains so. Since the passage of TVPA in 2000 through the end of 2003, only 448 victims have been certified or issued refugee benefits eligibility letters from the Department of Health and Human Services.

How could the TVPA better serve its stated goal to eliminate trafficking and protect trafficking victims? First, most victims need immediate secure shelter and access to legal resources before they leave their abusers. While the Act allows certified trafficked persons to receive benefits equivalent to those of refugees, the requirements for certification are too stringent, deterring victims from coming forward or denying relief to those who have not been trafficked with enough force. Unless they qualify as victims of a “severe form of trafficking,” they risk deportation.


26 See 22 U.S.C. § 7101(a), (b) (24).

27 See Hyland, supra note 12, at 63, 64 (discussing the House bill on the TVPA, which offered emergency housing and mandatory access to legal assistance for trafficking victims).

28 See 22 U.S.C. § 7105(b)(1)(A); Candes, supra note 14, at 593, 602; Hyland, supra note 12, at 56; discussion infra Part II.A. The Act’s success also depends upon victims having knowledge of their new rights and confidence that law enforcement agencies will protect their rights. See discussion infra Part IV.

29 See 22 U.S.C. § 7105(b)(1)(A); Candes, supra note 14, at 594. Charles Song, an attorney for the Coalition to Abolish Slavery and Trafficking (CAST), illustrated why protections are so vital to combat trafficking:
teria that victims must meet in order to remain in the United States are likewise too severe.30

Part I of this Book Review examines the causes, nature, and prevalence of trafficking worldwide. Part II assesses the TVPA requirements that victims must meet to be eligible for protections, and argues that they are overly stringent. Part III examines the assistance currently available to victims under the TVPA, and proposes enhanced protections that address victims’ distrust of law enforcement and fear of their traffickers. Part IV explores the coordination and protocols that nonprofit organizations and law enforcement must develop locally in order to identify and adequately provide for victims.31

This Book Review concludes that, given trafficking persons’ complex situations, the offered protections must be expanded and tailored to victims’ needs before more will seek to benefit from the TVPA.

I. THE CAUSE, NATURE & PREVALENCE OF TRAFFICKING

More than twenty million people migrate to another country every year; over half travel illegally.32 Some pay smugglers to facilitate the journey; others are trafficked.33 While statistics on trafficking are unreliable, largely due to the clandestine nature of the activity, the

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32 See Bo Cooper, A New Approach to Protection and Law Enforcement Under the Victims of Trafficking and Violence Protection Act, 51 Emory L.J. 1041, 1047 (2002).
United Nations Population Fund estimates that about four million persons worldwide are trafficked annually. Although McGill does not clearly distinguish between smuggling and trafficking, this Book Review argues that the distinction is important because, under most anti-trafficking laws, those who are trafficked receive protections while those who are smuggled will likely be deported.

The greatest distinction between smuggling and trafficking is that a smuggled person chooses autonomously to move to a new country. Smuggling is a transaction: the migrant pays the smuggler to procure illegal entry into another country. In contrast, trafficking involves a dynamic, ongoing violation of the person by threats or actual physical force, deception, fraud, intimidation, isolation, debt bondage, threats of deportation, as well as threats of harm to family members. The traffickers’ goal is to control the victim for labor exploitation purposes, manifested as slavery, involuntary servitude, peonage, debt bondage, or commercial sex acts.

Differentiating between smuggling and trafficking becomes more difficult when persons who voluntarily migrate become subject to violence or threat of violence under slave-like conditions in their destination country. These victims, deceived about the working conditions

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55 Cooper, supra note 33, at 1047. Typically, a person who has voluntarily entered into an arrangement to be brought into the United States without the appropriate immigration permission will not be considered a victim of severe trafficking and will not qualify to receive benefits under the TVPA. See Protection and Assistance for Victims of Trafficking, 66 Fed. Reg. 38,514–15 (July 24, 2001) (codified at 28 C.F.R. pt. 1100).

56 See Cooper, supra note 33, at 1047.

57 Id. The payment can be exorbitant, often accrues interest and involves the threat of violence if not paid in a timely manner. See McGill, supra note 1, at 10, 13. McGill found that many smugglers view themselves as professionals who provide a needed service—helping people with relocation. See id. at 124–25.

58 Hearing, supra note 11 (statement of Director Wendy Patten).

59 See Cooper, supra note 33, at 1047. Some traffickers do not believe that they are exploiting people for their labor, arguing that these people would be poor and jobless back in their home countries as well. Interview with Carol Gomez, Founder of Trafficking Victim Outreach and Services (TVOS) Network, in Boston, Mass. (Sept. 29, 2004).

60 See Inglis, supra note 3, at 93.
and exploited, also deserve protection. Law enforcement officials should consider whether victims were deceived initially rather than focus solely on coercion in determining qualifications for TVPA protections.

Although human trafficking has existed for centuries, its recent resurgence can be traced to industrialization, which shattered subsistence farming and traditional ties of family responsibility and kinship. These developments drove millions of peasants to the cities, concentrating the land in the hands of an elite who produced cash crops for export, ultimately making the poor more vulnerable. Additionally, since 1945 the world population has nearly tripled from two billion to more than 5.7 billion. For countries that were already poor, the population explosion overwhelmed the available resources. Other operative factors include restrictive immigration policies, and the lack of appropriate legislation and political will to address the problem. Moreover, modern technology and globalization enable small networks of criminals to operate internationally and prey upon the poor and vulnerable.

Enforcement efforts both at borders and within countries are not enough to stop traffickers, because profit margins for trafficking are so high. According to one estimate, the illegal immigration industry

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41 See Jane Doe I v. Reddy, No. C 02-05570 WHA, 2003 U.S. Dist. LEXIS 26120, at *12 (N.D. Cal. Aug. 4, 2003) (finding that the victims were lured from India by false promises of education and employment opportunities in the United States, but upon arrival were forced to work long hours below minimum wage and were sexually abused and beaten). See Inglis, supra note 3, at 93. Some victims may respond to job advertisements to go to a new country or fall in love with men who later sell them, and end up in situations where they receive little or no pay and cannot leave. See McGill, supra note 1, at 81. Still others become enslaved because their debt from their journey to the new country accrues interest, and they cannot afford the monthly payments. See id. at 10.

42 See 22 U.S.C. § 7102(2) (2000) (focusing on coercion); discussion infra Part II.A.


44 Bales, supra note 13, at 12.

45 Id. at 12.

46 Id.

47 Trafficking in Human Misery, supra note 34.

48 Hearing, supra note 11 (statement of Director Wendy Patten).

49 See McGill, supra note 1, at 189. The United Kingdom’s National Crime Intelligence Service (NCIS) Director General John Abbott said, “I would be surprised if [increases in sentencing and fines] had a significant impact. [Illegal immigrants] pay up to £20,000 each. . . . The indications are that despite actions being taken, the market will increase and profits will remain high.” Id.
is worth more than ten billion dollars a year. Depending on the destination, a person pays anywhere from five thousand to fifty thousand dollars for travel arrangements. While smugglers only receive one payment for transporting a person, traffickers receive ongoing profits from their victims’ labor over a long duration. In fact, trafficking in women is now organized crime’s third most profitable trafficking industry behind drugs and guns. In contrast to drugs, humans continue to work and earn profits for their owners, and can be resold. Furthermore, under the scheme of debt repayment, traffickers either pay their victims either very little or nothing at all.

II. TVPA REQUIREMENTS FOR TRAFFICKING VICTIMS

Victims must meet many requirements to be certified to receive benefits under the TVPA. Trafficked persons must be a victim of a “severe form of trafficking,” and willing to assist in every reasonable way.

50 Id. at 1. Others have come up with different numbers. See Bales, supra note 13, at 23; Joshi, supra note 43, at 31. Joshi states that the trafficking network produced an annual profit of up to seven billion dollars. Joshi, supra note 43, at 31. Professor Bales estimates that the total yearly profit from slave labor would be on the order of 13 billion. Bales, supra note 13, at 23.

51 McGill, supra note 1, at 1.

52 Hyland, supra note 12, at 38; see United States v. Gasanova, 332 F.3d 297, 298 (5th Cir.), cert. denied, 540 U.S. 1011 (2003). A husband and wife illegally brought three Uzbekistani women to the United States and promised them modeling careers if they raised $300,000 in topless dancing. Gasanova, 332 F.3d at 298. They collected over $500,000 from the women, keeping the vast majority of the money for themselves. Id.


54 Hyland, supra note 12, at 38.

55 Id. McGill tells the story of Sasha, a Ukrainian girl, who answered an advertisement to become a ballet dancer in Belgium, only to find that she was brought there, along with a busload of other aspiring dancers, to be a sex slave. McGill, supra note 1, at 76, 78–79. Initially, she was told that once she made $250,000 she would be free to go. Id. at 81–82. Her existence consisted of performing sex acts for up to 10 men a day. Id. at 86. She was later sold to a man in London, who told her that she had to earn enough to pay off her debt, ostensibly incurred by traveling with the supposed dance troupe and living in their housing. Id. See United States v. Garcia, No. 02-CR-110S-01, 2003 U.S. Dist. LEXIS 22088, at *2 (W.D.N.Y. Dec. 2, 2003) (finding that the defendants refused to pay their farm workers, whom they had lured from Mexico, and repeatedly told them that they owed large sums of money and could not leave until they paid off their debts).

in the investigation and prosecution of their trafficker. Additionally, the victim must either have made a bona fide application for a T visa that has not been denied, or his or her continued presence in the United States must be necessary for the prosecution of traffickers. Trafficked persons can only qualify for T visas by demonstrating “extreme hardship involving unusual and severe harm upon removal.”

Part A of this Section explores the requirement that persons must be a victim of “severe forms of trafficking” to be eligible for any protections under the TVPA. It argues that this stringent requirement must be relaxed to assist victims of all forms of trafficking. Part B examines the requirements that victims must meet to obtain legal residency in the United States. It argues that the “extreme hardship involving unusual or severe harm upon removal” is also too rigorous, and should be based instead on a well-founded fear of retribution upon removal. Part C suggests that the 5,000-person cap on the number of victims who can obtain temporary residency is arbitrary and excessively low, and should be repealed.

A. Severe Form of Trafficking

The TVPA criminalizes only “severe forms of trafficking in persons,” which include only sex trafficking for the purpose of a commercial sex act, and labor trafficking, defined as involuntary servitude, peonage, debt bondage, or slavery. By restricting its scope to “severe forms of trafficking,” the Act implies that other forms of trafficking exist, but makes no attempt to define or criminalize those forms. Physical coercion is not always required, but a victim of severe commercial sexual exploitation, such as prostitution, pornography, and sex tourism; trafficking for the purpose of non-commercial sex, such as marriages for the purpose of child-bearing, forced marriages, early marriages, temporary marriages, and mail-order brides (i.e., bride trafficking); trafficking for the purpose of forced labor, in particular domestic service, street begging, and camel jockeying; trafficking for the purpose of illicit inter-country adoption (i.e., baby trafficking); trafficking for military purposes; trafficking for

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57 Id. § 7105(b)(1)(A), (E).
58 Id. § 7105(b)(1)(E).
60 22 U.S.C. § 7102(8). It defines sex trafficking as “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.” Id. § 7102(9). A commercial sex act means “any sex act on account of which anything of value is given to or received by any person.” Id. § 7102(3).
trafficking must believe that he or she would suffer serious harm or physical restraint if he or she were to leave the trafficker.\textsuperscript{62}

The Act should adopt a broader definition that includes all kinds of trafficking, similar to that of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, which supplements the United Nations Convention Against Transnational Organized Crime.\textsuperscript{63} The Protocol’s operative concept is exploitation, rather than coercion.\textsuperscript{64} This approach recognizes that trafficked workers, primarily women, may make voluntary choices about their migration and working conditions, but may nonetheless end up in exploitative working conditions.\textsuperscript{65} It goes further than the TVPA by discussing the abuse of power, a position of vulnerability, and the giving or receiving of payments or benefits to achieve the consent of a person having control over another.\textsuperscript{66}

Moreover, the TVPA’s standard that eligible victims must be victims of “severe forms of trafficking” is difficult to apply.\textsuperscript{67} Law enforcement agents must make immediate determinations as to whether to take the victim to a detention center or an appropriate facility for trafficking

the purpose of involvement in illegal activities, such as drug trafficking; and trafficking in human organs.

Mattar, supra note 9, § VIII.

\textsuperscript{62} 22 U.S.C. § 7102(2). Prior to the Act, and in accordance with the Supreme Court’s Kozminski Test, a victim had to prove the use or threat of physical or legal coercion; now, psychological coercion suffices under the TVPA. See id; United States v. Kozminski, 487 U.S. 931, 952 (1988). The Kozminski case involved dairy farmers who conspired to interfere with two mentally retarded farm laborers’ right to be free from involuntary servitude. Kozminski, 487 U.S. at 934.

\textsuperscript{63} See Protocol, supra note 8, art. 3.

‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring, or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation [irrespective of the consent of the person]. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

\textit{Id.}


\textsuperscript{65} Inglis, supra note 3, at 95.

\textsuperscript{66} See Protocol, supra note 8, art. 3.

\textsuperscript{67} Candes, supra note 14, at 594.
victims; however, this decision cannot be made on-site without investigating the facts of the case.68 Therefore, victims should be presumed to qualify as a victim of severe forms of trafficking until a contrary determination is made.69

A strict interpretation of “severe” requires that victims, who are misidentified or not trafficked with enough force, be treated as criminals, detained, and deported.70 The courts and the Department of Homeland Security will likely interpret this language very narrowly to prevent fraud.71 Victims lack incentive to testify if they are not going to be allowed to stay in the United States or adequately protected.72 Even the White House believes that the victims of severe forms of trafficking standard is stringent and the criteria for temporary residency visa is too restrictive.73 A rigid reading of “severe” ultimately would prevent the TVPA from accomplishing its intended purpose.74

B. Extreme Hardship Requirement

Trafficked persons must demonstrate “extreme hardship involving unusual and severe harm upon removal” to qualify for a T visa or temporary residency.75 Furthermore, victims are only eligible to remain in the United States permanently if they have been in the country for three years, and have established either that they have complied with law enforcement requests during that time, or would suffer “extreme hardship involving unusual and severe harm upon removal.”76 This harsh standard should be liberalized to protect trafficking victims who cannot demonstrate unusual and severe harm but may face genuine danger and hardship upon removal nonethe-

68 Id.
69 Id.
70 See id. at 594, 602. Victims who were not material witnesses were regularly detained and deported to their home country before the TVPA. Id. at 594.
71 Id. at 596. In the committee report originally attached to the bill, Congress stated that the Trafficking Act intentionally included the term “victims of trafficking” in some sections instead of “victims of severe forms of trafficking.” Chris Smith, Victims of Trafficking and Violence Protection Act of 2000, H.R. Conf. Rep. No. 106–939, at 90 (2000). In doing so, Congress intended to encompass a broader range of victims in these areas, and that the “severe forms of trafficking” standard is intended to be narrower than the “victims of trafficking standard.” Id.
72 See Candies, supra note 14, at 597.
73 Id. at 596 (criticizing the strict standards for missing the stated goals of the TVPA).
74 See id. at 597.
less. These trafficked persons are no less deserving of human rights protections than asylum seekers, who are granted asylum if they demonstrate a well-founded fear of persecution in their home country. Therefore, the TVPA should model its standard after the criteria that asylum seekers must meet to stay in the United States, and trafficking victims would qualify for residency if they have a well-founded fear of retribution upon removal.

At the very least, the residency criteria should conform to the minimum anti-trafficking standards that the United States sets for other countries in the TVPA. The Act states that other governments should provide "legal alternatives to removal to countries in which [trafficking victims] would face retribution or hardship." This language is significantly less restrictive than the "extreme hardship involving unusual and severe harm" that victims in the United States must demonstrate to prevent removal. This discrepancy undermines the validity of the United States' insistence that other countries comply with anti-trafficking measures, given the lesser protections the United States provides to victims within its own borders.

Further, to remain or be admitted to the United States, qualifying spouses and children of trafficked persons also must show that extreme hardship would otherwise result. Victims' family members, however,

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79 See id. §§ 101(a)(42), 208(b)(1), 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1); Smith, supra note 71, at 94 (discussing a House bill, which provided that eligibility for T visas should be based on a "well-founded fear of retribution involving the infliction of severe harm upon removal").
80 See 22 U.S.C. § 7106(b)(2) (2000). The TVPA recognizes that trafficking can only be eliminated by an international effort, and urges other countries to take strong action. Id. § 7101(b)(24). A country that does not comply with the United States' minimum standards for the elimination of human trafficking receives a negative evaluation in the annual Trafficking in Persons Report. TIP Report, supra note 23, at 8. Such an evaluation could lead to the United States withholding non-humanitarian, non-trade-related assistance to that country. Id.
84 INA § 101(a)(15)(T), 8 U.S.C. § 1101(a)(15)(T). This extreme hardship may be met when traffickers threaten the victim and or her family members. See Mattar, supra note 9, § VII.
should be eligible for residency status based on the immigration doctrine of derivative beneficiaries, where spouses and children are allowed to follow to join the principle immigrant without further proof of hardship.\textsuperscript{85} This change is needed because trafficking victims frequently migrate in order to provide financial support for their families.\textsuperscript{86} Additionally, the shame and danger associated with trafficking applies not only to victims, but also to their entire family.\textsuperscript{87}

In the Conference Committee report that accompanied the TVPA, Congress offered no justification for the standard of extreme hardship involving unusual and severe harm upon removal.\textsuperscript{88} The only legislative history attempting to explain its meaning is the final Conference Committee report, which emphasized the narrow interpretation of the requirement:

The conferees expect that the [Department of Homeland Security] and the Executive Office for Immigration Review will interpret the “extreme hardship involving unusual and severe harm” to be a higher standard than just “extreme hardship.” The standard shall cover those cases where a victim likely would face genuine and serious hardship if removed from the United States, whether or not the severe harm is physical harm or on account of having been trafficked... [and] shall involve more than the normal economic and social disruptions involved in deportation.\textsuperscript{89}

\textbf{C. T Visa Cap of 5,000}

Moreover, the TVPA restricts the number of available T visas a year to five thousand for trafficking victims,\textsuperscript{90} an arbitrary and low

\textsuperscript{85} See INA § 203(d), 8 U.S.C. § 1153(d).
\textsuperscript{86} Id.
\textsuperscript{87} Id.
\textsuperscript{88} Jackson, supra note 20, at 554. See generally Smith, supra note 71. The Clinton administration argued for reducing the T visa requirements, since victims need immediate protection before they will voluntarily report their traffickers. Hyland, supra note 12, at 65.
\textsuperscript{89} Smith, supra note 71, at 95; Jackson, supra note 20, at 554. The victim may have to prove: (1) that she requires medical care not available in her country of origin; (2) that denying her access to the U.S. legal system would leave her without any remedy; (3) that she will most likely be subjected to punishment because her country of origin penalizes the trafficked victim; or (4) that she will most likely be re-victimized, especially if her country of origin provides no assistance to trafficking victims. Mattar, supra note 9, § VI(b).
\textsuperscript{90} Alien Victims of Severe Forms of Trafficking in Persons, 8 C.F.R. § 214.11(m) (2004). It includes a provision that the Attorney General should provide a yearly report to Congress on T visa rejections based on the cap. 22 U.S.C. § 7105(g) (2004).
number when compared to the estimated fifty thousand women and children trafficked into the United States every year, and to the estimated one million persons living in the United States under slave-like conditions. 91 Although the number of T visa recipients currently falls well below the cap, 92 human rights principles direct that the United States should not constrain its welcome to people who have been abused or enslaved within the nation’s borders. 93

The congressional members who supported the cap on T visas argued that the restriction was necessary to prevent persons from fraudulently claiming to be victims of trafficking to remain in the United States legally. 94 This concern is misguided, however, since victims who seek permanent residency must undergo an application process that carefully scrutinizes their trafficking history. 95 Furthermore, the visa cap fails to conform to the purpose of the Act—to increase the risk to traffickers and increase the protections for victims. 96

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91 Ryf, supra note 77, at 69. According to a conference report from the House Judiciary Committee, which contained an estimate of the yearly number of visa recipients provided by the Congressional Budget Office (CBO), the CBO “assume[d] that about 50,000 women and children are trafficked into the United States every year” (consistent with the CIA estimate), but “discussions with State Department officials led CBO to assume that only about 2,000 victims would be freed each year and could potentially receive benefits.” See Jackson, supra note 20, at 555 (quoting Smith, supra note 71, at 24).

92 See Mattar, supra note 9, ¶ VII. Only 757 T visa applications have been received between the passage of the Act and the end of 2003, of which 328 visas were issued, thirty-eight denied, and the remaining applications are pending. Id.

93 See 146 Cong. Rec. 7628, 7629 (2000). Congressman Melvin Watt of North Carolina opposed the 5,000 cap on visas and discounted fraud as a justification, stating that:

The issue is would we send a woman or child who has been sexually abused and put into slavery in this country back into another country where that kind of activity was going on, so whether the victim is the 499th or the 4,099th, or the 515th or the 5,015th should not be the issue. The issue is what should our policy be, and we should open our arms to these people. Id.

94 See Ryf, supra note 77, at 68; 146 Cong. Rec. at 7629 (statement of Rep. Smith). The idea for a cap originated with the administration bill, which contained a cap of only 1,000 visas for each fiscal year. 21st Century Law Enforcement and Public Safety Act, S. 2783, 106th Cong., § 7 (2000).

95 Ryf, supra note 77, at 69.

96 Id. If victims are uncertain whether they fall within the cap (for the few even aware of the 5,000 limit), then they will fear further danger if they go to authorities. See id. Additionally, victims may not cooperate with law enforcement if they are not offered witness protection or the opportunity to stay in the United States. Id.
III. A Need for Enhanced Protections

Traumatized victims of trafficking face many practical and psychological obstacles in their efforts to break free from their traffickers’ control.\(^9\) Not only are they unfamiliar with the laws, culture, and language of the destination country, but traffickers often threaten to harm or kill the victims or their family members if they attempt escape.\(^8\) U.S. law enforcement typically lacks the power to prevent traffickers from retaliating against family members in other countries, especially when police in those countries are unresponsive, underfunded, or corrupt.\(^9\) Moreover, victims are fearful of being treated as criminals or deported by law enforcement.\(^10\) These factors, among others, prevent trafficking victims from coming forward of their own volition; most who have benefited from the TVPA have been identified and rescued by others.\(^11\)

Therefore, any effective anti-trafficking strategy must address both the victim’s fear of their traffickers and their mistrust of law enforcement.\(^12\) The TVPA must enhance its protections and ensure that victims redeem their rights to safety and access justice.\(^13\) Part A of this Section explores the implementation of immediate safety measures to protect victims from their traffickers. Part B discusses reforms that

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\(^9\) See Hearing, supra note 11 (statement of Director Wendy Patten) (testifying that offering victims witness protection alone is insufficient given their traumatized condition, especially since traditional witness protection situations were designed for witnesses who themselves are criminals).

\(^8\) 22 U.S.C. § 7101(b)(7), (20) (2000); Mattar, supra note 9. See United States v. Bradley, 390 F.3d 145 (2004) (finding that the use of physical threats as well as threats to call immigration officials were used to keep the victims from escaping).

\(^9\) Jackson, supra note 20, at 558. There should be a mechanism for bringing protection to those family members who remain at risk in home countries before U.S. authorities go after criminal traffickers either in the form of witness protection or residency status. E-mail from Jane Rocamora, Greater Boston Legal Services Immigration Unit, to Carol Gomez, Founder of the Trafficking Victim Outreach and Services (TVOS) Network (on file with author). Thus, in certain instances, status for a trafficked victim may need to be established to protect relevant family members prior to public law enforcement efforts. Id.

\(^10\) See Hyland, supra note 12, at 55. This happens commonly with trafficked women forced into prostitution. Id. Imposing fines and incarceration on these women for prostitution and immigration violations further victimizes the trafficked persons. Id.

\(^11\) Interview with Gomez, supra note 39. See Bradley, 390 F.3d at 149 (stating that an anonymous tip to the police led to the rescue of Jamaican laborers held against their will).

\(^12\) See Hearing, supra note 11 (statement of Director Wendy Patten); Candes, supra note 14, 580–81.

\(^13\) Victims of trafficking prosecuted under other laws, such as the Mann Act or the Racketeer Influenced and Corrupt Organizations Act, should also be entitled to the benefits granted under the TVPA and the enhanced protections proposed in this Section. Interview with Carol Gomez, supra note 39.
promise to broaden victims’ access to legal resources, and the victim’s right to self-petition for certification.

A. Victims’ Right to Security

The TVPA requires agencies and departments to promulgate regulations that will ensure that trafficking victims are not held in facilities “inappropriate to their status as crime victims,” but only “to the extent practicable.”\textsuperscript{104} Instead, the government should provide secure and immediate housing for trafficking victims before certification, to ensure their security in the interim.\textsuperscript{105} If safety is not guaranteed, victims will not risk coming forward, because their abusers may inflict even greater harm on them for trying to escape.\textsuperscript{106} As an additional safety measure, potential and actual trafficking victims must be able to obtain restraining orders on short notice against their traffickers either in the state or federal court.\textsuperscript{107} Furthermore, NGOs and social workers should develop “trafficking safety plans” for housing, services, travel, and work based on the victims’ risk of danger from their trafficker.\textsuperscript{108} Service providers should look to NGOs and shelters that offer such plans for domestic violence victims for guidance.\textsuperscript{109}

\textsuperscript{104} 22 U.S.C. § 7105(c) (2000). The House bill offered additional protective measures, excluded from the Act, that required that victims not be “jailed, fined, or otherwise penalized due to having been trafficked,” and that they “shall be housed in appropriate shelter as quickly as possible.” H.R. 3244, 106th Cong. § 7(c) (1st Sess. 1999).

\textsuperscript{105} See Hearing, supra note 11 (statement of Sister Mary Ellen Dougherty, U.S. Conference of Catholic Bishops, Migration and Refugee Services (MRS/USCCB)). The MRS/USCCB has developed a system for short-term emergency housing provided by individuals and communities, who open their doors when there is an emergency in their area. Id.


\textsuperscript{107} E-mail from Jane Rocamora, supra note 99. Theoretically, victims have access to local courts; however, victims often fear that they will be charged with a crime if they attempt to seek protection from the courts. Id. Protective measures for trafficking persons can be modeled after domestic violence restraining orders, which are issued by state courts. Id. Protective order statutes permit the court to issue “stay away” provisions, which order the abuser to stay away from the victim. Women’s Law Initiative, More Information on Domestic Violence, at http://www.womenslaw.org (last visited Feb. 23, 2005). Victims generally can ask the court to prohibit all contact, such as communication by telephone, notes, mail, fax, or e-mail (“no contact” provisions). Id. Courts can also order the abuser to stop hurting or threatening the victim (“cease abuse” provisions). Id.

\textsuperscript{108} Florida Responds, supra note 31, at 215.

\textsuperscript{109} Id.
Shelters should also offer services that address the particular needs of trafficking victims. For example, whenever possible, victims should be housed together in culturally sensitive shelters where their native languages are spoken, a feature that many domestic violence shelters lack. Victims may be fearful if housed in an environment where they do not understand, much less speak the language, possibly slowing the rehabilitation process. Ideally, shelter staff should be trained to handle the aftermath of trafficking, because victims are physically and emotionally scarred. All victims should have access to gender-appropriate health care and psychological assistance, since talking to someone of the opposite sex can be intimidating, especially for sexually exploited victims.

B. Victims’ Right to Access Justice

Additionally, the TVPA should ensure the trafficked person’s right to access justice. Although the Act provides “[v]ictims of severe forms of trafficking [with] access to information about their rights and translation services,” such resources may not be provided until after they have been certified as being trafficked with enough force. The law presupposes that police will first rescue trafficking victims and then interview them to determine eligibility for

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110 Interview with Carol Gomez, supra note 39. Adequate funding for shelters and legal resources is essential to secure the victim’s safety and access to justice. Id. The federal government granted more than $35 million to thirty-six faith-based and community organizations to provide emergency shelter, legal, mental, and health services and English-proficiency instruction. Press Release, White House, Fact Sheet: Human Trafficking: A Modern Form of Slavery (July 16, 2004), at http://usinfo.state.gov/gi/Archive/2004/Jul/19-648859.html [hereinafter Press Release, White House].

111 Interview with Carol Gomez, supra note 39. Domestic violence shelters may also not be able to offer the appropriate counseling services. Id. For example, one trafficking victim was housed in a domestic violence shelter where community sessions focused on abusive husbands, but she had a wonderful husband and instead needed counseling that dealt with labor exploitation. Id.

112 See id.

113 See Inglis, supra note 3, at 102–03; Florida Responds, supra note 31, at 126.

114 See Inglis, supra note 3, at 105 (recommending gender-appropriate health services).


116 See 22 U.S.C. § 7105(c)(2); Jackson, supra note 20, at 557–58. If NGOs and law enforcement do not provide translators to inform victims of their rights in their language, particularly in government raids of brothels, immigrants often remain silent because they fear criminalization or deportation, and consequently punishment in place of their traffickers. Interview with Carol Gomez, supra note 39.
Those who are not “rescued” by law enforcement have no way of knowing whether authorities will believe their stories, so escaping involves a stakes gamble where losing may result in deportation. Additionally, those who escape or consider escaping on their own will find little information or assistance. Trafficked persons, initially too afraid to identify their abusers or unable to articulate the severity of their trafficked situation, are unlikely to find representation, since few NGOs provide free assistance to undocumented immigrants.

To address this problem, the TVPA should provide victims with access to Legal Services Corporation (LSC) attorneys upon first contact with authorities—whether they come forward, are rescued, or encounter law enforcement. Once safely in custody, if the victim’s credibility is in doubt, law enforcement may consider the opinion of psychologists and trained professionals who understand the effects of post-traumatic stress syndrome. This step is necessary because some seriously traumatized people have difficulty recounting their stories or suppress abusive memories that take time to surface. Thus, these factors could, at least initially, render the stories of legitimate victims unbelievable to law enforcement officials. Allowing more time to explore the validity of a trafficking claim would thus decrease assessment errors.

Finally, to increase access to justice, the TVPA should allow victims to self-petition for certification to obtain its benefits. This is

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consistent with both the purpose of the Act—to protect victims and punish traffickers—as well as its legislative history, which indicates that self-petitioning should be permitted. The TVPA could model its self-petitioning provision after the Violence Against Women Act (VAWA), in which victims of domestic violence can self-petition for legal permanent residence without relying on their citizen or legal resident spouses to sponsor them. Like abusive spouses, traffickers often threaten their victims with deportation; thus, adopting a self-petitioning provision would prevent abusers from using deportation as a tool to maintain control over their victims.

IV. Coordination and Protocol

For smooth and comprehensive delivery of protections, a multidisciplinary coordinated response is necessary to address the trafficked person’s variety of needs. Lawyers, nonprofit service providers, and federal and local law enforcement must work in tandem to combat trafficking in their community. Working groups should be established in cities nationwide, tailoring their services to the specific

and local law enforcement, rather than requiring them to cooperate with federal law enforcement. See Pub. L. No. 108–193, § 4 (codified as amended in 22 U.S.C. § 7105(3)(iv) (2003)). This change is significant because state and local law enforcement may be the first to come in contact with the victim. See Hearing, supra note 11 (statement of Sister Mary Ellen Dougherty).

127 Cooper, supra note 33, at 1056–57. A prior legislative proposal required a law enforcement agency request, modeling this requirement after the S visa. See H.R. 3154, 106th Cong. § 6(c)(2) (1999); Cooper, supra note 33, at 1056. Because Congress rejected this proposal, the DOJ and INS concluded that the legislature intended that the T visa be open to self-petitioning, and that the law enforcement agency should serve in an advisory capacity rather than as the sponsoring agency. See 8 C.F.R. § 214.11(f)(1); Cooper, supra note 33, at 1057. Law enforcement endorsement establishes two eligibility requirements: status as a victim and compliance with any reasonable request for assistance in the investigation or prosecution. Cooper, supra note 33, at 1057. To establish his or her status as a victim, the individual may submit credible secondary evidence, describing the nature and scope of any force, fraud, or coercion used against the victim. 8 C.F.R. § 214.11(f); Cooper, supra note 33, at 1057.


129 See id. See Cooper, supra note 33, at 1056; Candes, supra note 14, at 602. Congress concluded that, precisely because of their fear of retribution and deportation, trafficking victims typically find it difficult to approach law enforcement authorities. 22 U.S.C. § 7101(b)(20). Even with these immigration protections, however, abusers often misinform victims, which is why public awareness is so important. See infra Part IV. This distrust of law enforcement can stem from their experience of corrupt law enforcement in their country of origin, the lack of protection they have received, or the myths that traffickers tell them. See Candes, supra note 14, at 602; Jackson, supra note 20, at 558.

130 See Florida Responds, supra note 31, at 195.

131 See id. at 197–98; Press Release, White House, supra note 110.
needs of their given community. Community responses should focus on, among other things; victim identification and management, victim assistance for safety and medical and rehabilitative services, crime scene investigations, and coordination among different levels of law enforcement. Working groups should also strive to increase public awareness, since the effectiveness of these protections depends on the wider community’s knowledge of the laws. First, federal officials should train local law enforcement entities that may not be aware of the federal law. Professional schools in the fields of nursing, social work, law, medicine, business, and mental health should also integrate awareness of human trafficking into their curricula. To educate the public, working groups should develop media campaigns modeled after successful public health initiatives, such as anti-smoking, HIV/AIDS, do-

132 See Florida Responds, supra note 31, at 195. Membership in the working group should include the Departments of Justice and Health and Human Services, refugee service agencies, law enforcement agencies, prosecutors, nonprofit victim advocacy agencies and immigrant-focused, or similar community programs. Id. at 209. Once these working groups become established, membership should be expanded to include health care professionals, agricultural interests, the business community and Department of Homeland Security personnel. Id. at 219. The federal government has established anti-trafficking task force coalitions in Philadelphia, Phoenix, Atlanta, and Tampa, and plans to create a dozen additional task forces in 2004. Press Release, White House, supra note 110. Many other cities have established their own anti-trafficking coalitions. In Boston, TVOS, a coalition of community-based organizations, has met monthly since 2002, and began meeting with law enforcement in 2004. Interview with Carol Gomez, supra note 39. Houston recently established a similar coalition, the Human Trafficking Rescue Alliance. Civil Rights Div., U.S. Dep’t of Justice, 1 Anti-Trafficking News Bull. 1, 1 (Aug./Sept. 2004), available at http://www.usdoj.gov/crt/crim/trafficking_newsletter/antitraffnews_augsep04.pdf [hereinafter Anti-Trafficking News Bull.].

133 See Florida Responds, supra note 31, at 132–33, 216. It is important to determine a purpose for organizing and set forth a mission, such as conducting outreach or responding quickly to law enforcement raids on a trafficking crime scene. See id. at 198–99; Interview with Carol Gomez, supra note 39. This protocol information should be circulated to refugee service agencies, law enforcement agencies, prosecutors, nonprofit victim advocacy agencies and immigrant-focused or similar community programs, as well as health care providers. See Florida Responds, supra note 31, at 209–10.

134 See Florida Responds, supra note 31, at 221 (discussing public awareness strategies and empowering trafficking survivors within their communities).

135 See Hearing, supra note 11 (statement of Director Wendy Patten); Florida Responds, supra note 31, at 219. A training program can be implemented at the academy level for all state and local police. See Hearing, supra note 11 (statement of Director Wendy Patten). Florida, Missouri, Texas, and Washington have enacted state anti-trafficking laws to provide state law enforcement another tool to combat trafficking. Anti-Trafficking News Bull., supra note 132, at 1.

136 Florida Responds, supra note 31, at 209.
mestic violence, and drunk driving awareness efforts.\textsuperscript{137} To be effective, education and public awareness campaigns about trafficking should utilize the media in immigrant communities, such as newspapers or newsletters circulated in other languages.\textsuperscript{138}

**Conclusion**

With an estimated four million people trafficked worldwide every year, trafficking in persons is the most widespread manifestation of modern-day slavery.\textsuperscript{139} Through physical isolation and psychological trauma, traffickers economically and sexually exploit victims, instilling constant fear of arrest, deportation, and violence by traffickers themselves.\textsuperscript{140} Too often, governments have treated victims as criminals and let traffickers go free.\textsuperscript{141} In *Human Traffic: Sex, Slaves & Immigrants*, Craig McGill argues that current law enforcement policies do not effectively combat trafficking, and provides personal accounts that underscore why victim protection is crucial to the success of anti-trafficking strategies.\textsuperscript{142} An effective anti-trafficking strategy must view trafficking not only from an enforcement perspective, but also from a human rights perspective.\textsuperscript{143} Efforts to eliminate trafficking must ensure the dignity of victims, because the blatant disregard for human dignity lies at the core of human trafficking.\textsuperscript{144}

\textsuperscript{137} Id. at 221. All of the public campaigns should include a hotline number where witnesses and victims can report trafficking cases. See Hyland, *supra* note 12, at 48 (describing the National Worker Exploitation Taskforce’s hotline for reporting exploitation, abuse, and trafficking). As of April 2004, the Criminal Section of the Civil Rights Division had 153 open trafficking investigations, which is double that of 2001. TIP Report, *supra* note 23, at 258. Over half of these investigations originated from the “Traffic in Persons and Worker Exploitation Task Force Complaint Line,” run by the Department of Justice (1-888-428-7581) and established in February 2000. Id. In March 2004, an NGO activated a DDS-sponsored hotline for trafficking victims - (1-888-373-7888). Id. at 257.

\textsuperscript{138} RAYMOND & HUGHES, *supra* note 64, at 13. Anti-trafficking messages should be posted in places frequented by trafficked persons, such as Western Union terminals and offices, highway rest stops, retail, grocery and drug stores, and laundromats. FLORIDA RESPONDS, *supra* note 31, at 210. These businesses should display information on how victims can receive help or how witnesses can help someone they suspect to be trafficked. Id. Any public awareness campaign and materials should warn victims of the risks involved if their captors find them with anti-trafficking material. Id.

\textsuperscript{139} *Traffic in Human Misery, supra* note 34.


\textsuperscript{141} Id.

\textsuperscript{142} See McGill, *supra* note 1, at 4, 209–11.

\textsuperscript{143} See Hearing, *supra* note 11 (statement of Director Wendy Patten); Inglis, *supra* note 3, at 100.

\textsuperscript{144} Hearing, *supra* note 11 (statement of Director Wendy Patten).
In this regard, the TVPA is a bold step forward; while most international anti-trafficking laws focus primarily on law enforcement, the TVPA recognizes the fundamental human right of trafficked persons by attempting to protect and assist victims.\textsuperscript{145} The TVPA, however, lacks the comprehensive protection services necessary to be effective.\textsuperscript{146} The number of victims assisted and traffickers convicted will remain low until the TVPA fully assures victims of personal security and access to justice.\textsuperscript{147} The strict language of the TVPA and the lack of broad protections undermine its very purpose—to eliminate trafficking and increase protections for victims.\textsuperscript{148} Therefore, the TVPA must grant protection to victims of all forms of trafficking, so that they are not dissuaded from seeking assistance or are left without relief.\textsuperscript{149} The United States must demonstrate its leadership on this critical human rights issue by improving this legislation.\textsuperscript{150} The TVPA should signify the beginning of a movement focused on providing greater victim protections; only then, can we eradicate one of the most profound human rights abuses of our time.\textsuperscript{151}

\begin{thebibliography}{9}
\bibitem{note145}See 22 U.S.C. §§ 7101(b)(22), 7105 (2000); Bruch, \textit{supra} note 8, at 16.
\bibitem{note146}See \textit{Hearing, supra} note 11 (statement of Director Wendy Patten); Inglis, \textit{supra} note 3, at 75–76.
\bibitem{note147}See 22 U.S.C. § 7101(b)(20) (mentioning the victims’ obstacles to accessing justice due to fear of retribution and lack of legal knowledge); TIP Report, \textit{supra} note 23, at 257; Interview with Carol Gomez, \textit{supra} note 39.
\bibitem{note148}See Candes, \textit{supra} note 14, at 593; discussion \textit{supra} Part II.A-B.
\bibitem{note149}See Barone, \textit{supra} note 61, 594; Mattar, \textit{supra} note 9.
\bibitem{note150}\textit{Hearing, supra} note 11 (statement of Director Wendy Patten).
\bibitem{note151}Hyland, \textit{supra} note 12, at 70.
\end{thebibliography}
MARRIAGE PROMOTION POLICIES AND THE WORKING POOR: A MATCH MADE IN HEAVEN?

JULIA M. FISHER*


Abstract: David Shipler’s book, The Working Poor explores the lives and troubles of the working poor in post-welfare-reform America. While Shipler concludes that programs such as universal health care and equity in public school funding would greatly assist the working poor, the Bush administration and Congress have focused on a very different solution: marriage promotion programs. This Book Review investigates marriage promotion programs to determine whether these programs would help working poor single-parent families escape poverty, and thus would be a viable alternative to Shipler’s suggestions. In the end, this Book Review concludes that these programs are well intentioned, but do not significantly assist the working poor.

Introduction

The working poor present a tragic contradiction in American poverty discourse. Federal welfare reform in 1996 pushed millions of welfare recipients into the workforce, based on the idea that work would provide an exit out of the cycle of poverty. However, many of those recipients joined the ranks of millions of Americans who work full time at low paying jobs that leave them earning at or below the

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1 David K. Shipler, The Working Poor: Invisible In America 4, 40 (2004). In 1996, President Clinton signed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), which substantially overhauled the federal welfare system. Id. Among other things, the bill mandated that welfare recipients were required to engage in work activities after two years of receiving welfare benefits, with some state-allowed exceptions. R. Kent Weaver, Ending Welfare As We Know It 328, 332, 335 (2000).
federal poverty line. Their dilemma demonstrates that work is not the whole solution to poverty in America.

In *The Working Poor*, David Shipler explores the obstacles to the working poor and their families in their efforts to escape poverty. In his interviews with working poor families, he finds that a fatal combination of “bad choices and bad fortune” makes the cycle of poverty very difficult to break. The prosperity of most families were affected by both individual decisions such as taking drugs or dropping out of school, and also by bad circumstances such as lack of good health care, a dysfunctional family, inferior primary education and crumbling housing. These circumstances create a situation where working poor families always live on the verge of disaster. A small mishap, such as a babysitter not showing up, a car breaking down or a child’s asthma attack, is a crisis, potentially causing such families to spiral down into unemployment again.

Shipler suggests a variety of government policies and programs to assist the working poor in escaping poverty. Most of his suggestions involve modifications to preexisting government policies or programs, such as more funding for the Earned Income Tax Credit, and equity in the funding of public schools to raise standards overall. Shipler also recommends universal health care coverage, as working poor families often earn too much for Medicare but too little to afford health insurance. Finally, Shipler introduces some innovative new proposals, including service centers that would provide for a poor

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2 Shipler, [*supra* note 1], at 4. The federal poverty line was created in the 1960s, based on the assumption that families spend one-third of their income on food. Thus, the price of a “thrifty food basket” was tripled to create the federal poverty line, and is adjusted for the size of a family. Michael B. Katz, *The Undeserving Poor: From the War on Poverty to the War on Welfare* 115 (1989). Despite the fact that families now spend about one-sixth of their income on food, this calculation remains in effect. Shipler, [*supra* note 1], at 9.

3 See [*generally Welfare Reform: The Next Act* (Alan Weil & Kenneth Finegold eds., 2002)]. After reviewing studies of the effects of welfare reform, the editors found that many former welfare recipients “who do find jobs lose other supports designed to help them, such as food stamps and health insurance, leaving them no better off—and sometimes worse off—than when they were not working.” *Id.*

4 Shipler, [*supra* note 1], at 4–5.

5 *Id.* at 6.

6 *Id.* at 6–7. See discussion [*infra* Part I.B.]

7 Shipler, [*supra* note 1], at 4.

8 See *id.* at 285–300.

9 See *id.* at 291, 293–94. In a prominent review of *The Working Poor*, the reviewer comments that Mr. Shipler’s policy solutions “all seem worthy, yet familiar.” Michael Massing, *Take This Job and Be Thankful (for $6.80 an Hour)*, *N.Y. Times*, Feb. 18, 2004, at E8.

10 Shipler, [*supra* note 1], at 295–96.
family’s health, housing and nutritional needs all at once, and expanded vocational services in high schools.\footnote{11}

Quixotically, Congress and the Bush administration have chosen to approach the problems of the working poor by promoting a kind of program that Shipler never addresses: healthy marriage promotion for single-parent poor families.\footnote{12} Congress has made the healthy marriage initiative the centerpiece of various welfare reform reauthorization bills, explicitly tying marriage promotion to poverty policy.\footnote{13} The most current version of the welfare reform bill, presently stalled in the Senate, provides $100 million a year for “healthy marriage promotion activities,” such as public advertising campaigns on the value of marriage, premarital education, and marriage skills programs.\footnote{14} To promote these policies, President Bush declared that his administration “will give unprecedented support to strengthening marriages . . . [because] sta-
ble families should be the central goal of American welfare policy.”

While no one, including Shipler, would dispute that many of the working poor are single-parent families, whether marriage promotion programs would ease their plight is a matter of intense debate.

This Book Review examines the federal government’s healthy marriage policies to determine whether they will work their desired effect—helping working poor single-parent families. It also explores the federal government’s reasons for pursuing an anti-poverty strategy that Shipler’s extensive study of the working poor never mentions. Part I examines the problem these policies purport to address: poverty in single-parent families. Part II summarizes the healthy marriage policies in their most current form in Congress and how marriage promotion came to be a part of the welfare reform debate. Part III analyzes the ability of these marriage promotion policies to assist single income families out of poverty, and offers policy alternatives such as child support reform and Marriage Plus programs. This Book Review concludes that Shipler may have excluded discussion of these marriage promotion policies for a valid and purposeful reason—these policies, as currently formulated, are unlikely to significantly assist working poor single-parent families.

I. SINGLE-PARENT TRAP: POVERTY AND CHILD WELL-BEING IN SINGLE-PARENT FAMILIES

Unmarried women with children make up the majority of the


16 See Shipler, supra note 1, at 93. For background on the debate raging between feminist groups and social conservatives, see Heath, supra note 13.

17 Shipler focuses on the plight of the working poor in general. See generally Shipler, supra note 1. However, marriage promotion policies focus on the plight of working poor single-parent families. By analyzing these policies, this Book Review also focuses more narrowly on working poor single-parent families.

18 See infra notes 8, 9, 10, 11. Perhaps the greatest failing of Shipler’s work is its failure to analyze, let alone mention, these marriage promotion policies, even though the Bush administration and Congress have been pushing these policies at least since 2002. See Wetzstein, supra note 15. Shipler devotes a chapter to his own proposals to help the working poor, but never examines the proposals of others. See Shipler, supra note 1, at 285–300. The structure of the book—which is divided into his observations of the lives of the working poor and then his policy proposals, which are based on his observations—leaves little room for an examination of the current debate in Congress. See id.

19 The term “single parents” is defined differently by various sources. Marriage promotion policies themselves tend to classify a single parent as an unmarried parent living with the children. See Press Release, White House, Working Toward Independence: Promote Child Well-
working poor. Children living in families headed by single women are five times more likely to live in poverty than children living in families with married parents. These statistics have led researchers to examine the link between poverty and single-parent families, and also the impact, if any, this family type has on children.

A. The Economic Disadvantages of Single Parenthood

The economic disadvantages of single parenthood derive from both the simple math that one parent can provide only one full income and the possible intrinsic attendant drawbacks due to the lack of support and stability provided by marriage. This economic disadvantage is especially apparent when the parent works in a low-wage job.

Single parents do not have the option of pooling their resources as married or cohabiting couples can, a practice that often results in great savings. When parents live apart, each must support a separate...
household. Married or cohabiting parents communally support only one household, and thus save greatly by sharing living expenses such as housing, utilities and food. For example, in 2001, two parents with one child living together would have had to earn a combined total of $14,255 to live above the federal poverty line. If the parents lived apart, however, the number is increased to $21,421 for each to live above the federal poverty line—$12,207 for the parent with the child, and $9,214 for the absent parent. Simple addition reveals that living apart and out of poverty is $7,166 more costly.

Moreover, child support, a judicial tool to assist single parents raising children financially, is not adequately administered or enforced. Only about one-third of children with a child support award receive the full amount they are owed, and one-quarter of children with an award receive nothing at all. Furthermore, forty percent of those eligible for child support do not even have an award. Part of this is attributable to the common state practice of reducing welfare benefits for families receiving child support, or precluding families from receiving the entire award while on welfare. Such policies discourage mothers from filing to file for child support from the onset. Another possible reason for the disparity in need and compensation is that absent low-income parents may have difficulty paying child support, which often constitutes a high percentage of their income.

Research suggests that married parents have some intrinsic advantages over single parents that increase married parents’ chances of financial success. The stability of marriage and two incomes provide

26 See McLanahan & Sandefur, supra note 19, at 24.
27 Id.
28 Lerman, supra note 21, at 4 n.1.
29 Id.
30 Id.
31 See McLanahan & Sandefur, supra note 19, at 25.
32 Id.
33 Id.
35 Id.
36 Id. at 157. The award is based on “presumptive income,” which is how much the father is predicted to make in one year, regardless of his actual earnings. Id. Many fathers cannot afford to pay the award, or build up large arrearages in prison, putting an onerous burden on absent fathers and breeding resentment among the fathers. Id.
37 Lerman, supra note 21, at 5–6. As Director of the Urban Institute’s Labor and Social Policy Center, Robert Lerman claims that cohabiting couples may not gain these intrinsic advantages because they are less “stable.” For discussion of this topic, see Wade F. Horn,
married parents greater opportunity to save, plan and invest for the long term.\textsuperscript{38} Some research suggests that the greater emotional health of married couples may even translate into better performance on the job and higher earning power.\textsuperscript{39}

B. Child Well-Being at Risk with Only One Biological Parent

Children from one-parent families\textsuperscript{40} are less likely to be successful financially, academically, and socially than children from two-parent families.\textsuperscript{41} Studies have documented that as compared to children from two-parent homes, children living apart from one parent during their childhood were twice as likely to drop out of high school, to have a child before the age of twenty, and to be unemployed in their late teens and early twenties.\textsuperscript{42} Other studies show that children of

\begin{itemize}
  \item \textsuperscript{38} Lerman, supra note 21, at 5–6. For example, a couple might have enough of a financial cushion for only one spouse to work full-time while the other can attend school to get more skills to receive greater future earnings. \textit{Id.}
  \item \textsuperscript{39} See id.; \textsc{Linda J. Waite \& Maggie Gallagher, The Case for Marriage: Why Married People Are Happier, Healthier, and Better Off Financially} 99–104 (2000). Studies have documented that married individuals are more likely to report that they were very happy with their life in general (40\%) than single or cohabiting individuals (25\%), separated individuals (15\%), divorced individuals (18\%), and widowed individuals (22\%). \textit{Id.} at 67. Married individuals are also less likely to be depressed or anxious than those who are single, divorced or widowed. \textit{Id.} Although it is not entirely clear whether marriage causes greater emotional health or emotionally healthy people are more likely to marry, some research suggests the former. \textit{Id.} at 68–71.
  \item \textsuperscript{40} In this Section, single-parent family is defined as one in which the child lives with only one biological parent, as that is how the research defines it. \textsc{See McLanahan \& Sandefur, supra note 19, at 5; Horn, supra note 37, at 131.}
  \item \textsuperscript{41} McLanahan \& Sandefur, supra note 19, at 1; DeParle, supra note 12; Horn, supra note 37, at 129. Professors McLanahan and Sandefur, authors of the definitive work on this subject, conclude:
    
    \begin{quote}
    We have been studying this question for ten years, and in our opinion the evidence is quite clear: Children who grow up in a household with only one biological parent are worse off, on average than children who grow up in a household with both of their biological parents, regardless of the parents’ race or educational background.
    
    McLanahan \& Sandefur, supra note 19, at 1.
    \end{quote}
  \item \textsuperscript{42} McLanahan \& Sandefur, supra note 19, at 2. Professor McLanahan groups stepfamilies with single-parent families, because in stepfamilies children still only have one biological parent. \textit{Id.} at 5. Her research does show that these child well-being indicators are likely to be lower in stepfamilies than in two-parent families. \textit{Id.} at 29. However, stepfamilies do have an economic advantage over single-parent families living alone. \textit{Id.} at 82.
\end{itemize}
single-parent families are more likely to commit crimes and to rely on welfare as adults than children in two-parent families. These statistics suggest that family structure may contribute to the inheritance of poverty from one generation to the next.

Poverty or economic hardship is the most important predictor of the lesser achievement and well-being of children from single-parent families. Poverty often has broad negative effects on children that frequently influence their adulthoods. For example, poor children may be malnourished, which in turn impairs brain development and the immune system, as well as the ability to learn and concentrate. Children from poor families are also likely to attend inferior public schools, while families with higher incomes can afford to relocate to a neighborhood with good schools, or to send their children to private schools. Families with high incomes can also pay for extracurricular activities, which are generally seen as positively affecting children.

Research suggests that single-parent families may have non-economic negative consequences on children as well, because children in single-parent families generally receive less parental supervision and involvement than children in two-parent families. Parental involvement is important to a child’s well-being, especially in the area of academic achievement. Children whose parents read to them and help them with their homework are more likely to excel academically than those living with uninvolved parents. In a single-parent home, the parent is more likely to be juggling work and family, leaving little time to provide this support. Additionally, the nonresident parent is typically unavailable to give daily support. Moreover, studies show that the quality of the nonresident parent’s involvement in his or her chil-

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43 Horn, supra note 37, at 129.
44 See McLanahan & Sandefur, supra note 19, at 2; Horn, supra note 37, at 129.
45 McLanahan & Sandefur, supra note 19, at 3. Professor McLanahan ascribes half of the disadvantage to poverty. Id.
46 Shipler, supra note 1, at 215–16. Old and decrepit housing may create other health problems for poor children, such as asthma and lead paint poisoning. Id. at 226–27.
47 Id., at 239–40; McLanahan & Sandefur, supra note 19, at 33. Funding for schools is directly tied to area property taxes, and therefore when property is worth little, public schools will have little funding. See Shipler, supra note 1, at 239–40; McLanahan & Sandefur, supra note 19, at 33.
48 McLanahan & Sandefur, supra note 19, at 33.
49 Id. at 33–34; Horn, supra note 37, at 131.
50 Horn, supra note 37, at 130–31.
51 See id.
52 McLanahan & Sandefur, supra note 19, at 33.
53 Id. In this context, absent parent merely means a parent who lives apart from his or her child. Id.
Children’s lives further affects academic performance. Children with nonresident parents who helped with homework, provided discipline, and offered advice generally did better academically and were healthier psychologically than children whose involvement with nonresident parents consisted of recreational activities. Unfortunately, visitation agreements tend to encourage nonresident parents to engage in the latter form of activities, reinforcing the negative consequences of single-parent households.

Children in single-parent families also generally possess less “social capital,” a commodity defined as the benefits, such as jobs or opportunities, that flow to children through their parents’ relationships with other adults and community institutions. Children in two-parent families can take advantage of the connections and networks of both of their parents. Children growing up in single-parent households, however, typically only benefit from the social networks of the parent they live with, as the other parent may live in another city or state, or may possess a weakened bond to the child. Consequently, he or she may have fewer opportunities as a child or more difficulty finding a job as an adult.

Given the economic and social disadvantages that children of single-parent families face, it is unsurprising that many in the federal government are promoting marriage as a policy panacea. What follows is a discussion of how marriage became part of the federal welfare agenda in the last decade, and the proposals currently under consideration.

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54 Horn, supra note 37, at 131.
55 Id.
56 See id. at 131–32. Absent parents often only have limited time to spend with their children, perhaps because of court-ordered visitation rights. Id. Because the time together is limited, parents want to make sure their children “enjoy themselves” and consequently, tend to engage in recreational activities, as opposed to doing homework together or setting appropriate limits. Id.
57 McLanahan & Sandefur, supra note 19, at 3; McLanahan, supra note 50, at 37. The concept of social capital was created by sociologist James Coleman. McLanahan & Sandefur, supra note 19, at 3.
58 McLanahan & Sandefur, supra note 19, at 3. For example, a parent’s friend, because of the friend’s good feelings toward the parent, might give the child his or her first job after high school. Id. at 35. Or a parent who has community connections may learn from neighbors which teacher to request, or what after-school activities may be available and free. Id. at 34.
59 Id. at 35.
60 Id at 5–4, 35.
61 Id. at 22–23.
II. Federal Government Weds Marriage Promotion Proposals and Welfare Reform

Currently, the Bush administration and Congress are advocating healthy marriage policies as a solution to ease the existing poverty of single-parent families living alone and the continuing cycle of poverty for the children of these families. These policies had their genesis in the 1996 welfare reform law, which allowed states great flexibility to experiment with marriage promotion. In response to these efforts and the focus of the Bush administration, Congress made marriage promotion a central part of the welfare reauthorization proposals. This Section assesses the most recent welfare reform bill.

A. 1996 Welfare Reform Bill and State Efforts on Marriage Promotion

The 1996 welfare reform law was the first attempt to place marriage promotion as a poverty solution on the national agenda. The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) dismantled the previous welfare entitlement system, and created the Temporary Assistance for Needy Families (TANF) in its place. TANF awards states block grants to manage their welfare programs with few restrictions, requiring only that the funds be spent pursuant to the guidelines and stated purposes of PRWORA. PRWORA’s fourth purpose allows TANF funds to be spent to “en-

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64 Hearing, supra note 63, at 51, 53 (testimony of Theodora Ooms, Director and Senior Policy Analyst of the Resource Center on Couples and Marriage Policy at the Center on Law and Social Policy).
65 See Fagan, supra note 63; Jacqueline Marino, How Marriage Has Gone from a Private Matter to a Public Policy, Plain Dealer (Cleveland, Ohio), Sept. 14, 2003, Sunday Magazine, at 17; Wetzstein, supra note 15.
66 See Hearing, supra note 63, at 53 (testimony of Senior Policy Analyst Ooms).
68 See PRWORA § 103. A block grant means that states are given a fixed amount of money every year to spend on welfare within certain guidelines, while previously states would have received money to spend on welfare depending on how many people are in need. Jason DeParle, American Dream: Three Women, Ten Kids, and a Nation’s Drive to End Welfare 124–35 (2004). Such guidelines included minimum work requirements that all states must have at least 50% of their welfare caseload working at least thirty hours a week, a sixty-month lifetime limit of adults receiving TANF benefits, and no benefits to most legal and all illegal immigrants. See PRWORA §§ 103(a)(1), 401(a), 407, 408(a)(1)(B).
encourage the formation and maintenance of two-parent families,” which permits state use of block grants to encourage marriage.\footnote{PRWORA §§ 103(1), 401. Note that the fourth purpose does not mention creating low-income two-parent families, but two-parent families in general. \textit{See id.} This allows states to use TANF money to support programs that assist the middle class and upper class, not just those living in poverty. \textit{Hearing, supra} note 63, at 53 (testimony of Senior Policy Analyst Ooms).}

Only a handful of states have devoted significant TANF funds to marriage promotion programs.\footnote{\textit{See Hearing, supra} note 63, at 54. However, PRWORA did not mention any specific marriage promotion programs. \textit{Id.} Instead, PRWORA focused on programs that would deter out-of-wedlock births and teenage mothers. \textit{See, e.g., Weaver, supra} note 1, at 331. For example, PRWORA including an illegitimacy reduction bonus for five states a year that showed the greatest reduction in out-of-wedlock births without an increase in abortion rates. PRWORA §§ 103(1), 403(a)(2). After welfare reform passed, most states followed Congress’s lead and used their block grants to prevent out-of-wedlock birth instead of promoting marriage. \textit{Hearing, supra} note 63, at 54 (testimony of Senior Policy Analyst Ooms).} Some states such as Arizona have created marriage education programs for couples of all income levels.\footnote{\textit{Theodora Ooms et al., Ctr. for Law & Social Pol’y, Beyond Marriage Licenses: Efforts in States to Strengthen Marriage and Two-Parent Families} 11 (Apr. 2004), available at \url{http://www.clasp.org/publications/beyond_marriage.pdf}. Arizona, Louisiana, Michigan, New Mexico, Oklahoma, Utah, and Virginia all have created significant marriage promotion programs. \textit{Id.} While most states have not started marriage promotion programs, the vast majority have changed their rules to make it easier for two-parent households to apply for welfare. \textit{Id.} at 10. Prior to PRWORA, federal law mandated that two-parent families were eligible for assistance only if the parent who was considered the primary wage earner was unemployed or worked less than one hundred hours a month. \textit{Id.} at 15–16. Many researchers believed this requirement deterred poor couples on welfare from marrying. \textit{Id.} After PRWORA allowed states to determine the rules for administering assistance, thirty-six states changed their eligibility requirements for two-parent households, so that these households are now considered solely based on financial circumstances, as one-parent families and individuals are. \textit{Ooms et al., supra}, at 10.} Some programs are aimed at the general public, such as a Virginia public service announcement promoting marriage before having children, and an Oklahoma pilot program for a new high school elective fostering relationship skills and realistic expectations of marriage among students.\footnote{\textit{See id.} at 25; Wetzstein, \textit{supra} note 15. Arizona subsidizes the cost for any couple to attend such classes, paying 85% for middle class couples and 100% for low-income couples. \textit{Ooms et al., supra} note 71, at 10; Wetzstein, \textit{supra} note 15. As of 2002, 517 couples have taken these courses through the program, but only twenty-six were low income. Wetzstein, \textit{supra} note 15.} Other programs focus solely on low-income couples, including a six-week class in Michigan to teach parenting skills, the benefits of marriage, healthy relationships and other issues for single mothers on welfare and their partners.\footnote{\textit{Id.} at 40. However, this program was eliminated due to budget cuts. \textit{Id.}}
B. Federal Welfare Agenda Focuses on Marriage

In 2001, the Bush administration made marriage a top priority in welfare reauthorization, a move that was welcomed by the two bases of the Republican Party: social and fiscal conservatives. The Bush administration sought to advance this priority in several ways. First, President Bush authorized the Administration for Children and Families (ACF), an agency of the Department of Health and Human Services, to disperse grants to marriage promotion projects and research around the country. In 2002–2003, the ACF distributed more than $90 million in such grants. The Bush administration also published a policy paper in February 2002, outlining methods to incorporate healthy marriage programs into welfare reform. The paper proposed declaring healthy marriages to be an independent purpose of TANF, setting up a $100 million fund to research healthy marriage projects, creating a competitive $100 million grant fund for states to create healthy marriage programs, and requiring states to provide annual reports on their progress in promoting marriage.

C. Current Congressional Proposals and Prospects

Congress has adopted and expanded many of the Bush administration’s healthy marriage proposals in several welfare reauthorization
bills, the most recent of which is H.R. 4.80 As proposed by the Bush administration, this bill would alter the language of the fourth purpose of welfare reform, from encouraging the maintenance of “two parent families,” to “healthy, 2-parent married families.”81 H.R. 4 also echoes the Bush administration’s prior policy proposals by creating a competitive grant award system of $100 million a year for states “developing and implementing innovative programs to promote and support healthy, married, 2-parent families.”82 As a condition of the award, states must match these grants, but they may then use TANF block grants to pay their matching amount.83 Congress amplified the Bush administration’s proposal by spelling out sample marriage promotion programs in H.R. 4.84 Among the suggested programs are high school classes about the value of marriage, marriage education programs for unmarried pregnant parents, and public service announcements promoting marriage.85

80 Ooms et al., supra note 71, at 7–8; Rector & Pardue, supra note 75, at 6. Although this Book Review focuses on the status of the most recent welfare reauthorization bill, two previous bills existed as well. The House passed a welfare reauthorization bill in May 2002, but the Senate never picked up this bill. See Ooms et al., supra note 71, at 8–9. The Senate Finance Committee also passed a welfare reauthorization bill in 2002, but it was never brought to the Senate floor for a full vote. Id.

81 See Personal Responsibility and Individual Development for Everyone Act, H.R. 4, 108th Cong. § 101(4) (2004) [hereinafter Senate Bill]; House Bill, supra note 14, § 101(4). The House and Senate passed slightly different versions of H.R. 4, but the marriage promotion provisions are nearly identical. See id. As the numbering of provisions is different in each bill, this Book Review will only cite to the House version for clarity’s sake.

82 House Bill, supra note 14, § 103(b)(2)(A), (C)(i).

83 Id. § 103(c)(V).

84 Id. § 103(b)(2)(B)(i)–(viii). The actual text of the suggested programs included:

i) Public advertising campaigns on the value of marriage . . .

ii) Education in high schools about the value of marriage . . .

iii) Marriage education . . . programs that may include parenting skills, financial management, conflict resolution and job and career advancement, for non-married pregnant women and non-married expectant fathers.

iv) Pre-marital education and marriage skills training for engaged couples . . .

v) Marriage enhancement . . . programs for married couples

vi) Divorce reduction programs . . .

vii) Marriage mentoring programs . . . in at risk communities

viii) Programs to reduce the disincentives to marriage in means-tested aid programs.

Id.

85 Id. The Senate version of H.R.4 restricts these types of programs, with the caveat that participation in (iii)–(vii) must be voluntary, Senate Bill, supra note 81, § 102(b)(2)(C). The Senate version also mandates that all grant recipients must consult with experts to ensure all programs, if possible, will raise awareness of domestic violence. Id. § 102(b)(2)(E)(i)–(ii)(II).
The marriage promotion programs in H.R.4 garnered little discussion and almost no dissent during debates in Congress.\textsuperscript{86} Due to the lack of articulated opposition, H.R. 4 sailed through the House in February 2003 with 230 for and 192 against.\textsuperscript{87} However, H.R 4 stalled in the Senate in April 2004, when Republicans failed to get the three-fifths vote needed to close debate on the bill for reasons unrelated to marriage promotion policies.\textsuperscript{88} There has been no activity on the bill since.\textsuperscript{89}

III. Do Marriage Promotion Programs Help the Working Poor?

The marriage promotion programs described in H.R. 4 are unlikely to have the intended effect of helping single-parent families and their children escape the cycle of poverty.\textsuperscript{90} These programs clearly attempt to address legitimate problems of poverty and child well-being in

\textsuperscript{86} See, e.g., 150 CONG. REC. S3345 (daily ed. Apr. 1, 2004) [hereinafter Senate Debate]; 149 CONG. REC. H473–483 (daily ed. Feb. 13, 2003) [hereinafter House Debate]. Perhaps there was little discussion of these programs because similar programs had been introduced in the previous welfare reauthorization bill. See Senate Debate, supra; House Debate, supra. Also, in the House of Representatives, debate on H.R. 4 was limited to only two hours, and so Representatives tended to focus on other aspects of the bill. House Debate, supra, at H465–66.

\textsuperscript{87} Senate Debate, supra note 86, at H552.

\textsuperscript{88} Senate Debate, supra note 86, at S3538. Republican leadership was unable to close the debate on H.R. 4 because they were unwilling to allow a separate vote on an amendment to raise the federal minimum wage. Id. at S3336, S3538. This prompted Democrats to block the vote on the welfare reauthorization bill. Frandsen, supra note 13. To close the debate, three-fifths of the senators must vote in favor of a cloture motion. On April 1, fifty-one senators voted to close the debate, while forty-seven voted to keep it open. Senate Debate, supra note 86, at S3538. These votes were strictly on partisan lines with the exception of Democratic Senator Zell Miller. Id. While Republicans accused the Democrats of bringing in a peripheral issue, the minimum wage was last raised in 1996, the year that welfare reform first passed. Act of Aug. 20, 1996 § 2104, 29 U.S.C § 206(a)(1) (2004) (raising the minimum wage to $5.15 an hour).


\textsuperscript{90} See Hearing, supra note 63, at 56–58 (testimony of Senior Policy Analyst Ooms); id. at 76–82 (testimony of Kathryn Edin, Assoc. Prof. of Sociology, Inst. of Policy Research, Northwestern Univ.); William Julius Wilson, The Truly Disadvantaged 72 (1987).
single-parent families.91 However, the healthy marriage programs in H.R. 4, however, have three fatal shortcomings: (1) no empirical evidence suggests that the programs will induce marriages or otherwise assist the working poor; (2) the programs are not sufficiently targeted to help the working poor in need today; and (3) the programs ignore the real reason many of the working poor do not marry.92 Underlying all three of these flaws is the issue of whether marriage is truly the best way to assist working poor families escape poverty.93 This Section concludes with policy alternatives that better address this important issue.94

A. No Proof That Such Programs Would Help the Working Poor

Very little research exists to show that marriage promotion programs are effective in creating marriages among low-income families.95 Marriage education has been documented to help preserve existing marriages among the middle class, but little research analyzes marriage education’s effect in creating new marriages or preserving marriages in lower-income communities.96 Moreover, studies of existing programs do not prove that pro-marriage policies actually reduce poverty among low-income families.97 Therefore, before millions of dollars a year are spent on these programs, more research must be conducted to show their efficacy in creating marriage and reducing poverty.98

Research conducted on the characteristics of single-parent families suggests that marriage counseling alone may not assist these families in escaping poverty.99 One study, which followed unwed parents for the first four years of their child’s life, suggests that many unwed

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91 See discussion supra Part I.
92 See Hearing, supra note 63, at 56–58 (testimony of Senior Policy Analyst Ooms); id. at 76–82 (testimony of Professor Edin); WILSON, supra note 90, at 72.
93 See Hearing, supra note 63, at 56–58 (testimony of Senior Policy Analyst Ooms); id. at 76–82 (testimony of Professor Edin); WILSON, supra note 90, at 72.
95 See Haynes, supra note 12. This is specifically true among marriage education programs, couples counseling, and divorce reduction programs. Id.
96 DeParle, supra note 12.
98 See Hearing, supra note 63, at 57 (testimony of Senior Policy Analyst Ooms). Ooms suggests there are gaps in the research relating to the low-income population and people of color, and before moving forward, there should be some pilot demonstration programs to measure the effects on different populations. Id.
99 See McLanahan et al., supra note 34, at 153.
parents are unlikely to benefit greatly from marriage without further services. Large numbers of unwed parents studied were high school dropouts, parolees, or currently unemployed. This situation suggests that many unwed parents and their children would not have benefited economically from marriage, because their marriage partners possessed low employment skills and currently lived in low socio-economic circumstances. Moreover, at the time of their child’s birth, half of the unwed mothers lived with the child’s father, and so were already receiving many of the economic benefits of sharing a household. For most unwed parents today, marriage is not likely to be the answer to get them out of poverty.

**B. Programs Do Not Target Today’s Working Poor**

Even if marriage promotion programs were proven to assist single-parent families in escaping poverty, the programs contained in H.R. 4 are unlikely to significantly assist the working poor. These programs are not means-tested, which permits marriage promotion programs to be aimed at individuals from all income levels, thus diverting funds from truly needy families. Marriage promotion programs are “preventative—not reparative,” aimed at preventing single-parent family poverty from occurring, not assisting single parents who

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100 Id. at 153–55. The study was the famous *Fragile Families and Child Well-Being* study.

101 Id. More than a third of the unwed fathers and mothers in the study lacked high school diplomas. Id. at 153. Thirty-eight percent of unwed fathers had been incarcerated, which is likely to create a significant barrier to future employment. Id. at 154. Twenty percent of non-custodial fathers earn less than $6,000 annually, and almost thirty percent had not worked in the past week when questioned. Id. at 153.

102 See id. at 155. At a federal welfare conference, Professor McLanahan estimated that a third of the unwed parents in the study were ready for marriage and would benefit from pro-marriage policies. Cheryl Wetzstein, *Traditional Marriage Seen as Antidote to Welfare; ‘Culture Change’ Needed to Solve Social Ills*, HHS Conferences Told, WASH. TIMES, May 31, 2004, at A3. Professor McLanahan commented further that another third needed additional services such as education, job training, or mental health counseling, and the last third would not be candidates for marriage at all. Id.

103 McLanahan et al., supra note 34, at 155.

104 See id.

105 See *Hearing*, supra note 63, at 53 (testimony of Senior Policy Analyst Ooms); Rector & Pardue, supra note 75, at 5.

106 Means-tested programs only provide benefits to individuals of a certain income level, enabling the government to target those most in need. *Weaver*, supra note 1, at 13. Most poverty programs such as the earned income tax credit, food stamps, and TANF benefits are means-tested programs. Id.

107 See *House Bill*, supra note 14, § 101; *Hearing*, supra note 63, at 55 (testimony of Senior Policy Analyst Ooms).
are currently in poverty. Such unfocused programs should have no place in a welfare reauthorization bill with such limited funds, as they divert funds from programs proven to assist the poor.

Since the marriage promotion programs are not means-tested, poor single-parent families are unlikely to be the main beneficiaries of the programs. The structure of TANF encourages this shift, as it allows states to spend their block grants on the fourth purpose of PRWORA, promoting two-parent families, a non means-tested goal. Those states that have already used part of their block grants to promote marriage under the fourth purpose generally have created programs that did not target the poor. If H.R. 4 were to pass, it is reasonable to assume that states would continue to aim their marriage promotion programs at the middle class or, at a minimum, the general public. Furthermore, the marriage promotion programs in H.R. 4 do not require these programs to target the poor specifically, and the bill suggests only two programs that focus on the poor. Therefore, marriage promotion programs in H.R. 4 likely would not significantly assist poor single-parent families.

Marriage promotion policies also shift funding and focus from assisting single-parent families currently living in poverty, to encouraging couples to marry to prevent poverty. These programs have a preventative focus; they seek to persuade couples to marry before or just after having a child in an effort to increase material and child well-being. This is evident from the sample programs H.R. 4 suggests, such as high school classes concerning the value of marriage, marriage education for unmarried expecting parents, and marital

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108 Rector & Pardue, supra note 75, at 5.
110 See Hearing, supra note 63, at 53 (testimony of Senior Policy Analyst Ooms).
111 See supra II.A. See Adams, supra note 109, at 1; Casey, supra note 109, at 1; Ooms et al., supra note 71, at 26–60. Programs such as marriage skills classes for teenagers and public service announcements are focused at the public large. See Ooms et al., supra note 71, at 26–60. While some programs may not target any specific income level, attendance in such programs may be primarily middle class. See, e.g., Wetzstein, supra note 15. In Arizona as of 2002, 517 couples had participated in marriage counseling classes, but only twenty-six were low income. Id.
112 See Weaver, supra note 1, at 28; Ooms et al., supra note 71, at 26–60. Programs that benefit only the poor generally have a narrow political base. Weaver, supra note 1, at 28.
113 House Bill, supra note 14, § 103(b) (B) (vii), (b) (B) (viii).
114 See Casey, supra note 109; Ooms et al., supra note 71, at 26–60.
115 Rector & Pardue, supra note 75, at 5.
116 Id.
education for engaged couples. These programs do not address marriage promotion for current single parents, based on the belief that it would be a task akin to “trying to glue Humpty Dumpty together after he has fallen off the wall.” H.R. 4 thus prioritizes assisting future generations from falling into poverty, and largely ignores single-parent families currently in poverty. Moreover, since marriage promotion grants in H.R. 4 must be matched by the states likely from TANF funds, this priority literally diverts money from assisting current families in need. Though poverty prevention is admirable, in a time of limited funds and an uncertain economy, it is hard to justify siphoning money away from programs that improve the lives of single parents and their children in poverty right now.

C. Ignoring the Real Problem: No Jobs and Poor Marriage Prospects

The greatest fault of the marriage promotion programs may be their failure to address the more fundamental reason many low-income single mothers do not marry: a lack of eligible, financially stable marriage partners. Marriage promotion programs presume that individuals become single parents because it is culturally acceptable. These programs thus try to change cultural norms about marriage by teaching individuals both marriage skills and the value of marriage. Research suggests, however, that many single low-income

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117 See House Bill, supra note 14, § 103(b); Rector & Pardue, supra note 75, at 5. Part of this is based on research that unwed couples are most likely to marry around the “magic moment” of their child’s birth, but the longer they wait, the less likely they are to marry. McLanahan et al., supra note 34, at 156.

118 See Rector & Pardue, supra note 75, at 5. This is because for many single parents, their relationship with their child’s other parent is no longer romantic or may even be troubled. Id.

119 See id.

120 House Bill, supra note 14, § 103 (b) (2) (A), (c) (V). States that are awarded the optional marriage promotion grants must match the amount out of their own funds, including from their block grants. Id. § 103(c) (V). Thus states may be taking away money from other programs that are specifically targeted at the working poor, such as job training, in order to pay the matching funds. See id.

121 See id.

122 See Wilson, supra note 90, at 73.


124 See DeParle, supra note 12. DeParle, a reporter for the New York Times, comments:

  My own time in the inner city leaves me with some sympathy for what the Bush plan is trying to achieve. . . . Expanding economic opportunity is clearly a big part of the solution, but probably not the answer in whole, given the hurdles to fatherhood and marriage posed by community norms.
mothers remain single not because they do not believe in marriage, but because they find few eligible men for them to marry in their communities.125 Men in lower-income communities are not considered eligible because of the lack of well-paying jobs in those areas.126

Low-income inner city men have suffered greatly from the restructuring of the economy over the last thirty years.127 In that time period, the American economy has shifted from predominantly manufacturing jobs to predominately service jobs,128 hurting low-skilled male workers the most.129 Manufacturing jobs that provided decent pay were open to relatively unskilled workers and generally were held by men.130 Living wage jobs for low-skilled workers in general have also declined, and many new positions require some years of college education.131 Moreover, while most of the new low-skilled jobs are found in the suburbs, most low-skilled workers live in the inner city—creating a spatial “mismatch” that is hard to overcome due to limited public transportation.132 In combination, these factors have led to a decline in employment for low-skilled and low-income men.133

Thus, in low-income communities where most men are unemployed or work in low-wage jobs, women have few eligible marriage prospects and consequently are less likely to marry at all.134 Low-income single mothers generally consider economic stability “a necessary, though not sufficient, condition for marriage,”135 in large part

Id. at 76.

125 See, e.g., Hearing, supra note 63, at 78–79 (testimony of Professor Edin).
126 Wilson, supra note 90, at 91.
127 Wilson, supra note 123, at 25.
128 Wilson, supra note 90, at 39. From 1967-1987, New York City lost 58% of its manufacturing jobs, Chicago lost 60%, Philadelphia lost 64%, and Detroit lost 51%. Wilson, supra note 123, at 29.
129 Wilson, supra note 123, at 25. Service jobs requiring low skills generally go to women. Id. at 27.
130 Id.
131 Id. at 30–31.
132 Id. at 37.
133 Id. at 26. For example, two-thirds of male high school dropouts in the 1970s worked full-time in eight out of ten years, while only one-half did so in the 1980s. Id. In the 1990s, one-quarter of all male high school dropouts were unemployed for all of 1992. Id. Moreover, the number of both white and minority men who were not working and had given up looking for work has more than doubled since 1967.
134 See Wilson, supra note 90, at 83, 91.
135 Hearing, supra note 63, at 78 (testimony of Professor Edin). Professor Edin, an urban ethnographer, has interviewed over three hundred low-income single mothers in Chicago over the span of a decade. Id. at 76.
because they must worry constantly about money.\textsuperscript{136} They fear attachment to a marriage partner who does not contribute steadily to the household finances.\textsuperscript{137} These basic facts suggest that low-income single mothers will only marry someone who is steadily employed in a good job, a rarity in the communities in which they reside.\textsuperscript{138} Thus, however well-intentioned, marriage promotion programs cannot succeed communities where, despite valuing marriage, women have no one eligible to marry.\textsuperscript{139}

D. Policy Alternatives

If marriage promotion programs, as typified by H.R. 4, do not adequately address the twin problems of poverty and child well-being in single-parent families, other policy solutions must be found. Two policy alternatives, Marriage Plus and reforming child support, may better address these problems while and avoiding the three shortcomings mentioned above.\textsuperscript{140}

Marriage Plus is an approach that recognizes that marriage is legitimate governmental goal, but also that marriage alone is not sufficient to lift couples out of poverty.\textsuperscript{141} A Marriage Plus program

\textsuperscript{136} Id. at 78. One interviewee commented that when her children’s father did not work, she “didn’t let him eat my food. I would tell him, ‘If you can’t put any food here, you can’t eat here. These are your kids and you should want to help your kids, so if you come here, you can’t eat their food.’” Id.

\textsuperscript{137} Id. Moreover, these poor single mothers often view marriage to an unemployed man as undesirable because of the loss of respect from the community. Hearing, supra note 63, at 79 (testimony of Professor Edin). Contrary to the belief of many, Professor Edin’s research finds that poor single mothers think very highly of marriage and believe it has “sacred significance.” Id. These women believe marriage should be for life. Id. Because of this, poor women tend to want to marry someone well-off, someone who would elevate their own status. Id. The idea of marrying someone who is unemployed would make “one a fool in the eyes of the community.” Id.

\textsuperscript{138} See id. at 82 (testimony of Professor Edin). As Professor Wilson points out, this decision is sensible: “Single mothers who perceive the fathers of their children as unreliable or as having limited financial means will often—rationally—choose single parenthood.” Wilson, supra note 123, at 104.

\textsuperscript{139} See Hearing, supra note 63, at 82 (testimony of Professor Edin).

\textsuperscript{140} See McLanahan et al., supra note 34, at 157; Ooms, Marriage and Government, supra note 94, at 4. The Center for Law and Social Policy proposed Marriage Plus as a counterweight to the Bush administration’s plan, believing that marriage education alone would have little effect. Ooms, Marriage and Government, supra note 94, at 4.

\textsuperscript{141} Ooms, Marriage and Government, supra note 94, at 4. As Ooms has commented, “marrying a low-income unmarried mother to her child’s father will not magically raise the family out of poverty when the parents often have no skills, no jobs, and terrible housing, and may be struggling with depression, substance abuse, or domestic violence.” Theodora
would include not just marriage counseling and relationship training, but services that focus on removing the barriers to marriage and poverty in low-income communities, such as employment training and placement. Ideally, marriage would provide a panoply of services, including pregnancy prevention, mental health support and greater childcare services. The goal of Marriage Plus is primarily to promote the well-being of children, by either helping more children to be raised in married parent families, or if this is not possible, assisting single parents to become more economically self-sufficient. Thus, children of parents who participate in Marriage Plus programs will likely see an increase in general well-being, even if the parents do not ultimately marry. As compared to H.R. 4, Marriage Plus would reduce poverty rather than merely promote marriage by targeting those who truly need assistance.

A second option, reforming the child support system, would address the root problems of single-parent poverty and child well-being.

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142 Ooms, Marriage Plus, supra note 141.
143 Daniel Lichter, Marriage as Public Policy, Pol'y Rep. (Progressive Policy Inst., Washington, D.C.), Sept. 2001, at 8–9, available at http://www.ppionline.org/documents/marriage_lichter.pdf. Professor Lichter argues that discouraging out-of-wedlock birth should be the core of Marriage Plus, because he believes single mothers face large barriers to marriage later on. Id. at 9. Women who bear children outside of marriage are significantly less likely to ever marry than women who do not, and marriages between women who have had a child outside of marriage with their child’s father are very unstable. Id. at 5–6. Professor Lichter believes that this evidence suggests that marriage promotion may come too late for current single mothers, and so any marriage promotion policy must impact this problem before it starts: before the birth of children. Id. at 8–9.
144 See Ooms, Marriage and Government, supra note 94, at 4–5; Ooms, Marriage Plus, supra note 141.
145 Ooms, Marriage and Government, supra note 94, at 4–5. Marriage Plus explicitly recognizes that for some single parents, marriage is not the answer. Id. For example, in the situation when a single mother has children by more than one man, it may be unclear whom she should be encouraged to marry. Ooms, Marriage and Government, supra note 94, at 4. Similarly, many children’s parents are no longer romantically involved, and it would make little sense to encourage marriage then. See id.
146 See id.
147 See House Bill, supra note 14; Ooms, Marriage and Government, supra note 94, at 5. The Marriage Plus approach has been savagely critiqued by conservative critic Robert Rector as “a counterfeit policy that promotes healthy marriage in name but not in substance.” Robert Rector et al., “Marriage Plus”: Sabotaging the President’s Efforts to Promote Healthy Marriage, Heritage Found. Backgrounder No. 1677 (Heritage Found., Washington, D.C.), Aug. 22, 2003, at 7, available at http://www.heritage.org/Research/Welfare/BG1677.cfm. Rector believes that the job training and pregnancy prevention programs of Marriage Plus duplicate existing programs in the federal system, tend to sap funds from the traditional marriage promotion policies, and have little to do with promoting marriage. Id. at 7–8.
without directly promoting marriage at all.\textsuperscript{148} Currently, child support is often overly burdensome on low-income fathers, which may discourages them from both payment of child support and involvement in their children’s lives.\textsuperscript{149} A simple solution would be to index child support as a flat percentage of the father’s income, so it would automatically decline if the father is unemployed or incarcerated.\textsuperscript{150} A similar existing problem is that even if unwed parents live together, the father must still pay child support, creating a double burden on the father and an incentive for him to move out.\textsuperscript{151} Altering this rule so that fathers living with the mothers of their children do not have to pay child support, may encourage such fathers to stay in the household and to be involved in their children’s lives.\textsuperscript{152} Lastly, as mentioned above, many states reduce TANF benefits for families receiving child support, which intensifies poverty in single-parent families.\textsuperscript{153} Ending this policy might significantly increase the child’s standard of living.\textsuperscript{154}

**Conclusion and Alternatives: Marriage Is Not an Anti-poverty Tool**

Marriage promotion programs in H.R. 4 are likely to fail to assist working poor families escape poverty because this initiative confuses the ends with the means. Marriage promotion programs are trumpeted as a method to reduce poverty and improve child well-being.\textsuperscript{155} However, these programs are unlikely to achieve their stated goals, primarily because these programs do not tackle the fundamental reason many poor single parents do not get married.\textsuperscript{156} Therefore, these programs simply promote marriage for marriage’s own sake.\textsuperscript{157} While marriage may be a legitimate governmental goal, these marriage promotion programs are dangerous because they are framed not as

\textsuperscript{148} See McLanahan et al., supra note 34, at 157.

\textsuperscript{149} \textit{Id.} This lack of parental involvement often leads to lower child well-being. See supra Part I.

\textsuperscript{150} See McLanahan et al., supra note 34, at 157.

\textsuperscript{151} \textit{Id.} The double burden results from the father paying child support, even though he is likely to be supporting the family financially by splitting the rent and other household expenses. \textit{Id.}

\textsuperscript{152} See \textit{id.}

\textsuperscript{153} \textit{Id.} at 158.

\textsuperscript{154} \textit{Id.}

\textsuperscript{155} See supra Part I.

\textsuperscript{156} See supra Part IIIA–C.

\textsuperscript{157} See supra Part IIIA–C.
pro-marriage programs, but as anti-poverty vehicles.\textsuperscript{158} They divert attention and money away from formulating policies that are more likely to assist the legitimate problems of poverty and child well-being among single-parent families.\textsuperscript{159} Both Marriage Plus and child support reforming are policy alternatives that better address these problems and avoid some of the dangerous pitfalls of marriage promotion policies as currently formulated.\textsuperscript{160}

Such options suggest that American policymakers already have what Shipler calls “the skill,” or the capability, to alleviate poverty among single-parent working poor families.\textsuperscript{161} The question remains whether American society has the “will” to spend the money to make such programs a reality.\textsuperscript{162} Marriage promotion programs are enticing because they are relatively cheap and suggest that marriage is an easy answer to poverty.\textsuperscript{163} Unfortunately, as Shipler has demonstrated, the situation of the working poor is a complex one, unlikely to be solved by a quick fix, and likely to require a great deal of time and energy.\textsuperscript{164} Shipler suggests that the value of American society depends on how America confronts challenges to injustice and suffering, such as the dilemma of the working poor.\textsuperscript{165} America has a long way to go if it adopts marriage promotions as a panacea for poverty.


\textsuperscript{159} See \textit{supra} Part I. The scope of this paper does not encompass a full exploration of alternatives. For alternatives that address the problems of the working poor in general, see Shipler, \textit{supra} note 1, 285–300.

\textsuperscript{160} See \textit{supra} Part III.D.

\textsuperscript{161} Shipler, \textit{supra} note 1, at 286.

\textsuperscript{162} Id.

\textsuperscript{163} Id.


\textsuperscript{165} See Shipler \textit{supra} note 1, at 4–5, 286; \textit{supra} Part III.C.

\textsuperscript{166} Shipler \textit{supra} note 1, at 298–99.
A HEAT OF PASSION OFFENSE:
EMOTIONS AND BIAS IN “TRANS PANIC”
MITIGATION CLAIMS

VICTORIA L. STEINBERG*


Abstract: In Hiding from Humanity: Disgust, Shame, and the Law, Martha C. Nussbaum critically examines the role of emotions in our legal system. Nussbaum combines insights from child psychology, history, sociology, and legal theory to determine whether shame and disgust are reliable foundations on which to base law. She concludes that these two emotions serve as repositories of unreasonableness, mediums for abuse of minorities, and reflections of a society’s current anxieties. Thus, they form a portrait of current prejudices and vulnerabilities, and should not constitute the basis for mitigation. This Book Review applies Nussbaum’s analysis to the case of Gwen Araujo, a transgendered woman killed by four of her friends. In that case, defendants attempted to mitigate the punishment for their brutal killing through a heat of passion argument called a “trans panic defense.” An examination of the provocation, emotion, and reasonableness elements of a heat of passion claim reveals that trans panic defenses never justify this type of mitigation. Nussbaum fails to address violence against transgendered individuals; however, her insights about emotion illustrate why courts should decline to instruct on manslaughter when defendants argue a trans panic defense.

Introduction

On the night of October 3, 2002, four young men found out that their friend, Gwen Araujo, was biologically male. They kneed her in...
the face, slapped, kicked, and choked her, beat her with a can and a metal skillet, wrestled her to the ground, tied her wrists and ankles, strangled her with a rope, and hit her over the head with a shovel.\(^2\)

She begged for mercy, offered money in a desperate attempt to buy her freedom, and said her last words: “Please don’t, I have a family.”\(^3\) Her killers buried her in a shallow grave and went to McDonald’s for breakfast.\(^4\)

One man pled guilty and testified against his friends,\(^5\) another disclaimed any role in Araujo’s murder, asserting that he only helped to bury her.\(^6\) The remaining two defendants argued that if guilty, their crime was the lesser offense of manslaughter because they killed in a heat of passion.\(^7\) This attempt to mitigate their crime pointed a public

have sex reassignment surgery someday. See id. After Araujo’s death, her mother successfully petitioned the court to change her name from Eddie to Gwen Amber Rose Araujo, saying, “I made a promise to her and I fulfilled my promise. I only wish in my lifetime I had called her Gwen more often.” See Ben Aguirre Jr., Slain Transgender Teen’s Name Legally Changed to Gwen, OAKLAND TRIB., July 3, 2004, available at 2004 WL 79863115.


\(^3\) Ivan Delventhal, Witness Tells of Assault on Araujo, OAKLAND TRIB., Apr. 27, 2004; Yomi S. Wronge, Witness Says Victim Offered Cash to Suspect, SAN JOSE MERCURY NEWS, Mar. 18, 2003, at 1.

\(^4\) See Murder Trial Starts in Teen’s Slaying, L.A. TIMES, Apr. 15, 2002, at B8. The details are more gruesome than described here. See Hate Clause Memo, supra note 2, at 5–8. After suspecting for some time that Gwen may have male genitals, the young men harassed her at a friend’s party and told a female friend to take Gwen into the bathroom to find out her biological sex. See id. After the men’s friend came out of the bathroom screaming, “It’s a fucking man,” the men violently wrestled Gwen to the ground and pulled off her clothing, revealing male genitals. See id. at 7. Burying Araujo, one defendant said that he was so angry, “he could still kick her a couple of times.” Michelle Locke, Araujo’s Death Was Violent, Witness Says, CONTRA COSTA TIMES, Apr. 28, 2004, at 4.

\(^5\) See Curtis, supra note 2.


\(^7\) See CAL. PENAL CODE § 192 (West 1999); see also St. John, supra note 6.
spotlight on the “trans panic” defense, a variation of the gay panic and homosexual advance defenses.8

Gay panic and homosexual advance arguments attempt to mitigate punishment for murder by categorizing as manslaughter a killing precipitated by either a perceived sexual advance or the revelation or perception that another person is a homosexual.9 Traditionally, gay panic defenses used a diminished capacity argument, claiming that a defendant’s latent homosexuality caused his violent reaction to a gay man’s advance.10 In contrast, homosexual advance defenses typically take the form of heat of passion arguments.11 A defendant invoking a trans panic defense utilizes a heat of passion framework, claiming that his violent acts were triggered by the revelation that another person, sometimes with whom he has been sexually involved, is transgendered.12

Judges should decline to instruct juries on manslaughter when a trans panic defense is used because that defense does not fulfill the elements of a heat of passion claim.13 A close look at the defense as it was put forward in the first Araujo trial proves that it never fulfills the

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9 See Chen, supra note 8, at 210. The author outlines the origins of the nonviolent homosexual advance defense and its shift from homosexual panic as an insanity defense to homosexual advance as a provocation defense. See id at 201–16.


legal elements of a heat of passion claim.\textsuperscript{14} To understand why the two are incompatible, one must examine the emotion-based elements of heat of passion defenses alongside the pattern of facts put forward in a standard “trans panic” argument.\textsuperscript{15}

Emotions were central to Araujo’s case, as defense counsel’s heat of passion claim turned on the defendants’ emotional reaction to discovering that their friend Gwen—with whom three of them had been sexually intimate—had male genitals.\textsuperscript{16} One lawyer explained that the men acted out of “shame and humiliation, shock and revulsion.”\textsuperscript{17} Feelings of having been duped grounded defendants’ framing of the case as a “story about deception and betrayal.”\textsuperscript{18}

Such emotions have long played a central role in some areas of our legal tradition. In \textit{Hiding from Humanity}, Martha Nussbaum examines that role, focusing on ways in which emotions reflect society’s evaluation of what constitute important benefits and harms.\textsuperscript{19} Specifically, Nussbaum examines shame and disgust, and concludes that these emotions, central to the defense in Araujo’s case, should not form the basis for legal defenses.\textsuperscript{20}

This Book Review explains why mitigation for trans panic defenses is not legally justifiable, and concludes that courts should discourage their use by refusing to instruct juries on manslaughter based on trans panic heat of passion arguments.\textsuperscript{21} Part I scrutinizes Nussbaum’s analysis of the structure of emotions and their place in mitigation doctrines. Part II uses Nussbaum’s analysis to examine the compatibility of trans panic defenses with the elements of California’s heat of passion defense. Part III explains why it is imperative that courts

\textsuperscript{14} See \textit{Cole}, 95 P.3d at 851; \textit{Breverman}, 960 P.2d at 1106–07; \textit{Hate Crime Memo}, supra note 2, at 11–13. A heat of passion defense cannot be pieced together out of many insufﬁcient elements; each element must be proved. See \textit{Breverman}, 960 P.2d at 1124 (Kennard, J., dissenting).

\textsuperscript{15} See \textit{Breverman}, 960 P.2d at 1106–07.

\textsuperscript{16} See \textit{Hate Clause Memo}, supra note 2, at 7. This Book Review defines “defense counsel” as the two lawyers representing defendants who used a heat of passion argument to attempt mitigation to manslaughter.

\textsuperscript{17} \textit{Killer Acted Out of “Shame,”} GRAND RAPIDS PRESS, Apr. 16, 2004, at A2.


\textsuperscript{19} See Martha C. Nussbaum, \textit{Hiding From Humanity} 22, 36 (2004).

\textsuperscript{20} See id. at 13–15.

begin to curb legally deficient attempts to mitigate punishment in cases of violence against transgendered people.

I. Arguing Emotion: The Legal Function and Structure of Emotions

Nussbaum begins with the seemingly benign task of differentiating emotions from feelings. Unlike “bodily forces” such as hunger, emotions necessarily incorporate beliefs. Strong emotions require a valuation of some object (usually related to one’s own well-being) and a belief about that object. Anger, for example, involves a belief that an object one values has been harmed. Similarly, pity entails a belief that a person or an object that one cares about is suffering.

Nussbaum points out that because one person’s feeling about an object may shift constantly and may differ from others’ feelings, legal analysis rightly focuses judgments of reasonableness on the thoughts involved in emotion rather than the bare feelings. Because beliefs underlie emotions, people’s emotions shift when mistaken beliefs are exposed or when one changes his valuation of an object. Like an individual, a culture may judge the reasonableness of emotional reactions differently over time. Nussbaum invites legal thinkers to consider that the average man can be unreasonable, and that certain emotions are structurally and functionally prone to serving as repositories of man’s unreasonableness. The role of these shifty emotions within the law should be scrutinized with skepticism.

Nussbaum’s depiction of an emotion as a two-part entity, comprised of both an object and a valuation of that object, may seem a novel concept to many readers. In the doctrines of self-defense and

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23 Id. at 25–26.
24 See id. at 27, 29.
25 See id. at 27.
26 See id.
27 See Nussbaum, supra note 19, at 27–28.
28 See id. at 34–35. For example, sexism-based hate and racism-based fear are not simply unreasoned urges; they can be overcome by new factual understandings of the actions of women and minorities. See id at 35.
29 See id at 34–37.
30 See id. at 36–37.
31 See Nussbaum, supra note 19, at 36–37.
32 See id. at 31.
mitigation, however, legal doctrine recognizes and relies heavily on this two-pronged definition of emotion. Nussbaum explains:

[In general we do not condone any homicide not committed in self-defense. We hold that the reasonable person would never actually take the law into his own hands in a situation of provocation. But we do want to give public and legal recognition to the fact that reasonable people become enraged at certain types of damages to themselves or their loved ones, and we therefore build into the legal doctrine a reduction for those who commit a violent act under such circumstances. The homicidal act is not justified, but it is partially excused, in the sense that a lesser punishment is given for it. The reason is not simply that the person’s emotion is comprehensible. It is that the emotion itself, though not the act chosen under its influence, is appropriate.]

Significantly, even appropriate, intense emotion does not warrant mitigation unless that emotion is based on reasonable beliefs about a situation.

Thus, three emotion-based considerations aid evaluation of whether a given situation warrants mitigation: (1) does society value the object of the harm or threat to which the defendant reacted; (2) was the defendant’s resulting emotion appropriate; and (3) was the defendant’s reaction based on a reasonable belief about a situation? Because these questions involve normative evaluations, they illustrate how “[t]he situations in which perpetrator emotion mitigates murder change inevitably with societal mores.”

Courts may use this three-step reasoning to examine the appropriateness of a manslaughter instruction in a given case. For example, in Commonwealth v. Carr, a defendant argued for mitigation based on

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33 See id. at 37–45.
34 Id. at 39.
35 See id. at 42–43. In California, it is well settled that passion alone cannot mitigate punishment: “no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless . . . the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man.” People v. Logan, 164 P. 1121, 1122–23 (Cal. 1917). This Review focuses on California law, where Araujo’s case took place.
36 See Nussbaum, supra note 19, at 46–47.
37 See id. at 36–37.
38 See Logan, 164 P. at 1122–23; Nussbaum, supra note 19, at 42.
39 See Megan Sullaway, Psychological Perspectives on Hate Crime Laws, 10 Psychol. Pub. Pol’y & L. 250, 269 (2004); see also Nussbaum, supra note 19, at 47.
disgust and revulsion when charged with shooting two lesbian women because he saw them being intimate with one another.\(^{40}\) The court rejected the heat of passion argument, stating, “[The law] does not recognize homosexual activity between two persons as legal provocation sufficient to reduce an unlawful killing . . . from murder to voluntary manslaughter.”\(^{41}\) The court found that mitigation is inappropriate when the defendant has reacted only to another person’s sexuality or to a threat to his own sense of appropriate sexual behavior.\(^{42}\) Thus, the court’s evaluation did not end with a finding that the defendant felt strong emotions; rather, the court looked to the content of those emotions—the threat he felt and the beliefs he held about his situation—to evaluate the reasonableness of his actions.\(^{43}\) The court stated that having witnessed the women’s intimacy, a “reasonable person would simply have discontinued his observation and left the scene; he would not kill the lovers.”\(^{44}\)

Just as the Carr court held that homosexual activity is insufficient provocation, courts should find that the claimed provocation in trans panic defenses is insufficient as a matter of law.\(^{45}\) Nussbaum’s analysis of shame and disgust adds support to the conclusion that a trans panic defense, by definition, does not warrant instruction on manslaughter because its constituent parts do not satisfy the elements of heat of passion claims.\(^{46}\) Interestingly, although Nussbaum’s book discusses sexuality and gender dynamics within mitigation doctrine, it mentions neither trans panic defenses nor transgendered people in any context.\(^{47}\) The omission is emblematic of the blind spot occupied by transgendered individuals in our culture; even this scholar, whose work relates directly to the foundations of bias against the trans community, over-
looked their implications for a population that desperately needs the benefit of her insights.48

II. What Happens in the Heat of Passion?

Although jurisdictions differ as to the amount of evidence required to instruct on lesser included offenses, in California, a trial judge is only required to instruct the jury as to lesser included offenses when there is substantial evidentiary support for those offenses.49 California courts define substantial evidence in this context as “evidence from which a jury composed of reasonable [persons] could . . . conclude . . . that the lesser offense, but not the greater, was committed.”50 In a murder trial, to justify giving voluntary manslaughter instructions, there must be substantial evidence, not simply some evidence, of heat of passion.51 Further, because malice is presumed when circumstances of a killing suggest intent to kill, heat of passion and provocation must be affirmatively demonstrated.52

California courts state that for an intentional, unlawful homicide to constitute voluntary manslaughter as a heat of passion crime, there must be substantial evidence of the following five elements: 1) that the killer’s reason was actually obscured; 2) by a provocation; 3) which aroused a strong passion;53 4) sufficient to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection; and 5) there must be insufficient time between provocation and fatal blow for passion to subside and reason to return.54

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50 See Breverman, 960 P.2d at 1106 (quoting Carr, 502 P.2d 513). In another case, the court found that the trial judge properly refused to instruct the jury on involuntary manslaughter because defendant was able to describe the crimes in detail and act in a cold, calculating manner during the crimes, so that no reasonable jury could have found defendant guilty of involuntary manslaughter. People v. Haley, 96 P.3d 170, 190–91 (Cal. 2004).

51 See People v. Williams, 46 Cal. Rptr. 2d 730, 734 (Cal. App. 2d 1995).

52 See People v. Sedeno, 518 P.2d 913, 923 (Cal. 1974).

53 “Strong passion” is defined as any violent, intense, high-wrought or enthusiastic emotion other than revenge. See People v. Gutierrez, 28 Cal. 4th 1083, 1144 (Cal. 2002), cert. denied, 538 U.S. 1004 (2003).

54 See Breverman, 960 P.2d at 1106.
The provocation, passion, and reasonableness requirements are linchpins of any heat of passion claim to mitigation. Sufficient provocation ensures that the defendant’s reaction was based on a reasonable belief about his situation. Requiring that the defense articulate a particular passion allows the factfinder to evaluate the appropriateness of the defendant’s emotion. The reasonableness requirement invites an inquiry into how highly society values the type of harm or threat to which the defendant reacted. The Araujo case, examined through Nussbaum’s emotion analysis, illustrates that trans panic defenses do not fulfill these three elements of a heat of passion claim.

A. Reaction to Inaction: Insufficient Provocation

To warrant a heat of passion instruction, evidence must exist that the victim provoked the defendant; absent such evidence, a heat of passion instruction as to voluntary manslaughter is not justified. In California, the jury usually decides, as a question of fact, whether a particular provocation was sufficient to arouse an ordinarily reasonable person’s passion. However, the court may resolve the question where the provocation is sufficiently slight or sufficiently great.

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55 See Nussbaum, supra note 19, at 37–38.
56 See id. at 42.
57 See id. at 36–37.
58 See id. at 46–47.
59 See id. at 36–37, 42, 46–47. In Araujo’s case, elements apart from these three are also lacking; serious doubts exist regarding the lack of a cooling off period. See Hate Clause Memo, supra note 2, at 8. At least one defendant drove from the site of the attack to his house to get shovels for the assault, and drove back. See id.; see also Without Mercy, supra note 1. Prior to the attack, the men talked about what they might do to a “man who pretended to be a woman,” creating doubt about a lack of premeditation or malice aforethought, which can be shown from either express evidence of deliberate purpose to kill or by inferences made from other proof. See People v. Golsh, 219 P. 456, 457–58 (Cal. Ct. App. 1925); Hate Clause Memo, supra note 2, at 5.
62 See Fenenbock, 46 Cal. App. 4th at 1705. The court may decide the issue when reasonable jurors could not differ on the issue of adequacy. See id. However, courts find some provocation insufficient as a matter of law without reference to the jury’s consensus on its adequacy. See People v. Cole, 95 P.3d 811, 850–51 (Cal. 2004); Commonwealth v. Carr, 580 A.2d 1362, 1364–65 (Pa. Super. Ct. 1990). Therefore, the adequacy of the claimed provocation should be evaluated as compared to other provocations which the courts have taken up and deemed sufficient or insufficient as a matter of law. See Cole, 95 P.3d at 850–51; Carr, 580 A.2d at 1364–65.
though no specific type of provocation is required, some types of provocation have been deemed insufficient as a matter of law.\textsuperscript{63}

As Nussbaum suggests, courts judging whether provocation is sufficient implicitly look for a threat or harm to some core value that is worthy of either protection or extreme reaction.\textsuperscript{64} Thus, typical examples of sufficient provocation include the murder of a family member, a threat to one’s own life, or an intense quarrel.\textsuperscript{65} If no core value exists, provocation is insufficient, a situation found in \textit{People v. Fenenbock}, where mitigation was denied when the defendant claimed that his panic was triggered by harm to a child with whom he had no close personal bond.\textsuperscript{66}

In Araujo’s case, the defense did not explicitly define its claimed provocation, but implied three triggers: Araujo’s biological sex itself, the revelation of that sex, and Araujo’s act of “deception” arguably perpetuated on defendants.\textsuperscript{67} The first provocation claimed, Araujo’s biological sex, does not constitute sufficient provocation. By definition, heat of passion requires first an action by the victim, followed by defendant’s violent reaction.\textsuperscript{68} When the victim is “just being there,” and the defendant reacts to a feeling about that person (or even about himself), the defendant is the first aggressor.\textsuperscript{69}

To expand the definition of sufficient provocation to include a victim’s characteristics would open the door to justifying mitigation for murder of anyone that a killer merely dislikes, feels uncomfortable interacting with, or finds disgusting.\textsuperscript{70} Nussbaum reminds readers that

\begin{itemize}
  \item \textsuperscript{64} See \textit{Fenenbock}, 46 Cal. App. 4th at 1705; \textsuperscript{Nussbaum}, supra note 19, at 46–47. In California, verbal provocation may be sufficient, so provocation must not rest on its form, but with its effect on the defendant. See \textit{People v. Berry}, 556 P.2d 777, 780 (Cal. 1976).
  \item \textsuperscript{65} \textit{Fenenbock}, 46 Cal. App. 4th at 1705. The court provides examples: “In previous cases, the murder of a family member, a sudden and violent quarrel, and infidelity of a wife or paramour have been held to constitute legally adequate provocation for voluntary manslaughter.” \textit{Id.} (citations omitted). “On the other hand, neither simple trespass nor simple assault constitute provocation sufficient to reduce the killing to manslaughter.” \textit{Id.} (citations omitted).
  \item \textsuperscript{66} \textit{Id.}
  \item \textsuperscript{67} See \textsuperscript{Nussbaum}, supra note 19, at 128–29; Without Mercy, supra note 2, at 11–13 (explicitly arguing that “deceit” was the provocation, though using language implicitly suggesting an array of possible triggers).
  \item \textsuperscript{68} See \textit{People v. Breverman}, 960 P.2d 1094, 1106 (Cal. 1998); \textsuperscript{Nussbaum}, supra note 19, at 39.
  \item \textsuperscript{69} See \textsuperscript{Nussbaum}, supra note 19, at 128–29.
  \item \textsuperscript{70} See \textit{id.} at 128–29, 133–34. Similarly, “[b]eing disgusting to look at is not an invitation to violence;” \textit{id.} at 128.
\end{itemize}
disgust defenses in cases of violence against Jews, blacks, or people with disabilities are not entertained today, but were readily accepted in the past. At times, our legal system and other governments have tolerated mitigation in the context of violence reacting to disability, religion or race. Today’s tolerance of disgust defenses against gay and transgendered individuals highlights cultural anxiety around gender and sexuality boundary-crossing. Allowing the fact of being transgendered to qualify as sufficient provocation reifies this anxiety.

Similarly, revealing one’s biological sex does not constitute sufficient provocation. Again, California law states that to be sufficient, provocation must be caused by the victim. In Araujo’s case, the defendants harassed Araujo to determine her sex, ultimately throwing her to the ground and pulling off her clothing to reveal her genitals. Defense counsel suggested that the revelation had a particularly intense impact on these young men because they were immature and “unhealthy.” California case law, however, clearly disallows personal vulnerabilities or preexisting states of mind to bear on the evaluation of a person’s reaction. For this reason, the prosecution

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71 See id. at 134.
72 See id. at 107–115; see also Muneer I. Ahmad, A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion, 92 Cal. L. Rev. 1259, 1265, 1301 (pointing out that “the claimed provocation of the “black rage” defense has been largely dismissed, and thereby rendered irrational,” although “emotionally driven, racist policies” remain in place and actively inform our laws.
73 See Nussbaum, supra note 19, at 133–34. Again, though Nussbaum laments that “as a society, we are conflicted about the disgust issue as applied to homosexuals,” she fails to mention those issues as applied to transgendered people. See id. at 134. Disgust aimed at transgendered people evidence society’s current discomfort with challenges to policed gender boundaries. See Patience W. Crozier, Forcing Boys to be Boys, B.C. THIRD WORLD L.J. 123, 133–36 (2001).
74 See Nussbaum, supra note 19, at 128–29.
75 See People v. Lee, 971 P.2d 1001, 1007 (Cal. 1999); Nussbaum, supra note 19, at 39–40; Locke, Transgender Murder, supra note 2.
76 See Lee, 971 P.2d at 1007; Breverman, 960 P.2d at 1106. Defendant’s own thoughts triggered by another’s action cannot constitute sufficient provocation because they are not acts of the victim. See People v. Kanawyer, 113 Cal. App. 4th at 1233, 1247 (Cal. App. 3d. 2003).
77 See Hate Clause Memo, supra note 2, at 6–7. In the beginning of this encounter, the men made it clear that they were touching her to find out whether she was a man or a woman, she said of their unwanted physical touching and their comments, “I’m not going to let you molest me” and refused to answer their questions about her gender. See id. at 6.
79 See Logan, 164 P. at 1122. In another case of an unhealthy defendant, “evidence that he was intoxicated, that he suffered various mental deficiencies, that he had a psychological dysfunction due to traumatic experiences in the Vietnam War, and that he just ‘snapped’ . . . may have satisfied the subjective element of heat of passion, but it did not
reminded jurors that the provocation “did not flow from Eddie Araujo. The provocation flowed from within [the defendants]. They were the source of their own provocation.”

Above all, defense counsel argued that Araujo’s commission of “sexual fraud” constituted sufficient provocation. Rather than her transgender identity, the defense claimed that Araujo’s “deception and betrayal,” provoked the men’s reaction. While burying Araujo, one defendant said that “he could not believe that someone could ever be so deceitful. By being deceitful, he meant having sex with someone who thought that it was a woman, not simply presenting as a woman when the person was actually a man.” However, such “sexual fraud” also falls short of sufficiency.

The inconsistent language used by reporters and attorneys to describe “sexual fraud” belies its lack of definition. Perhaps defense counsel intended the term to mean a wrongful act similar to so-called “heart balm” crimes: common law sexual torts including seduction, alienation of affections, and breach of promise to marry. California, however, abolished such “amatory torts” in 1939. More recently, the meaning of “sexual fraud” has shifted to encompass actions such as concealing a sexually transmitted disease or falsely stating that one is

satisfy the objective, reasonable person requirement” because the victim must cause the provocation. See People v. Steele, 47 P.3d 225, 239 (Cal. 2002), cert. denied, 537 U.S. 1115 (2003).

80 See Locke, Jury Ponders, supra note 2.

81 See Locke, Defense Claims, supra note 2.

82 See Haddock, supra note 12; see also Hate Clause Memo, supra note 2, at 6.

83 See Hate Clause Memo, supra note 2, at 9. Much of the memo reveals a shocking disrespect of the victim and misunderstanding of her self-identity. See id. The memo uses the pronoun “it” to describe Araujo, and describes her as “actually a man,” “a man who presented as a woman,” and “acting as if he were a she.” Id. The media also misrepresented Araujo’s identity, with headlines such as Boy May Have Been Slain Over Cross-Dressing, from San Jose Mercury News, Oct. 19, 2002, available at http://www.mercurynews.com/mld/mercurynews/news/4320907.htm?1c.

84 See Locke, Defense Claims, supra note 2. Sometimes the phrase is used to mean the revelation of Araujo’s gender, described above as insufficient provocation; one attorney said “the sudden discovery that she was biologically male was a sexual violation of the type ‘so deep, it’s almost primal.’” See id.


86 See CAL. CIV. CODE § 43.5 (West 1982).
taking birth control or is infertile. Yet, these claims too are rejected almost universally by courts on both policy and privacy grounds.

Fraud refers to a phenomenon wherein one misrepresents a material fact that one has a duty to reveal; typically, the party alleging fraud must show that actual harm resulted. Of course, Araujo did not misrepresent her gender to the men; they knew her as a woman, and she both identified and lived as a woman. Nonetheless, defendants relentlessly accused Araujo of “deception” and “sexual fraud.”

Though the defendants might not have known Araujo’s biological sex, fraud and deceit also require a person to misrepresent a fact that he or she has a duty to reveal. In fact, one defendant argued that the duty to reveal one’s biological sex exists, stating, a “heterosexual male has a right to . . . choose the gender of his partners . . . Eddie Araujo took away that choice by deception.”

However, allowing this type of sexual fraud to constitute sufficient provocation leads inevitably to the conclusion that a person has a duty to reveal their genitals, or verbally communicate the nature of their biological sex to one with whom they are intimate. This creates both

89 See Hate Clause Memo, supra note 2, at 3, 6; Without Mercy, supra note 1.
90 See Hate Clause Memo, supra note 2, at 6, 9. There is a so-called “sexual fraud statute” which is generally not applicable in trans panic defense cases, because it requires that sex was induced by fear. See CAL. PENAL CODE § 266c (West 2004). The statute was put into place after a case of extraordinary facts, not likely to be repeated. See Andy Grieser, Sex Under Duress, 2 A.B.A. J. E-Rep. 9 (Feb. 7, 2003), available at www.westlaw.com.
93 See Vade, supra note 48.

After being rejected by someone who claimed to have been deceived, Vade wished he had said: You deceived me. All this time I thought you were just a cute transgender guy. You really should have told me you are a nontransgender person. I cannot believe that you did not tell me what your genitalia look like. I cannot go through with this. I would have never come over to your place had I known.

Id. Of Araujo, he says:

Gwen Araujo was being herself, openly and honestly. No, she did not wear a sign on her forehead that said “I am transgender, this is what my genitalia
a logistical conundrum (defining “sex” for the purposes of revelation) and serious policy concerns (determining when and how a person must reveal that “sex”). California courts are reluctant to recognize fraud in situations that require an assessment of the parties’ intimate relationship. In *Stephen K. v. Roni L.*, the California appellate court rejected a misrepresentation claim based on plaintiff’s reliance on his partner’s false claim that she took birth control pills. The court found:

Claims such as those presented . . . in this case arise from conduct so intensely private that the courts should not be asked to nor attempt to resolve such claims. . . . Although Roni may have lied and betrayed the personal confidence reposed in her by Stephen, the circumstances and the highly intimate nature of the relationship wherein the false representations may have occurred, are such that a court should not define any standard of conduct therefor.

Courts should similarly refuse to suggest the existence of a duty to reveal one’s genitals (or one’s biological sex however defined). Such a revelation would also arise during “intensely private conduct” and in “highly intimate” circumstances. Barring the existence of a duty to reveal one’s sex, courts should not base mitigation instructions on an imagined breach of this contrived duty.

A final element of fraud is a showing that actual damage resulted. Statutorily and logically, fraud without harm is not actionable. For example, one is not required to disclose one’s birth con-

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96 See id.
97 See id. at 619–20.
98 See id.
99 See id.
100 See id., 737 S.W.2d 769, 773–74 (Mo. Ct. App. 1987).
trol use or infertility, in part because courts are unwilling to recognize “wrongful birth” as harm for the purpose of proving fraud. In trans panic cases, the sole harms implicated by defendants’ arguments are surprise and a destabilization of their sexual identity and masculinity. The *Carr* court found the defendant’s heat of passion claim deficient, in part because Carr suffered no harm or threat beyond an affront to his ideas about sexuality. Similarly, a court should not identify as actual harm a threat to defendants’ perception of their own sexuality by allowing “sexual fraud” to constitute sufficient provocation.

Even if a court does uphold a duty to reveal one’s genitals, recognize the breach of that duty as sexual fraud, and find that a resulting consensual sexual encounter was actual harm, one must still ask whether such “sexual fraud” constitutes sufficient provocation. Perceived “deceit” occurs in many intimate relationships; one person may lie about her age, another about his marital status. The law does not recognize these types of deceit as paths to mitigating punishment for murder.

**B. I Second-Guess That Emotion**

To prove heat of passion under California law, sufficient provocation must arouse “any violent, intense, high-wrought or enthusiastic emotion.” However, a complete exception to this “any emotion” standard exists for revenge. The creation of this exception suggests

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104 See *Hate Clause Memo*, supra note 2, at 7; *Kelly St. John, Witness Tells How She Learned Transgender Teen Was Male*, S.F. Chron, Apr. 21, 2004 at B5; *St. John, Panic Defense*, supra note 79.

105 See 580 A.2d at 1364–65.

106 See id.

107 See *Lovejoy*, 14 Cal. Rptr. 3d at 122, 125; *Woy v. Woy*, 737 S.W. 2d 769, 773–74 (Mo. Ct. App. 1987); *Stephen K.*, 164 Cal. Rptr. at 619; *Vade*, supra note 48.

108 See *Subotnik*, supra note 87, at 406; *Haddock*, supra note 12.

109 See *Woy*, 737 S.W. 2d at 773–74; *Stephen K.*, 164 Cal. Rptr. at 619. One might also ask whether courts would entertain fraud claims based on the non-revelation of one’s race, religion, disability, or ethnicity. See *Michelle Locke, Activists Put Araujo Case Under Close Watch, CONTRA COSTA TIMES*, June 7, 2004, at 4 (quoting Shannon Minter, legal director of the National Center for Lesbian Rights).


111 See *People v. Gutierrez*, 52 P.3d 572, 609 (Cal. 2002), cert. denied, 538 U.S. 1001 (2003); *People v. Logan*, 175 Cal. 45, 49 (1917); *Nussbaum*, supra note 19, at 13–15. California courts are not explicit about why revenge constitutes an absolute exception, except to say that it is a deliberate, sometimes belated, emotion suggesting premeditated, rea-
that a court might disqualify other emotions from comprising appropriate passions under heat of passion. Nussbaum’s inquiry into disgust and shame suggests that another exception for these two emotions should exist in the context of trans panic defenses.112

To shore up the emotion requirement of its heat of passion claim, defense counsel relied heavily on a dramatic account of the night of Araujo’s killing.113 A motion detailed two defendants’ immediate reactions to the revelation of Araujo’s biological sex, claiming that the “news provoked emotional reactions.”114 One defendant appeared “disillusioned” and had a “look in his eyes . . . like his illusion as to normality and the way things are supposed to be had been shattered.”115 He acted as if he had heard “the craziest news you could ever hear.”116 A second defendant cried, and “throughout all the events was very emotional.”117 While killing Araujo, he exclaimed, “I can’t be fucking gay, I can’t be fucking gay.”118 Defense counsel claimed that the men acted out of “shame and humiliation, shock and revulsion.”119 Reliance on shame and disgust is typical of trans panic defenses; Nussbaum, however, argues that these two emotions are merely signs of a legally deficient argument for heat of passion mitigation.120

1. Disgust

Nussbaum advances structural, historical, and experiential reasons why disgust should never form the basis of law, especially in mitigation contexts.121 “The ideational content of disgust is that the self

112 See Gutierrez, 52 P.3d at 609; Nussbaum, supra note 19, at 13–15.
113 See Hate Clause Memo, supra note 2, at 2–9; St. John, supra note 92.
114 See Hate Clause Memo, supra note 2, at 7 (citations omitted).
115 See id.
116 See id.
117 See id.
118 See id.
119 See Killer Acted Out of “Shame,” supra note 17.
120 See Nussbaum, supra note 19, at 13–15; Vade, supra note 48.
121 See Nussbaum, supra note 19, at 13–15. Before reaching her conclusion, she surveys the spectrum of academic discourse regarding disgust, and situates her argument
will become base or contaminated” by ingesting offensive material.\textsuperscript{122} In turn, a fear of contamination typically involves anxiety around some boundary violation or a violation of accepted categories.\textsuperscript{123} The defendants in Araujo’s case made clear that their well-policed gender and sexuality boundaries were threatened, resulting in a feeling that “the way things are supposed to be had been shattered.”\textsuperscript{124} The defendants’ illusion that their gender and sexuality was impenetrable, stable, and immovable was challenged by Araujo’s transgender identity.\textsuperscript{125}

Furthermore, social psychology links disgust to human beings’ refusal to accept our own animal nature.\textsuperscript{126} Professor William Miller states that “the basis for all disgust is \textit{us}—that we live and die and that the process is a messy one emitting substances and odors that make us doubt ourselves and fear our neighbors.”\textsuperscript{127} Nussbaum explains that resistance to vulnerabilities often leads a powerful majority to project disgust onto minority groups in order to insulate itself from contamination.\textsuperscript{128}

History, too, provides ample evidence that laws and behaviors resulting from a disgust justification are oppressive at best, torturous at worst.\textsuperscript{129} Over time, American society has propagated, and later re-
pudiated, laws that project disgust onto disfavored minorities, including Jews, African Americans, women, and gay men. Mitigation in trans panic defenses cases amounts to an acceptance of violence against transgendered people founded in disgust. Thus, with negligible representation and protection in our legal system, transgendered people find disgust for them reified in the law.

Nussbaum also discredits disgust because it has no place in laws intended to engender shared and articulable values, such as mitigation. It is almost impossible to convince someone who is not disgusted by something that that thing is, in fact, disgusting. One might discuss the properties of the offensive object, or attempt to assimilate it with an object that your listener already finds disgusting, but one is likely to fail in this effort. By contrast, anger and indignation are emotions that can be easily brought out in one person by another, in part because values underlying these emotions can be shared and fully communicated. Where articulable values exist, a society can promulgate laws based on an acceptance or rejection of those values; where emotions indicate only one person’s unique self-reflection or biases, we may be more wary of basing laws on those emotions.

Lastly, according to Nussbaum, disgust is suspect because it is based on “magical thinking” rather than wrongdoing. It does not respond to changing amounts of risk, and does not correlate to real sources of harm. Instead, the feared harm giving rise to disgust is

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131 See Hate Crime Memo, supra note 2, at 7; Nussbaum, supra note 19, at 88; Haddock, supra note 12; St. John, supra note 78.

132 See Hate Crime Memo, supra note 2, at 7; Nussbaum, supra note 19, at 88; Haddock, supra note 12; St. John, supra note 78.

133 See Nussbaum, supra note 19, at 39, 101.

134 See id.

135 See id. Similarly, one may describe to a friend the erotic love felt for a partner without being able to convince that friend to love the partner in the same way. See id.

136 See id.

137 See id. at 102–03, 122.

138 See Nussbaum, supra note 19, at 102–03, 122.

139 See id. at 102.
imagined. Such logic, based on irrational fears of contamination and constructive, not actual, harm is at best a shaky foundation on which to base a claim for mitigation. The “harm” to the defendants in Araujo’s case is an imagined wrong. Their comments during and after the crime, such as “I can’t be . . . gay,” illustrate that the primary perceived threat was one to their sexuality. Mitigation typically addresses a violent reaction to concrete harm or threat, whereas disgust reveals a sense that an act, object, or person is a pollutant, and “[w]e would be better off if this contamination were kept far away from us.”

2. Shame

In the Araujo case, a psychologist testifying for the defense explained that an “unhealthy” young man is likely to panic when confronted with the personal and public shame of learning about a sexual partner’s transgender identity. However, the defendants’ claimed “shame and humiliation” should not constitute qualifying emotions for the purpose of heat of passion. Shame is closely connected to a vain wish for omnipotence and an unwillingness to accept one’s neediness. Like disgust, shame reflects both a desire to hide from imperfections and a wish to be perfect, whole, and impenetrable. Gay men’s sexuality, for example, may threaten an insecure straight man’s fantasy of impenetrability and immovable heterosexual-

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140 See id.
141 See id. at 102–03. John Stuart Mill wrote:

[W]ith regard to the merely contingent, or . . . constructive injury which a person causes to society, by conduct which neither violates any specific duty to the public, nor occasions perceptible hurt to any assignable individual . . . the inconvenience is one which society can afford to bear, for the sake of the greater good of human freedom . . . [T]here are many who consider as an injury to themselves any conduct which they have a distaste for, and resent it as an outrage to their feelings.

142 See Nussbaum, supra note 19, at 102.
143 See St. John, supra note 79; Hate Clause Memo, supra note 2, at 7.
144 See Nussbaum, supra note 19, at 122–23.
145 See St. John, supra note 79.
146 See Nussbaum, supra, note 19, at 36–37, 129; Killer Acted Out of “Shame,” supra note 17.
147 See Nussbaum, supra note 19, at 15.
148 See id. at 17, 184–85.
Laws should not sanction “[heterosexual] male loathing of the male homosexual,” a loathing that too often presents itself through violence.150

Perhaps most importantly, both shame and disgust react to a whole person or a characteristic rather than a discrete action.151 To the extent that one’s dislike of another person is related to a vulnerability in his own personality or identity, it is illogical and unfair to mitigate punishment for his violent acts towards that other person.152

Mitigation is most appropriately understood as a way for judges and juries to partially forgive a person’s violent reaction to a harmful or threatening action; it should not be a means of lessening punishment based on a reaction to one’s own or another’s character.155 Insofar as shame and disgust reflect a person’s wishes for perfection, impenetrability, stable gender boundaries, or unchanging sexual orientation, shame and disgust reactions amount to a portrait of the bias of a particular day.154

C. A Few Unreasonable Men

Trans panic defenses likewise fail to fulfill a third heat of passion element: reasonableness. Heat of passion claims require that the claimed provocation be sufficient to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection.155 A defendant may not generate his own standard of conduct to justify his actions unless the jury also finds that the facts and circumstances were sufficient to arouse the passions of an ordinarily reasonable man.156 Defense counsel in Araujo’s case simply ignored

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149 See id. at 113–14.
150 See id. Nussbaum calls heterosexual male loathing of the male homosexual the “central locus of disgust” in contemporary American culture. See id. at 13.
152 See Nussbaum, supra note 19, at 128–29.
154 See id. at 13–17, 93–94, 184–85.
156 See People v. Logan, 164 P. 1121, 1122 (Cal. 1917). “Thus no man of extremely violent passion could so justify or excuse himself if the exciting cause be not adequate, nor could an excessively cowardly man justify himself unless the circumstances were such as to arouse the fears of the ordinarily courageous man.” Id.
this rule when they argued that the defendants’ emotional immaturity exacerbated their reaction.\textsuperscript{157}

The reasonableness element of the heat of passion doctrine invites an inquiry into whether the value threatened or harmed by a particular provocation is one to which society expects a reasonable person to react violently.\textsuperscript{158} In trans panic defense cases, one must therefore ask whether a threat to one’s sexuality reasonably triggers an aggressive reaction.\textsuperscript{159} Many reject the idea that a homicidal reaction to a challenge to an individual’s sexuality is a reasonable one; the reasonableness requirement of heat of passion claims allows a court to consider just that.\textsuperscript{160}

Nussbaum points out that over time, the law has shifted as to which core values may justifiably be protected by mitigation doctrines.\textsuperscript{161} For example, until the late 1970s, the law generally held that marital infidelity could provoke a reasonable man to homicidal rage; mitigation in this scenario protected a sense of “manly honor.”\textsuperscript{162} Today, although most people judge infidelity as morally wrong, and something that a reasonable man would be angry about, few would condone a homicidal reaction.\textsuperscript{163} This expresses a societal shift away from accepting a violent reaction to the wrongful “taking” of one’s wife.\textsuperscript{164} The honor or ownership threatened by infidelity is no longer

\textsuperscript{157} See id.; see also Yomi S. Wronge, Judge Declares Mistrial in Araujo Murder Case, CONTRA COSTA TIMES, June 23, 2004, at 4. Even a defense witness psychologist testified that a “male who is more mature” than the defendants would know that to “go for a walk or even to hit the wall could be a more appropriate response.” St. John, supra note 78. Recall also that the judge in Carr suggests that a reasonable person would have “left the scene” if upset about same-sex intimacy. See 580 A.2d 1362, 1364 (Pa. Super. Ct. 1990).

\textsuperscript{158} See Breverman, 19 Cal. 4th at 163; Nussbaum, supra note 19, at 43.

\textsuperscript{159} See Breverman, 19 Cal. 4th at 163; Nussbaum, supra note 19, at 43.

\textsuperscript{160} See Nussbaum, supra note 19, at 132. See generally Mison, supra note 11 (assessing the reasonable requirement as it pertains to homosexual provocation defenses).

\textsuperscript{161} See Nussbaum, supra note 19, at 46–47.

\textsuperscript{162} See id. at 46–47, 63. “When wives were legally the property of their husbands, contemporary law allowed that ‘adultery is the highest invasion of property’ and therefore ‘if the husband shall stab the adulterer . . . this is bare manslaughter’ (not murder).” See Sulaway, supra note 39, at 269 (quoting J.J. Sing, Culture as Sameness: Toward a Synthetic View of Provocation and Culture in the Criminal Law, 108 YALE L.J. 1845–84 (1999)).

\textsuperscript{163} See Nussbaum, supra note 19, at 47.

\textsuperscript{164} See id. In California, mitigation is still allowed when there is sufficient evidence of a continuous pattern of provocative conduct by the victim during the course of a romantic relationship which culminates in a passionate outburst; however, mere “sexual jealousy” will not fulfill the sufficient provocation requirement of heat of a passion defense. See People v. Borchers, 325 P.2d 97, 102 (Cal. 1958). In 1994, picketing, editorializing, and judicial disciplinary proceedings followed an adultery case in which the judge allowed voluntary manslaughter, commenting that nothing could provoke an “uncontrollable rage” greater
unanimously understood to comprise a core value that society deems worthy of protection by mitigation doctrines.\textsuperscript{165}

Defendants arguing trans panic defenses point to their heterosexuality and masculinity as the core values threatened by the victim.\textsuperscript{166} Shouting “I can’t be fucking gay, I can’t be fucking gay . . .” as he killed Araujo, one man put words to his deep homophobia, and the fear that his sexuality might be other than he believed.\textsuperscript{167} One defendant tellingly said that his “illusion as to normality and the way things are supposed to be had been shattered.”\textsuperscript{168} To comfort another defendant, the woman who discovered Araujo’s biological sex appealed directly to his masculinity, saying “[T]his is not your fault. You were a football player.”\textsuperscript{169} Araujo’s identity shook the men’s fragile confidence in their masculinity and sexuality, thereby shaking their entire world view.\textsuperscript{170}

To define sexuality or masculinity as core values to which a reasonable person might react with extreme violence is a dangerous proposition.\textsuperscript{171} A court endorses this valuation of sexuality and masculinity when it instructs a jury on manslaughter based on defendants’ violent reaction to a threat to their identity, as opposed to their life, physical well-being, or family.\textsuperscript{172} Given that shame and disgust are typically repositories of unreasonableness, the court should consider the reasonable man standard for heat of passion not in terms of the average man reacting to these emotions, but the rational man—for

\textsuperscript{165} See Nussbaum, supra note 19, at 63.
\textsuperscript{166} See Hate Clause Memo, supra note 2, at 7; St. John, supra note 92.
\textsuperscript{167} See Hate Clause Memo, supra note 2, at 7. He also said, “I’m not gay. I don’t like men.” St. John, supra note 104. Again, the men’s ignorance about transgender identity was key to their understanding of the situation. See Vade, supra note 48. Araujo identified as a woman, and one’s understanding of one’s sexuality may change over time; only defendant’s narrow view of gender and sexuality allowed him to believe that intimacy with her implied that he was gay. See id.
\textsuperscript{168} See Hate Clause Memo, supra note 2, at 7.
\textsuperscript{169} See St. John, supra note 106.
\textsuperscript{170} See id.; see also Hate Clause Memo, supra note 2, at 7.
\textsuperscript{171} See Mison, supra note 11, at 159–61.
\textsuperscript{172} See Nussbaum, supra note 19, at 127; Mison, supra note 11, at 159–61. Nussbaum explains that though the standard for sufficient provocation shifts over time, it “always involves some serious aggression and harm done to the defendant by the victim,” such as bodily assault or domestic abuse. See Nussbaum, supra note 19, at 127.
whom it is unreasonable to react violently to a threat to his sexuality.\textsuperscript{173}

III. A Passionate Appeal for Justice

One defense attorney in Araujo’s case explicitly asked jurors not to think of their verdict as a message to society.\textsuperscript{174} Yet, the trans panic defense inevitably reifies harmful stereotypes about transgendered individuals.\textsuperscript{175} The defense bolsters a common myth that transgendered people are deceiving the world about their true self, rather than struggling to understand and communicate their identity in a safe environment.\textsuperscript{176} Just as harmful a message, trans panic communicates the idea that one may protect one’s masculinity or perception of his or her sexuality at all costs.\textsuperscript{177}

Sadly, trans panic defenses do resonate with juries that harbor biases, misinformation, or confusion about transgendered individuals.\textsuperscript{178} In 1998, a Boston jury acquitted William Palmer of murder and manslaughter.\textsuperscript{179} Palmer had picked up a woman named Chanelle Pickett in a bar, and when he found out that she had male genitals, he beat and throttled her for more than eight minutes, ultimately killing

\begin{itemize}
\item Kelly St. John, \textit{Prosecutor Calls 3 Defendants Equally Guilty in Teen’s Death}, S.F. CHRON., June 2, 2004, at B5. Another asked female jurors to put themselves in a “different mindset,” and think about how their sons or nephews might have reacted. L.A. Chung, \textit{In Transgender Case, Don’t Ask Jurors to Think Like Defendants}, SAN JOSE MERCURY NEWS, June 4, 2004, at C2. Chung wholly rejects this suggestion, saying:

\begin{quote}
In an era when we try 14-year-olds for murder and expect them to know right from wrong like adults, [women] are now asked to think like 24-year-old men who are in a state of arrested emotional development. So should I give a pass to men for just acting like boys? From this woman’s point of view: Don’t insult me.
\end{quote}

\textit{See id.}
\item See Vade, \textit{supra} note 48; \textit{5 Facts, supra} note 175.
\item See Chen, \textit{supra} note 8, at 225. Some activists note that if women were allowed to react with violence to unwanted sexual advances by heterosexual men the way “gay panic” allows straight men to react to gay men, “the world would have far fewer heterosexual men.” Haddock, \textit{supra} note 12; \textit{see also} Mison, \textit{supra} note 11, at 160–61.
\item See Haddock, \textit{supra} note 12.
\item See \textit{id.}
her.\textsuperscript{180} When Pickett was sentenced to just two years for assault and battery, one transgender activist said: “I’ve seen people get more jail time for abusing animals . . . we’ve been judged expendable.”\textsuperscript{181}

Such a tragic story of the trans panic defense “successfully” exploiting a transphobia arguably present in every jury today illuminates perhaps the strongest argument against the use of trans panic defenses. The “average” man today may feel uncomfortable or unfamiliar with the issues faced by transgendered individuals; for this reason the court should not confuse him with the reasonable man.\textsuperscript{182} Nussbaum’s rejection of disgust and shame as bases for mitigation goes to another central reason why trans panic mitigation attempts should fail: when emotions communicate an individual’s own unique discomforts, vulnerabilities, and judgments about other people, they are not justifiable bases for law.\textsuperscript{183}

It is not surprising that Nussbaum fails to address the trans panic defense, given that transgendered people occupy a near-total blind spot in our society and legal system.\textsuperscript{184} Only a handful of states statutorily and expressly prohibit discrimination against transgendered individuals.\textsuperscript{185} In only three states have courts interpreted Title VII sex discrimination to include transgendered people.\textsuperscript{186} Public and private employers are free to discriminate against trans individuals in the vast majority of states.\textsuperscript{187} This bleak legal and legislative reality for the

\textsuperscript{180} See id.; see also Kevin Rothstein, \textit{Travesty of Justice: When Is a Murder Not a Murder? When the Victim Is Transsexual}, \textit{Boston Phoenix}, May 1997, available at http://www.bostonphoenix.com/archive/1n10/97/05/MURDER.html.

\textsuperscript{181} See Haddock, supra note 12.

\textsuperscript{182} See id. (explaining that few jurors will know someone personally who is transgender, which is likely to work in favor of panic defenses in this context); see also Nussbaum, supra note 19, at 133–34.

\textsuperscript{183} See Nussbaum, supra note 19, at 101–03, 229.

\textsuperscript{184} Compare id. at 35, 46–48, 130–34, 298–99 (discussing the implications of gender and sexuality dynamics in mitigation and other law), with Vade, supra note 48 (highlighting the prevalence and implications of violence against transgendered people), and Letellier, supra note 49 (same).


trans community reflects and reinforces a general lack of safety: tragic statistics of violence against transgendered people prove a dire need to address transphobia through both public education and protective laws.\textsuperscript{188} The trans panic defense hinders all attempts at justice for trans individuals, as it institutionalizes misunderstanding and bias against them even in the context of brutal victimization.

\textbf{Conclusion: Manslaughter, Meet Mistrial}

The jury in Araujo’s case deadlocked, and a retrial is scheduled.\textsuperscript{189} Post-deliberation interviews suggest that the jury may have rejected the trans panic defense, but was reportedly unable to choose between first- and second-degree murder.\textsuperscript{190} Yet, the facts and circumstances of Araujo’s case illustrate the urgent need for judges to disallow further use of trans panic defenses.\textsuperscript{191}

The dignity of the court—as well as the individual parties—is at stake in the decision to reject trans panic defenses. As shown in this Book Review, trans panic arguments leave at least three elements of heat of passion defense unfulfilled. When basic elements of a defense lack the required substantial evidence, it follows that the court should protect both judicial resources and the integrity of the proceedings by declining to entertain the defense or base instructions on it.\textsuperscript{192} When the court entertains a manslaughter instruction based on trans panic reasoning, it tolerates a claim that is legally without merit, while fueling a type of victim-blaming too familiar to the gay, lesbian, bisexual, and transgender communities.\textsuperscript{193}


\textsuperscript{191} People v. Breverman, 960 P.2d 1094, 1106-07 (Cal. 1998); Nussbaum, supra note 19, at 13–15; Locke, supra note 109.


\textsuperscript{193} See Ben Aguirre Jr., Fundamentalists Come from Kansas to Protest Araujo trial, OAKLAND TRIB., Apr. 18, 2004, available at 2004 WL 73090553. Members of a fundamentalist church
Trans panic claims focus unwarranted scrutiny on the victim’s character and lifestyle, which may both traumatize the victim’s family and distract jurors from their duty to judge the defendants’ actions. Whether or not a trans panic defense succeeds, judicial and media attention given to the argument plays a dynamic role in the legal system and the court of public opinion. The rejection of this legally unviable argument will be one step toward justice and dignity for Araujo, and for the trans community’s many victims.

protested Araujo’s trial and regretted passing up a chance to disrupt her funeral. See id. The church believes that Araujo, and “fags and fag-enablers” are to blame for any harm that comes to them. See WBC to Picket Funeral of Cross-Dressing Teen Pervert Eddie Araujo, GodHatesAmerica.com, Oct. 21, 2002, at http://www.godhatesamerica.com/ghmirc/fliers/flierarchive.html.


See Nussbaum, supra note 19, at 12.

See Letellier, supra note 48; Public Announcement, Three Things to Do Coming Out of the Gwen Araujo Mistrial, Transgender Law Center (June 23, 2004).