ARTICLES

SEEING THE OLD LADY: A NEW PERSPECTIVE ON THE AGE OLD PROBLEMS OF DISCRIMINATION, INEQUALITY, AND SUBORDINATION

Jacquelyn L. Bridgeman

[pages 263–324]

Abstract: In recent years, legal scholars have used insights from cognitive and social psychology to explain that, despite significant gains, discrimination persists in America. Specifically, such scholars argue that our current antidiscrimination legal system, aimed at overt, conscious, and intentional conduct is not an effective tool for combating current forms of discrimination that are often subtle, unconscious, and unintentional. This article builds on that work by illustrating that, while insightful, the perspective from which these scholars approach the problem of discrimination is really no different from that which informs the current antidiscrimination system they seek to change. Accordingly, this article will explain how the perspective of these scholars is the same as that informing the current system. Second, this article will put forth an alternative perspective and then demonstrate how the new point of view advocated for opens up new possibilities with respect to how we might eradicate discrimination from American society.

A DOMESTIC RIGHT OF RETURN?: RACE, RIGHTS, AND RESIDENCY IN NEW ORLEANS IN THE AFTERMATH OF HURRICANE KATRINA

Lolita Buckner Inniss

[pages 325–374]

Abstract: This article begins with a critical account of what occurred in the aftermath of Hurricane Katrina. This critique serves as the backdrop for a discussion of whether there are international laws or norms that give poor, black Katrina victims the right to return to and resettle in New Orleans. In framing this discussion, this article first briefly explores some of the housing deprivations suffered by Katrina survivors that have led to widespread displacement and dispossession. The article then discusses
two of the chief barriers to the return of poor blacks to New Orleans: the
broad perception of a race-crime nexus and the general effect of the im-
position of outsider status on poor, black people by dominant groups. Fi-
ally, the article explores the international law concept of the right of re-
turn and its expression as a domestic, internal norm via standards
addressing internally displaced persons, and considers how such a “do-
mestic right of return” might be applicable to the Katrina victims.

NOTES

STUDENT INTERROGATIONS BY SCHOOL OFFICIALS: OUT WITH AGENCY
LAW AND IN WITH CONSTITUTIONAL WARNINGS

Eleftheria Kean

Abstract: When public school students admit to violating of school rules
to their principals, they may also be admitting to a violation of criminal
law. Increasingly, principals share these confessions with local law en-
forcement and the students are charged in a criminal proceeding. Be-
cause principals, knowing the evidence will be turned over to law enforce-
ment per school policies, are seeking evidence to use against their
students, these students should be so warned before an interrogation with
their principal. Though most prior case law involving student interroga-
tions has been decided under agency law, the Supreme Court’s decision
in Ferguson v. City of Charleston suggests a new framework to analyze stu-
dent interrogations by school officials. Ferguson dealt with a Fourth
Amendment search, but suggested the same analysis would be applicable
in Fifth Amendment cases. Because Fourth Amendment school cases of-
ten value the same factors as in the Ferguson analysis, Ferguson’s test, which
requires constitutional warnings when state actors seek out incriminating
evidence, should also be applied in Fifth Amendment school cases.

I BEG YOUR PARDON: A CALL FOR RENEWAL OF EXECUTIVE CLEMENCY
AND ACCOUNTABILITY IN MASSACHUSETTS

Gavriel B. Wolfe

Abstract: The pardon power, often described as a safety valve on the
criminal justice system, is in a state of atrophy. Against a backdrop of
“tough-on-crime” rhetoric, a systemic devaluation of rehabilitation efforts,
and significant racial disparities in punishment, the disuse of clemency
means no possibility of exit for those who have transformed themselves
while incarcerated. This Note examines the origins, history, and philosophical underpinnings of clemency in the United States, focusing on the delicate balance between executive discretion and accountability. It then considers the structural and political factors that have contributed to the almost total failure of the clemency process in Massachusetts in recent years. The Note argues for the revitalization of executive clemency as a means of achieving optimal justice in individual criminal cases and system-wide, and it suggests changes to the administration of the clemency process in Massachusetts to achieve that end.

**BOOK REVIEWS**

**Lesson Learned: Why Federal Stem Cell Policy Must Be Informed by Minority Disadvantage in Organ Allocation**

*Margaret Bichler*

[pages 455–476]

**Abstract:** Ever since advancements in medical technology made organ transplantation possible, the demand for organs has been far greater than the supply, thus creating an organ shortage. The medical necessity of genetic matching between donor and donee has disadvantaged minorities in their pursuit of healthy organs because most organ donors are Caucasian and are therefore not a genetic “match” for minorities. Minority disadvantage in organ allocation must inform federal stem cell policy lest the same genetic incompatibility hinder minority access to potentially life-saving stem cell therapies. The federal government must take affirmative and timely steps in order to ensure equitable access to stem cell therapies in the future. This book review outlines those steps, arguing that Congress should: (1) fund stem cell research in order to secure march-in rights under the Bayh-Dole Act; and (2) condition the receipt of funds on the use of diverse stem cell lines in order to promote the creation of therapies genetically accessible to a diverse citizenship.

**Fulfilling the Promise?: When Humanitarian Obligations and Foreign Policy Goals Conflict in the United States**

*Eleanor E. Downes*

[pages 477–498]

**Abstract:** In *Seeking Refuge: Central American Migration to Mexico, the United States, and Canada*, María Cristina García evaluates the United States’ response to political and military upheavals in Central America in the 1980s. García explains that both international and domestic law de-
manded that the United States provide refugee status to individuals with a “well-founded fear of persecution.” She suggests that, because it played a significant role in creating these refugees, the United States had an even greater responsibility to provide for their refuge. This Book Review evaluates the failure of U.S. law and policy to realize even the minimal standards established under international agreements with regard to the protection of refugees. In examining the situations in Central America in the 1980s and Iraq now, it concludes that the United States must fulfill its obligations under international law without regard to whether the United States contributed to the refugee-creating crisis.

“Til Death Do Them Part?: Assessing the Permanence of Goodridge

Michael T. Mullaly

[pages 499–528]

Abstract: In America’s Struggle for Same-Sex Marriage, Daniel Pinello explores the social and political underpinnings of the controversy surrounding so-called “gay” marriage. Pinello’s analysis is directed toward using the struggle for marriage equality as an empirical basis for achieving a better understanding of how public policy derives from the interactions of citizens, interest groups, and government entities. This Book Review argues the importance to policy formation of a force Pinello tends to underemphasize: the counter-majoritarian influence of constitutional law and judicial review. The significance of this factor is considered primarily in relation to state constitutional amendments that purport to “define” marriage as being strictly between one man and one woman. This Book Review concludes that such amendments, by their nature, violate the Federal Equal Protection Clause. Separate consideration is given to the particular illegitimacy and vulnerability of such an amendment in Massachusetts, where state constitutional jurisprudence requires equal marriage rights for same-sex couples.

The Reasonable Woman: Has She Made a Difference?

Nicole Newman

[pages 529–556]

Abstract: It has been fifteen years since the Ninth Circuit decided to utilize the reasonable woman standard in sexual harassment cases, and the Supreme Court has yet to comment on its legitimacy or the split in federal circuits. In Legal Feminism, Ann Scales promotes a feminist way of understanding law that takes history, suffering, and context seriously. Among other things, she identifies philosophical liberalism as a limiting rhetoric that hides structures of privilege behind a pretense of neutrality.
Consequently, Scales prescribes eschewing neutrality to overcome the historic equation of rationality with maleness, and to expose the colossal privilege that allows those in power to believe they are acting neutrally. Neutrality and its pretense are at the heart of the ongoing debate over the use of the “reasonable woman” instead of the “reasonable person” to satisfy the objective prong of Title VII hostile work environment claims. This Book Review examines the evolution of the reasonable woman and explores her successes and failures in fifteen years of jurisprudence.
Abstract: In recent years, legal scholars have used insights from cognitive and social psychology to explain that, despite significant gains, discrimination persists in America. Specifically, such scholars argue that our current antidiscrimination legal system, aimed at overt, conscious, and intentional conduct is not an effective tool for combating current forms of discrimination that are often subtle, unconscious, and unintentional. This article builds on that work by illustrating that, while insightful, the perspective from which these scholars approach the problem of discrimination is really no different from that which informs the current antidiscrimination system they seek to change. Accordingly, this article will explain how the perspective of these scholars is the same as that informing the current system. Second, this article will put forth an alternative perspective and then demonstrate how the new point of view advocated for opens up new possibilities with respect to how we might eradicate discrimination from American society.

Introduction

There are some who would say that everything they needed to know they learned in kindergarten, but for me, some of the most valuable lessons I have learned came courtesy of my English teacher during my first year in high school. This teacher was a rather eccentric older
man who wore wooden ties to class, used to sit in a chair with no back but with support for his knees, and who taught us to spell by having us jump in the air and touch each letter. He taught us word roots and the rules of grammar through clever rhymes and sayings, most of which I remember to this day. He required us to complete every task “eighty-two” times—his metaphor for the importance of revision—and a yawn in class earned the offender a set of ten push-ups or a lap around the school, depending on how frequent the offense. However, with all of his unconventional methods and creative ways, the things I remember most were the logic games and brain teasers, for they were the activities through which I learned the most. Operating under the belief that “just as one uses calisthenics to exercise one’s body, one must also work to exercise one’s mind in order to keep it in shape,” our teacher had a closet full of logic games that he had collected over his long career. Through the use of those games we learned how to think critically and “outside of the box.” We learned to reason through problems the likes of which we had never seen and through those games we learned the paramount importance of perceiving a problem correctly in order to reach an appropriate solution. This latter point was best illustrated on one particular day about half-way through my freshman year.

On this day our teacher started class with a brain teaser. However, this time it was not one of the games from his closet but a picture he had us look at that he had hung on the chalkboard. He asked us to look at the picture and write down what we saw. I looked and saw a black and white drawing of a young woman, dressed in Victorian style clothing with a beautiful, elaborate cap on her head. I wrote down my answer and waited for the rest of the class to do the same. After a few minutes passed, our teacher asked the girl in front of me what she saw; like me, she saw a young woman. The teacher then proceeded to ask another kid and then another and another, and each, like me, saw a young woman. Finally he came to a student towards the back of the class, a smaller child, a bit of a misfit. With some hesitation, the child admitted that he did not see a young woman; he saw instead an old lady. As soon as he gave his answer the majority of the class proceeded to roll their eyes and snicker behind their palms. How could he see an old lady when obviously there was not one?

Our teacher did not roll his eyes, nor did he snicker. Instead he looked the ostracized kid right in the eye and with a smile told him he was exactly right, there was an old lady and how great it was that he had been able to see it. The rest of us stopped mid-giggle and stared at the picture again. There must have been some mistake as there was obviously no old lady in that picture. Perhaps our rather eccentric teacher
had finally lost his mind. The teacher asked the strange student if he would come to the front of the class and trace for us the picture of the old lady. Still rather tentative, although gaining some confidence now, the student walked to the front of the room and identified for us the old lady in the picture. Sure enough she was there, occupying the same space as the young woman. What appeared to be the ear of the young woman was at the same time the eye of the old woman. What appeared to be the neck and a necklace of the young woman was actually the chin and the mouth of the older woman. What appeared to be the hat of the young woman was the hair of the old. Once the old lady was pointed out, she was obvious. In fact, I could not believe that I had so easily missed her. But missed her I had, as had most of the rest of the class.

The obvious point of this brain teaser was to demonstrate to us how the mind can adopt a particular point of view, and, once it has done so, how difficult that point of view can be to change. Often, when this happens, one literally cannot see the world in a different way, even if that different way is in fact present, valuable, legitimate, and helpful. The lesson also illustrated how changing an entrenched view is even more difficult when a large group of people subscribe to that view. I have no doubt that had our teacher not been so supportive, the timid child at the back of the class never would have spoken up or challenged the rest of us. As a consequence, his views would have gone unheard and we would have persisted in ours none the wiser, having never considered a different perspective because we had no idea there was another one to consider. The lesson I learned that day is one that may be helpful to us in trying to use the law as an effective tool for combating the persistent problems of subordination and discrimination in this country.

Before America became America, it had a discrimination and subordination problem. America’s problem with discrimination produced one of the bloodiest wars in American history, brought about the restructuring of our Constitution, sparked social movements, engendered the passage of several laws, and prompted the creation of a variety of task forces and commissions. This problem has been the subject of countless articles, books, movies, poems, songs, television shows, conferences, and other discussions, and through all of these efforts we have

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2 A version of this picture is available at http://www.mathworld.wolfram.com/YoungGirl-OldWomanIllusion.html.
3 See discussion infra Part III.A.
4 See discussion infra Part III.A.
made significant progress in addressing and eradicating this societal problem. Yet, it persists and persists. Like the mythical Hydra, it would seem that as soon as we think we have addressed subordination and discrimination, they rear their ugly heads again. This has occurred so frequently that some believe it is an intractable and unsolvable problem, that the extremely complex and difficult problem of eradicating discrimination and subordination will never be solved. While I certainly agree with many of the sentiments and valuable insights that have caused some to reach this conclusion, I am not willing to subscribe to that outcome yet. For I believe that, much like my classmates and I who were only able to see the young woman and not the old lady, part of why we have had such a difficult time eradicating subordination in this country is that we have not actually addressed the core problem in all of its complexities. We have not done so because, to a large extent, we have only seen a portion of the problem, not the whole. Much like a doctor who misdiagnoses a disease, we have addressed certain symptoms and manifestations based on what we see and are willing to acknowledge, but have not been able to cure the disease as a whole because we have not addressed the root of the problem.

This article is an attempt to begin to do that. The first in a series of four articles, this article asserts that part of why our antidiscrimination laws have not been as effective as we might hope in eradicating all forms of discrimination and subordination is because they are based on a view of subordination and discrimination that is at best incomplete and at worst inaccurate. Thus, our approach and the laws we have developed are also incomplete. Specifically, I argue that our approach to addressing discrimination through our antidiscrimination laws is based on the view that discrimination is the anomaly in this country: a break from the norm, perpetrated by a few bad actors at specific points in time. Thus, our laws are geared toward identifying those bad actors and providing redress to the victims of those specific instances. Consequently, our antidiscrimination laws have done fairly well addressing and helping to eradicate blatant forms of discrimination but unfortu-

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6 See, e.g., Derrick Bell, The Permanence of Racism, 22 Sw. U. L. Rev. 1103, 1104 (1993) (discussing the continued elusiveness of equality for African Americans and even stating the thesis that “[b]lack people will never gain full equality in this country”) (quoting Derrick Bell, Faces at the Bottom of the Well: The Permanence of Racism 12 (1992)).
7 See discussion infra Part I.B.
nately have done little to adequately address discrimination in its many other forms.\textsuperscript{8}

The goal of this article is to try to add to the conversation in which several scholars have engaged in recent years regarding how we can make the law a more useful tool in combating all forms of discrimination.\textsuperscript{9} Building on the valuable insights of the last few decades by critical scholars across disciplines including the groundbreaking work of several critical race theorists, psychologists, and sociologists, this article asserts that one of the necessary components to making the legal approach to discrimination more effective is to change the conception of discrimination that underlies that approach. In other words, if we can reconceptualize the problem, perhaps we can also develop better solutions, solutions that are viable though possibly not readily apparent from our current point of view.

Towards that end, I argue that discrimination and subordination are not the anomaly but the norm in American culture. As American as apple pie, they are part and parcel of the way we perceive the world. They are embedded in the way we have structured our country and permeate our institutions, important societal systems, and cultural constructs.\textsuperscript{10} Thus, the perception of discrimination as an anomaly perpetrated by bad actors at specific points in time in an equal and nondiscriminatory world has allowed us to alleviate the symptoms of blatant discrimination, yet it has not allowed us to address the problem as a whole. Accordingly, in this article I argue for us to take the first steps in changing that perspective. Part I reviews the development of antidiscrimination law in the United States with an emphasis on articulating the current, dominant perception of discrimination and subordination such law embodies. Specifically, this view rests upon the assumption that discrimination and subordination are anomalies perpetrated by a few bad actors in isolated pockets of society. Part II reviews recent innovative proposals to use or change the law to make it more responsive to the persistent problem of discrimination and subordination. This part explains how these new proposals tweak the dominant perspective in some significant ways but still leave some of its fundamental underlying premises intact. Part III explains what both the dominant perspective and these innovative scholars are still missing, specifically, that discrimination and subordination are the norm in, are embedded in, and

\textsuperscript{8} See discussion \textit{infra} Part I.B.

\textsuperscript{9} See discussion \textit{infra} Part II.A.

\textsuperscript{10} See discussion \textit{infra} Part III.A.
permeate every aspect of American life. This part begins by looking critically at the history of the United States and then explaining what new perspective may be derived from that history. It then provides examples to illustrate how the proposed change in point of view would affect our approach to the problems of discrimination and subordination.\textsuperscript{11}

I. THE CRISIS IN AMERICAN ANTIDISCRIMINATION LAW: THE UNFULFILLED PROMISE

A. A Little Bit of History

The inherent difficulty of solving complex social problems through the legal system is a rather obvious and important issue, for even if one is able to correctly define the particular problem, there are still variables, competing interests, and other factors that make fashioning and implementing an effective solution a Herculean task at best and an impossible one at worst. The problem of eradicating subordination and inequality in American society is no different.

The first major societal attempt to address this problem on a national scale came after the Civil War in the form of the First Reconstruction.\textsuperscript{12} The passage of a series of laws\textsuperscript{13} and three constitutional amendments,\textsuperscript{14} led to the end of slavery and the first steps towards forming a more equal nation. The passage of these laws and constitutional amendments appeared to have brought sweeping change to the

\textsuperscript{11} As mentioned, this is the first of what I intend to be a series of four articles. Thus, my goal in this article is only to present the proposed change in perspective as a viable alternative in our quest to effectively eradicate discrimination and subordination. The second article will propose a new definition of equality that better articulates the goal of a truly equal society than do the definitions we currently employ. The third article will take the new concepts proposed in the first two and suggest how we might begin to work those ideas into a practical and cost-effective scheme that starts from the perspective proposed in this article and develops structures and rules under the law that might allow us to reach the equal society as defined in the second article. However, the radical changes proposed in the first three articles would not be without their consequences. Thus, the fourth article in the series looks at the potential consequences, both good and bad, of implementing the proposals put forth in this body of work.

\textsuperscript{12} Manning Marable, Race, Reform, and Rebellion: The Second Reconstruction in Black America, 1945–1990, at 1–12 (2d ed. 1991) (identifying 1865–1877 as the first period of reunion, reconstruction, and racial readjustment); William A. Sinclair, The Aftermath of Slavery 37 (1969) (referring to the period right after the Civil War as the era of Reconstruction).

\textsuperscript{13} See Civil Rights Act of 1875, ch. 114, 18 Stat. 335; Enforcement Act of 1870, ch. 114, 16 Stat. 140; Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

\textsuperscript{14} U.S. Const. amends. XIII–XV.
country. Apart from no longer being slaves, blacks voted in record numbers, sat on juries, and meaningfully participated in American society in many other ways. However, these gains were met with massive resistance including the rise of the Ku Klux Klan and similar groups, and the widespread violence such groups perpetrated that worked to intimidate and prevent the newly freed slaves and their allies from exercising their rights. In the face of this resistance, those in power proved they would only protect the rights of the newly freed slaves so long as it was politically expedient. Consequently, within less than twenty years after emancipation, the newly gained freedoms began to disappear.

By 1867, every state in the South had passed laws whose sole purpose was to relegate the freed men and women to as close a condition of slavery as possible without technically reinstating the peculiar institution. These laws, popularly known as Black Codes, provided sanctions, usually in the form of servitude or even whipping, for offenses such as vagrancy and disorderly assembly. These laws also sought to return blacks to a condition of servitude by forcing them to sign yearly labor contracts (through which they were punished if they left the plantation before the contract expired), apprenticing black children who were

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17 Levine, supra note 15, at 102.

18 Id. at 99; see Wormser, supra note 16, at 19–20 (describing the many ways in which blacks participated in civic life during Reconstruction, primarily through Union Clubs).


20 See Levine, supra note 15, at 104–06 (describing waning white support for Reconstruction from 1870 on, which eventually resulted in the Hayes-Tilden compromise of 1877 whereby the Democrats conceded the presidency to the Republicans in return for the end of Reconstruction); Wormser, supra note 16, at 30–33.

21 If one marks the beginning of the end with the 1877 Hayes-Tilden compromise, the newly found freedoms of the ex-slaves lasted scarcely fourteen years after Lincoln signed the Emancipation Proclamation in 1863.

22 Levine, supra note 15, at 289 (defining “black codes” as “[l]aws passed by the former Confederate states between 1865 and 1867 intended to return blacks to virtual servitude”); Sinclair, supra note 12, at 37–73.

taken from parents deemed unfit, and by leasing out the labor of convicts.\textsuperscript{24} At the same time, while slavery may not have gained a foothold in the North and many in the North may have pushed for abolition, white supremacy and the inequality it engendered were still the order of the day throughout the country.\textsuperscript{25} The belief in white supremacy and the desire for reconciliation and imperialistic adventures throughout the world combined to shift the attitudes of many in the North to those of their southern brothers by the end of the nineteenth century.\textsuperscript{26}

Additionally, the U.S. Supreme Court dealt the final blow to the aspirations of Reconstruction in a series of cases that either struck down the laws intended to protect the newly freed slaves and give some content to their freedom,\textsuperscript{27} or read the new amendments so narrowly as to make them largely ineffective.\textsuperscript{28} The recalcitrance of the South, the increasing lack of support in the North, an ineffective executive, and an unsupportive Supreme Court ultimately combined to bring the progress which had followed the Civil War to a virtual standstill. In fact, it would be another half century before the nation would see a similar step toward equality.

Beginning roughly with the \textit{Brown v. Board of Education} decision in 1954,\textsuperscript{29} the United States once again turned a corner on the road to true equality.\textsuperscript{30} Often referred to as the Second Reconstruction, this

\textsuperscript{24} Levine, \textit{supra} note 15, at 95–96.
\textsuperscript{26} Id. at 69–74.
\textsuperscript{27} See, e.g., United States v. Cruikshank, 92 U.S. 542 (1875) (striking down the provisions of the 1870 Enforcement Act meant to protect against terrorism by the Ku Klux Klan and similar groups); United States v. Reese, 92 U.S. 214 (1875) (invalidating sections of the Enforcement Act of 1870 meant to secure the right to vote under the Fifteenth Amendment).
\textsuperscript{28} Using an extremely narrow definition of national citizenship, the Court held in the \textit{Slaughter House Cases} that the Privileges and Immunities Clause of the Fourteenth Amendment did not allow the federal government to protect privileges and immunities that lay within state power. 83 U.S. (16 Wall.) 36 (1873). The Court then went on to define state power as that “for the establishment and protection of which organized government is instituted.” Id. at 76. In that way the Court effectively read the Privileges and Immunities Clause out of the Fourteenth Amendment. \textit{See id.} at 76–78; \textit{see also} The Civil Rights Cases, 109 U.S. 3 (1883) (determining that (1) the Fourteenth Amendment only applied to state action, and therefore Congress could not pass laws targeting the behavior of individuals, and that (2) while the Thirteenth Amendment may apply to individual actions, its provisions did not extend so far as to offer protection against wrongs such as a refusal of accommodation at an inn or on a public conveyance).
\textsuperscript{29} 347 U.S. 483 (1954).
\textsuperscript{30} While many mark the beginning of the Second Reconstruction at the time of the \textit{Brown} decision or slightly before, \textit{see} Marable, \textit{supra} note 12, at 18, 40–41, it was not as though the fight for civil rights remained dormant during the period between the First
period resembled the First Reconstruction in terms of the kind of change brought about in a relatively small amount of time.\textsuperscript{31} However, these eras do differ in significant ways. Unlike the First Reconstruction, the second was backed by a vibrant protest movement that gained international notoriety and support, the groundwork for which had been laid in the intervening fifty to sixty years.\textsuperscript{32} The Second Reconstruction took place in an America where the attitudes of the majority of Americans had changed; where the hazards of prejudice and discrimination were brought home through World War II and the Nazi campaign, which put in stark relief the potential consequences of severe prejudice and discriminatory action; and where white supremacy and America’s racist attitudes were hurting her image and credibility abroad.\textsuperscript{33} Apart from this, these two eras also differed because the Second Reconstruction proved more successful than the first.

As with the First Reconstruction, Congress passed national laws meant to address the problem of discrimination and to help guarantee basic civil rights.\textsuperscript{34} However, unlike the First Reconstruction the Supreme Court was not so quick to strike down these laws,\textsuperscript{35} and the ex-

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\textsuperscript{31} Marable, supra note 12, at 3–4.


\textsuperscript{33} Sitkoff, supra note 32, at 14–17.


\textsuperscript{35} See, e.g., South Carolina v. Katzenbach, 383 U.S. 301 (1966) (finding that Congress did not exceed the power granted to it in section two of the Fifteenth Amendment in holding certain challenged provisions of the Voting Rights Act constitutional); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (upholding Title II of the Civil Rights Act of 1964 as a constitutional exercise of Congress’s commerce power). Not only did the Court uphold the constitutionality of these laws, many would argue that the Court led the charge with respect to securing civil rights during this era. See, e.g., David J. Garrow, The Supreme Court’s Pursuit of Equality and Liberty and the Burdens of History, in Redefining Equality 205, 205 (Neal Devins & Davison M. Douglas eds., 1998) (noting the Court’s Brown decision “is commonly regarded as the signal event in the modern quest for racial equality”). But cf. Gerald N. Rosenberg, The Irrelevant Court: The Supreme Court’s Inability to Influence Popular Beliefs About Equality (or Anything Else), in Redefining Equality, supra, at
ecutive was more effective in enforcing them.\textsuperscript{36} Thus, although there was still widespread resistance to the changes wrought during the Second Reconstruction, the response was more effective in the face of that resistance. Also, the general public appeared more willing to accept such changes than during the time of the First Reconstruction. While during both periods there was staunch resistance to the move to make the country more equal, during the Second Reconstruction that resistance did not result in the complete reinstitution of racist and discriminatory ideals. Further, after the Second Reconstruction, the sentiments of a majority of Americans began to change, at least on the surface.\textsuperscript{37} Consequently, the change engendered the second time around was much more permanent, widespread and meaningful.

De jure laws relegating blacks, women, and other minorities to legalized second class citizenship are largely a thing of the past as are many other forms of blatant discrimination.\textsuperscript{38} This change has been

\textsuperscript{36} For example, President Eisenhower reluctantly sent federal troops into Arkansas in response to Governor Faubus’s blatant defiance of a federal court order to integrate the schools and the militant defiance of many of the state’s citizens. Marable, supra note 12, at 42–43; Wormser, supra note 16, at 183. However, the willingness of the federal executive to help in the struggle for equality should not be overstated. In fact while the executive branch was helpful in some ways, it actively worked to thwart equality movements in other ways. The FBI’s Efforts to Disrupt and Neutralize the Black Panther Party, in The Eyes on the Prize Civil Rights Reader: Documents, Speeches, and Firsthand Accounts from the Black Freedom Struggle 529 (Clayborne Carson et al. eds., 1991) (describing and documenting the way the FBI worked to disrupt and neutralize the Black Panther Party during the 1960s and early 1970s).

\textsuperscript{37} For example, a 1942 survey showed that 51% of Americans surveyed favored segregated streetcars and buses, but by 1970, 88% favored integrated streetcars and buses. Paul M. Kellstedt, The Mass Media and the Dynamics of American Racial Attitudes 2, 4 (2003). Similarly, the same survey found that prior to the 1970s, 68% favored segregated schools and 55% favored active job discrimination. Id. at 2. By 1972, 97% favored equal employment opportunity for blacks and by 1995, 96% favored integrated schools. Id. at 4. But see John F. Dovidio & Samuel L. Gaertner, On the Nature of Contemporary Prejudice: The Causes, Consequences, and Challenges of Aversive Racism, in CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE 3 (Jennifer L. Eberhardt & Susan T. Fiske eds., 1998) (describing how despite the apparent sea change in attitudes, many Americans are still biased).

\textsuperscript{38} David O. Sears, Racism and Politics in the United States, in CONFRONTING RACISM, supra note 37, at 76, 80 (stating the general consensus is that “old fashioned racism” and “opposition to general principles of equality” have largely disappeared); Tristin K. Green, Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory, 38 Harv. C.R.-C.L. L. Rev. 91, 91 & n.1 (2003) (describing how discrimination in today’s workplace operates “less as a blanket policy or discrete, identifiable decision” and citing several scholars who “have documented this shift in the nature of discrimination”); Susan Sturm, Race, Gender, and the Law in the Twenty-First Century Workplace: Some Preliminary Obser-
significant enough that a good portion of white America no longer believes discrimination is still a problem in American society.\textsuperscript{39} Once the blatant forms of discrimination began to recede and more and more segments of society began to engage in formal practices of equality, it became apparent that the Second Reconstruction did have something in common with the first; in the wake of the Second Reconstruction, as with the first, subordination and discrimination remained.

While the law said all people were now equal and many professed that they believed it to be so, many of the accoutrements of true equality were missing. Those allowed into jobs they had previously been denied found it hard to move up once they gained entry, or found themselves the subjects of differential treatment and harassment.\textsuperscript{40} While things on the whole did improve for previously subordinated groups, members of those groups were certainly not equal. Minorities and women still found themselves overrepresented in the lower rungs of society—disproportionately holding the worst jobs if they held jobs at all,\textsuperscript{41} living in poorer conditions,\textsuperscript{42} and receiving an inferior education.\textsuperscript{43} At the same time, they were underrepresented in the best jobs,\textsuperscript{44} best neighborhoods,\textsuperscript{45} and best educational institutions.\textsuperscript{46} Not only that, demands to continue to move forward were increasingly met with

\textsuperscript{39} Sears, supra note 38, at 81 (“Most whites believe that discrimination has been greatly reduced and that equal opportunity does in fact exist.”).


\textsuperscript{41} \textit{U.S. Census Bureau, U.S. Dep’t of Commerce, Census 2000 EEO Data Tool, http://www.census.gov/eeo2000/index.html} (select “Employment by Census Occupation Codes and Earnings” and click “Next” button; select “US Total” and click “Next” button; select “Total Employed at Work” from list of occupation categories, select “Show Detailed Race/Ethnicity Categories” from list of race categories, select “Show Total of Selected Geographies and Occupations” from list of output options, and click “Display table” button) (indicating that minorities and women are disproportionately represented in the lowest level of jobs as indicated by median earnings for particular occupations); \textit{see Derrick Bell, And We Are Not Saved: The Elusive Quest for Racial Justice} 47 (1987).


\textsuperscript{43} \textit{Id.} at 39 & fig.9-2. However, it should be noted that, while a numerical minority, Asians and Pacific Islanders have the highest educational attainments of all groups in the census report. \textit{Id.} at 39.

\textsuperscript{44} \textit{See supra} note 41.

\textsuperscript{45} \textit{U.S. Population Profile: 1999, supra} note 42, at 28–32.

\textsuperscript{46} \textit{Id.} at 36–39.
resistance as challenges to affirmative action grew and support for civil rights waned.\textsuperscript{47} Thus, while the outcome of the Second Reconstruction was certainly better than the first, the promises of that era have still gone largely unfulfilled. The persistence of inequality and subordination in this country can be linked to a variety of factors. Be this as it may, at least one significant factor is the inherent shortcoming of the legal system meant to help address and eradicate this problem. Specifically, our legal system as currently constructed is inadequate for the task of eradicating persistent inequality and subordination, at least in part because it is derived from a faulty perspective with respect to the persistent nature of subordination and inequality in this country.

B. The Current Perspective

There are many situations in which a person can suffer discrimination that are actionable under current law.\textsuperscript{48} However, for purposes of making this discussion manageable, my primary focus will be on discrimination in employment and how it is addressed under both statutory and constitutional law.\textsuperscript{49} There are essentially five potential avenues open to an employee or potential employee who feels that he or she has been discriminated against. A brief review of these avenues and how they have been applied recently provides insight into the concept of discrimination that underlies them.

\textsuperscript{47} Kimberlé Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 103–04 (Kimberlé Crenshaw et al. eds., 1995).

\textsuperscript{48} For example, possible claims are available for discrimination with respect to housing, 42 U.S.C. § 3604 (2000); voting, \textit{id.} § 1973; and employment and education, \textit{id.} § 245.

\textsuperscript{49} The purpose of this portion of the discussion is to illustrate the perspective that underlies antidiscrimination jurisprudence. While the nature of how one brings a claim may differ somewhat depending on the type of discrimination at issue, the underlying perspective behind all antidiscrimination laws is essentially the same regardless of the type of claim. Because the laws and constitutional provisions addressing employment discrimination are fairly comprehensive and lend themselves well to illustrating the point I intend to make here, I have chosen to focus on those to make this portion of the discussion more manageable. See Michael Selmi, Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric, 86 Geo. L.J. 279, 285 (1997) (stating that there is no substantial difference in how the Supreme Court approaches discrimination issues whether they are statutory or constitutional).
1. Title VII claims

Title VII of the 1964 Civil Rights Act is the primary federal law addressing employment discrimination. While other laws such as the Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA) address discrimination with respect to categories not covered under Title VII, the theories under which a person might bring a claim under those acts largely mirror those of Title VII. Under Title VII and its state law counterparts, when an action is not discriminatory on its face, there are three theories of discrimination available to a potential plaintiff: disparate treatment, disparate impact, and harassment. However, for any of these theories to offer redress, a person must first demonstrate that he or she fits into a protected category covered by the Act. Even if a plaintiff can demonstrate blatant and even horrible discrimination on the basis of a particular characteristic or trait, for example obesity or sexual orientation, he or

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50 To the extent that a state also has its own antidiscrimination laws that mirror and are interpreted similarly to Title VII, much of what I say here will be applicable to state law claims as well.


54 However, the theories available are not necessarily identical. For example, while disparate impact claims may be available under the ADEA, the Supreme Court has indicated that such claims are narrower in scope than under Title VII. Smith v. City of Jackson, 544 U.S. 228, 240 (2005) (“[D]ifferences between the ADEA and Title VII make it clear that even though both statutes authorize recovery on a disparate-impact theory, the scope of disparate-impact liability under ADEA is narrower than under Title VII.”). Additionally, the ADA allows for an employee to recover for failure to accommodate a disability. 42 U.S.C. § 12112(b)(5)(A). Title VII only has a similar provision for discrimination on the basis of religion. Id. § 2000e(j).

55 McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973) (stating the elements of a prima facie case and allocation of proof for disparate treatment cases). Although the McDonnell Douglas Court did not specifically refer to the type of discrimination in that case as “disparate treatment,” that is the name such claims have been given over time. See Bell, supra note 15, at 643–45; Mark A. Rothstein & Lance Liebman, Employment Law 282–85 (5th ed. 2003).


58 Title VII states specifically that it only prohibits discrimination on the bases of race, sex, religion, color, and national origin. 42 U.S.C. § 2000e-2(a)–(d); see also Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510–11 (2002) (indicating that the first element in a prima facie case of disparate treatment based on circumstantial evidence is that the plaintiff show that he or she is a member of a protected group).
she will not be able to obtain redress under current law unless that person can make the characteristic in question fit into a protected category.\[^{59}\] Thus, Title VII is not a general civility code and it does not protect a person from all forms of discrimination.

Once a person has met the threshold requirement of fitting into a protected category, the next task is to establish discrimination on the basis of that particular characteristic. In situations where a person has been treated differently and detrimentally from similarly situated others, she may have a disparate treatment claim.\[^{60}\] When a person has not been specifically treated differently but has suffered a differential effect due to an employer’s policy or practice, the proper avenue is a disparate impact claim.\[^{61}\] Lastly, one who is subjected to a differential working environment because of a particular protected characteristic, such as when a woman is the object of lewd gestures or subjected to jokes or other conduct that alters her terms and conditions of employment, may have a claim for harassment.\[^{62}\]

Obviously, this is a cursory and simplified rendition of the way a person may prove a discrimination claim under Title VII,\[^{63}\] but, as stated, what is currently required to prove a discrimination claim is only important to this discussion to the extent that it provides insight into the underlying concept of discrimination. Under each of the above described theories, a plaintiff must not only show that he or she fits into a protected category, but that the basis for the alleged discrimination was

\[^{59}\] For example, the plaintiff in Whaley v. Southwest Student Transportation, clearly lost her job because of her obesity, but lost her case on a motion for summary judgment because the court found that her obesity did not qualify as a disability under the ADA. See No. 7:01-CV-034, 2002 WL 999582, at *2, *3 (N.D. Tex. May 9, 2002). In contrast, the plaintiff in Butterfield v. New York, was able to survive summary judgment on his ADA claim over the disputed fact of whether his morbid obesity constituted a disability, but was unable to bring a Title VII claim for harassment due to his weight as he did not fit into a protected category. See No. 7:96-CV-05144, 1998 WL 401533, at *13, *19 (S.D.N.Y. July 15, 1998). Similarly, in Rene v. MGM Grand Hotel, Inc., the plaintiff was ultimately able to survive a grant of summary judgment to the defendant on his sexual harassment claim despite the fact that the harassment he endured was largely because of his sexual orientation because the court found that “[t]he physical attacks to which Rene was subjected, which targeted body parts clearly linked to his sexuality, were ‘because of . . . sex.’” 305 F.3d 1061, 1066 (9th Cir. 2002).

\[^{60}\] McDonnell Douglas, 411 U.S. at 802; see Bell, supra note 15, at 643–45; Rothstein & Liebman, supra note 55, at 282–85.


\[^{62}\] Faragher, 524 U.S. at 786; Burlington, 524 U.S. at 751–54; Meritor, 477 U.S. at 63–67.

\[^{63}\] For a more detailed discussion, see Green, supra note 38, at 112–26.
that protected category. In other words, one must show that the particular act in question was motivated, at least in part, by animus toward a protected characteristic. Additionally, one can usually only recover when he or she has suffered some kind of identifiable tangible harm. Thus, the law only applies after the act of discrimination has occurred.

2. Equal Protection and Due Process Claims

For those employees working in the public sector, equal protection and due process claims under the Fourteenth Amendment may also be available to address claims of discrimination. Arguably, such claims, when available, are broader in scope in that one need not fit into a specific protected category in order to bring such a claim. For example, a homosexual person, similarly situated with respect to her coworkers but treated differently from them, may have a cognizable equal protection claim. Because homosexuality is not currently a protected category

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64 See sources cited supra notes 58–62.
65 See Price Waterhouse v. Hopkins, 490 U.S. 228, 240–41 (1989); see also 42 U.S.C. § 2000e-2(m) (“[An] unlawful employment practice is established when the complaining party demonstrates that race, religion, sex, or national origin was a motivating factor for any employment practice . . . .”).
66 See Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510 (2002) (noting that the third element of a prima facie case for disparate impact is “an adverse employment action”); Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988) (stating that a violation of Title VII can be found when a “facially neutral employment practice[,] . . . [has] significant adverse effects on protected groups”) (emphasis omitted); McDonnell Douglas Corp. v. Green, 411 U.S. 797, 802 (1973); Brown v. Brody, 199 F.3d 446, 452 (D.C. Cir. 1999) (noting that an adverse employment action must be shown whether the defendant is a private employer or a government agency).
67 U.S. Const. amend. XIV, § 1. Due to early interpretations of the Fourteenth Amendment restricting its application only to situations involving state action, such claims are generally only available to employees working in the public sector. See The Civil Rights Cases, 109 U.S. 3, 11–12 (1883); United States v. Cruikshank, 92 U.S. 542, 554–55 (1875). While claims under the federal Constitution are restricted to state action, that is not necessarily the case for all state constitutions. See, e.g., Luck v. S. Pac. Transp. Co., 267 Cal. Rptr. 618, 628 (Cal. Ct. App. 1990) (stating that California state constitutional provisions protecting privacy applied to private employers). However, while these state provisions may reach more broadly, as with Title VII, the underlying concept of discrimination that guides their application does not differ from that underlying application of the federal constitutional provisions.
68 Quinn v. Nassau County Police Dep’t, 53 F. Supp. 2d 347, 350, 356–58 (E.D.N.Y. 1999) (upholding a $380,000 verdict for the plaintiff on a sexual harassment claim based on the plaintiff’s sexual orientation brought under the Equal Protection Clause of the Fourteenth Amendment after applying the rational basis test). But see High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 568, 571, 578 (9th Cir. 1990) (finding cognizable an equal protection claim under the Due Process Clause of the Fifth Amendment regarding the Department of Defense’s policies of requiring expanded investigations and mandatory adjudications as well as refusing to grant security clearances to known or
under Title VII, no such claim would be available under that law. Similarly, one may have a due process claim for violation of a right regardless of the nature of the motivation underlying deprivation of that right. In other words, the underlying motivations that will sustain a constitutional due process claim are much broader than those that would sustain a Title VII claim. Yet, regardless of these differences, equal protection and due process claims are still similar to Title VII claims in that to prevail, a person must show causation and specific harm, both of which are addressed after the fact.

3. The Perspective Underlying Our Current Antidiscrimination Regime

This somewhat quick review of the statutory and constitutional schemes for combating discrimination provides the basis from which we can infer the concept of discrimination or equality that underlies these laws. First and foremost, as several commentators have already clearly demonstrated, the law envisions discrimination largely as something purposely, intentionally, and consciously done. This underlying

suspected gay applicants, but upholding the policies and practices under a rational basis test).

69 See, e.g., Perry v. Sindermann, 408 U.S. 593, 595, 598 (1972) (reversing grant of summary judgment to defendant school on plaintiff’s claim that the school’s refusal to hire him infringed his right to free speech, and noting that “a teacher’s public criticism of his superiors on matters of public concern may be constitutionally protected and may, therefore, be an impermissible basis for termination of his employment”).

70 See, e.g., Green, supra note 38, at 112 (“[The d]isparate treatment doctrine has long been understood to require a showing of intentional discrimination, often defined in terms of conscious motivation to discriminate.”); Justin D. Cummins, Refashioning the Disparate Treatment and Disparate Impact Doctrines in Theory and in Practice, 41 How. L.J. 455, 459 (1998) (“Antidiscrimination law . . . in accordance with the disparate treatment doctrine . . . only recognizes conscious acts of discrimination . . . .”); Linda Hamilton Krieger, The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity, 47 Stan. L. Rev. 1161, 1177 (1995) (“Courts have construed section 703 of Title VII, like 42 U.S.C. sections 1981 and 1983, to require proof of intent to discriminate in disparate treatment cases.”); Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317, 318 (1987) (explaining how the Supreme Court decision of Washington v. Davis, 426 U.S. 229 (1976), established the discriminatory purpose doctrine which “requires plaintiffs challenging the constitutionality of a facially neutral law to prove a racially discriminatory purpose on the part of those responsible for the law’s enactment or administration”); Alan David Freeman, Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, 62 Minn. L. Rev. 1049, 1054–55 (1978) (“[O]nly ‘intentional’ discrimination violates the antidiscrimination principle.”). But see Selmi, supra note 49, at 286–89 (agreeing that the Supreme Court requires a showing of intent, but that the focus of the Court’s inquiry when addressing the issue of intent centers on “whether race [or another protected cate-
premise is further evident in the jurisprudence regarding mixed motive cases under Title VII, particularly with respect to the fact that a defendant’s liability is less if part of the motive is permissible, even if discriminatory motive has clearly been shown. Second, not only is discrimination something that is purposely, intentionally, and consciously done, such action often will only result in liability if it can be shown that one’s intentional and conscious action was motivated by the victim’s membership in a designated protected category. As stated, a person who is the victim of blatant and even awful discrimination or inequality on the basis of something other than a specific category identified under the law generally will have no redress for that harm.

Third, this perspective is informed by the idea that equality exists when everyone is treated the same in a given situation, or put differently, when race or other protected categories are not taken into account. Thus, if in fact a particular person has a differential experience because of a unique personal quality or characteristic, but technically the standards applied to that person are “the same,” there is no cognizable claim for discrimination, a point which Professor Barbara Flagg illustrates well in her article Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking. In that piece, Professor Flagg presents a hypothetical situation detailing the differential treatment two black sisters received at their respective places of work. One, Yvonne, was an accountant at a major nationwide accounting firm. In
this scenario, Yvonne was a well-qualified individual who largely conformed to existing norms in her profession and within the corporate culture of her workplace, including the norm of estimating time spent on client accounts and erring on the side of overbilling.\textsuperscript{77} When it came time for Yvonne to be promoted to regional manager, she was passed over for promotion due to the imprecise manner in which she had billed certain clients.\textsuperscript{78} Yvonne was passed over despite the fact that she engaged in practices similar—if not identical—to other members of the firm, who were not held accountable for their equally shoddy recordkeeping.\textsuperscript{79} As Flagg points out, although she may not win, Yvonne would have a cognizable claim under existing antidiscrimination doctrine because she is being treated differently from similarly situated others.\textsuperscript{80}

In contrast, Yvonne’s sister, Keisha Akbar, did not assimilate to prevailing norms to the extent that Yvonne did. Apart from legally changing her name from Deborah Taylor, Keisha also adopted speech and grooming patterns consistent with her African heritage.\textsuperscript{81} Working as the only black scientist in a small research firm, Keisha did well at the technical aspects of her job, but was ultimately not promoted when the small firm began to expand because she was thought to lack the personal qualities needed to be an effective manager; namely, she was seen as being too different from the researchers she would supervise.\textsuperscript{82} While Keisha suffered differential treatment like Yvonne, Flagg explains that Keisha is much less likely to have a cognizable discrimination claim because, unlike Yvonne, Keisha is treated the same as her coworkers; the same norms are being applied to her as to everyone else, and she is arguably being treated the same as anyone who fails to conform to those norms.\textsuperscript{83} Despite the fact that Keisha’s unwillingness to conform to those norms is directly linked to her identity as a black woman, and thus arguably results in a difference in treatment based on her race, the discrimination Keisha experienced is not the type for which current antidiscrimination law provides redress.\textsuperscript{84}

\textsuperscript{77} Id. at 2009–10.  
\textsuperscript{78} Id. at 2010.  
\textsuperscript{79} Id.  
\textsuperscript{80} Flagg, supra note 75, at 2012, 2013, 2014.  
\textsuperscript{81} Id. at 2010–11.  
\textsuperscript{82} Id. at 2011.  
\textsuperscript{83} Id. at 2012.  
\textsuperscript{84} Id. at 2013–15; see also Martha Chamallas, Structuralist and Cultural Domination Theories Meet Title VII: Some Contemporary Influences, 92 Mich. L. Rev. 2370, 2407–08 (1994) (explaining how victims of cultural domination, such as victims of English-only rules, have not
Fourth, this perspective is informed by the idea that discrimination is an abnormality or rarity, rather than the norm. Put simply, the underlying assumption is that the employer has acted for permissible motives and the workplace is not discriminatory. Several of the major Supreme Court antidiscrimination cases evidence this point. For example, *Wards Cove Packing Co. v. Atonio* involved a disparate impact case in which employees challenged the composition of the employer’s workforce in which nonwhites predominated in the less-skilled, lower-paying jobs. Specifically, the plaintiffs alleged that hiring and promotion practices of the employer were responsible for the racial stratification of the workforce. In finding against the plaintiffs, the Supreme Court first explained that the proper comparison for analysis was not the discrepancy between the cannery and noncannery workforce within the particular employer, but rather the pool of qualified applicants versus those holding a particular position. Thus, the plaintiffs could not establish a prima facie case of disparate impact on the basis of comparing segments of the employer’s own workforce. Furthermore, although not necessary to the decision, the Court went on to clarify a few other points, the most important for this discussion being the issue of causation. Specifically, the Court made clear that even if properly determined, it would not be enough to demonstrate an imbalanced workforce to prevail on a disparate impact claim.

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been successful in seeking redress from the courts since their harm is regarded as due to their own choices, rather than them being victims of an exclusionary workplace culture).

85 See Krieger, supra note 70, at 1167 (“[D]isparate treatment analysis assumes that, unless they harbor discriminatory intent or motive, decisionmakers will act objectively and judge rationally.”); Anne Lawton, *The Meritocracy Myth and the Illusion of Equal Employment Opportunity*, 85 MINN. L. REV. 587, 590 (2000) (describing what she terms the “meritocracy myth” which reflects dominant cultural assumptions, the first of which being “that employment discrimination is an anomaly”); Donald E. Lively & Stephen Plass, *Equal Protection: The Jurisprudence of Denial and Evasion*, 40 AM. U. L. REV. 1307, 1314 (1991) (“[E]qual protection jurisprudence reflects a society that merely rebukes accidental manifestations of prejudice, condemning them as social blunders rather than recognizing them as symptoms of a deeper societal pathology.”); Sturm, supra note 38, at 672 (“The law appears to assume that, absent racist or sexist motivation, race and gender identity does not enter into workplace decision making . . . .”); see also Freeman, supra note 70, at 1103 (explaining that jurisprudence views discriminatory acts as “the occasional aberrational practice”).

86 490 U.S. 642, 647 (1989). Jobs at the canneries at issue were divided into two primary types, cannery and noncannery jobs. *Id.* The cannery jobs were unskilled, paid less than the skilled noncannery jobs, and were predominantly filled by nonwhites. *Id.* In contrast, the noncannery jobs were skilled positions filled predominantly by whites. *Id.*

87 *Id.* at 647–48.

88 *Id.* at 651–52.

89 *Id.* at 654–55.

90 *Id.* at 656–57.
establishing an imbalance, the plaintiff would also have to show that the particular disparate impact was created by a specific or particular employment practice. To the extent an employee is unable to make this causal link, the employee’s claim will fail. Hence, unless an employee can show that an employer has created a racial imbalance through some specific and identifiable practice, the employee will not be able to establish a claim of disparate impact discrimination under the law. In other words, there is no disparate impact discrimination. Thus, the assumption is that, unless specifically shown otherwise, the workplace is free from discrimination such that an employer enjoys a presumption of legitimacy.

Furthermore, discrimination is only actionable when the victim has experienced some tangible effect. Thus, there are no proactive claims available under the current system. An employer who is engaging in discriminatory practices is free to do so under this presumption of legitimacy. The law applies only after a specific instance of discrimination occurs to which an employee or potential employee can refer. Even at that juncture, the presumption of legitimacy remains unless the plaintiff can show by a preponderance of the evidence that there was a specific act or instance of discrimination based on an impermissible motive that caused an identifiable harm to that particular individual or group of individuals. Accordingly, pursuant to this view, equality and fairness are the embedded norms and discrimination is the anomaly.

The above perspective on equality and the legal system it has engendered has done fairly well combating blatant forms of discrimination, so much so that some believe discrimination and subordination are largely a thing of the past. However, subtle, unconscious, and un-
intentional discrimination still persists. For this reason, several scholars have put forth proposals for how to address these other forms of discrimination under the law.\textsuperscript{96} These proposals demonstrate a few key shifts in the traditional underlying perspective.

II. RECENT INNOVATIVE ATTEMPTS TO USE THE LAW TO COMBAT THE PROBLEM OF PERSISTENT INEQUALITY AND SUBORDINATION

For the last several decades, psychologists have explored the social and psychological processes that lead to prejudice, discrimination, and inequality.\textsuperscript{97} As a result, researchers have gained valuable and sometimes startling insights that help explain why discrimination and inequality persist despite the demise of more blatant forms of discrimination and the large number of people claiming to be in support of equality.\textsuperscript{98} Essentially, they described the preference for one’s own group versus those of an outside group and how categorization and stereotyping, though part of efficient cognitive functioning, can result in unconscious bias that affects one’s judgment of, perception of, and interaction with others as well as the ability to remember events.\textsuperscript{99}

Recognizing the persistence of discrimination in the wake of the Second Reconstruction and realizing that our laws and current antidiscrimination system were ineffective in sufficiently addressing the problem, legal scholars seized on the work of psychologists and began to theorize about unconscious and structural discrimination and how the law might be used to address it.\textsuperscript{100} A review of these theories is to where this article now turns.

\textsuperscript{96} See discussion infra Part II.A.


\textsuperscript{98} See, e.g., Dovidio & Gaertner, supra note 37, at 4–8 (describing how racism persists in our society despite a change in overt measures of racial attitudes that show an increase in the belief in equality due to a more subtle form of modern racial bias known as aversive racism).

\textsuperscript{99} See id. at 5–6. A comprehensive review of the wealth of this scholarship is beyond the scope of this paper, but for detailed overviews, see Handbook of Social Psychology (John Delamater ed., 2003) [hereinafter Delamater, Handbook]; Gilbert et al., Handbook, supra note 97, at 371–372; Prejudice, Discrimination, and Racism, supra note 97, at 128–133; Stereotypes and Prejudice, supra note 97.

\textsuperscript{100} See discussion infra Part II.A.
A. New Proposals

In his seminal article *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, Professor Charles Lawrence brought the problem of unconscious discrimination and inherent bias to the attention of the legal world. Relying on psychological theory, in particular Freudian and cognitive theories, he explained that all of us are influenced by a racist cultural heritage and, because of this influence, we are all racists to a certain extent. However, at the same time, most of us are unaware of our racism and, as a result, engage in behavior that produces racial discrimination influenced by unconscious, racial motivation. Accordingly, Lawrence sought in his article to challenge the doctrine of discriminatory purpose established by the Supreme Court’s decision in *Washington v. Davis*. He explained:

[A doctrine] requiring proof of conscious or intentional motivation as a prerequisite to constitutional recognition that a decision is race-dependent ignores much of what we understand about how the human mind works. It also disregards both the irrationality of racism and the profound effect that the history of American race relations has had on the individual and collective unconscious.

Given this, he proposed a “cultural meaning” test to address unconscious bias. Under this test, a particular government action would be evaluated to see if it “conveys a symbolic message to which the culture attaches racial significance.” If the court were to find by a preponderance of the evidence that a significant portion of the population would think of the action in racial terms, then a presumption would arise that unconscious racial attitudes had influenced the decisionmakers and the court would therefore apply heightened scrutiny. In this way, equal protection law would be more responsive to pervasive and unconscious discrimination.

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101 See generally Lawrence, supra note 70.
102 Id. at 322, 331–39.
103 Id. at 322, 339–44.
104 426 U.S. 229, 247 (1976); Lawrence, supra note 70, at 318–19.
105 Lawrence, supra note 70, at 323.
106 Id. at 324.
107 Id. at 324, 355–56.
108 Id. at 356.
109 Id. at 362–81 (containing illustrations for how the cultural meaning test would apply).
Since Lawrence’s article, several scholars have also put forth proposals to make antidiscrimination law more responsive to the ways in which modern discrimination manifests itself. For example, Professor Oppenheimer proposed the adoption of a negligence theory of liability under Title VII. In so doing, he likened the disparate treatment and impact theories of Title VII liability to intentional and strict liability theories in tort. He explained, however, that the work of social psychologists and sociologists lends considerable support to the idea that racial discrimination is frequently the result of negligent behavior. Accordingly, he proposed a negligence theory of Title VII liability whereby employers would be liable if they failed to act to prevent discrimination that they knew, should have known, expected, or should have expected to occur, or when they breached a statutorily established standard of care by “making employment decisions which have a discriminatory effect, without first scrutinizing their processes, searching for less discriminatory alternatives, and examining their own motives for evidence of stereotyping.” Apart from arguing that a negligence theory of liability would be more in line with the scientific data on discrimination, Oppenheimer also justified the proposal to impose negligence liability on the grounds that antidiscrimination doctrine already incorporated many aspects of negligence theory with respect to doctrines governing claims of harassment and those requiring accommodation of religious practices, pregnancy, and disabilities. Thus, it was but a small step to impose negligence liability, a better system for addressing unconscious bias.

Linda Hamilton Krieger also focused on the work of psychologists in her groundbreaking work *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*. However, unlike Lawrence and Oppenheimer, Krieger used psychological theory to do more than argue the existence of unconscious bias.

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111 *Id.* at 899, 920–21, 924–25.
112 *Id.* at 902–17.
113 *Id.* at 969–70.
114 *Id.* at 967.
115 Oppenheimer, *supra* note 110, at 939 (religious practices); 942–43 (pregnancy); 944 (disabilities); 948, 950 (racial harassment); 959, 962, 966–67 (sexual harassment).
116 *Id.* at 969–72. But see generally Amy L. Wax, *Discrimination as Accident*, 74 Ind. L.J. 1129 (1999) (arguing that unconscious bias should be addressed through an expansion of Title VII).
as something the law should address. Instead of just speaking generally about the existence of unconscious bias, Krieger articulated the specific ways in which normal cognitive functioning can lead to biased perception and decisionmaking.\(^{118}\) She then illustrated what that meant with respect to Title VII’s ability to adequately address workplace discrimination.\(^{119}\)

First, Krieger pointed out that under disparate treatment theory and, in particular, the pretext model, a defendant is assumed to have acted rationally and without discriminatory animus.\(^{120}\) However, as Krieger makes clear, psychologists have shown that “implicit knowledge structures and judgmental heuristics systematically bias perception and judgment at all points along the perceptual/judgment continuum.”\(^{121}\) Thus, decisions by those with even the best of intentions are often the result of intergroup bias.\(^{122}\) Accordingly, the insistence on only addressing discrimination where motive or intent are shown allows many instances of discrimination to go unaddressed.

Second, Krieger explained that disparate treatment theory also rests on the assumption that discrimination occurs at the moment a decision is made.\(^{123}\) However, psychological study has also demonstrated that this is not the case. Rather, interpersonal decisionmaking is an integrated process of several components that happens over time.\(^{124}\) Thus, while Title VII only addresses discrimination if intent or motive is found at the time of decision, in reality, cognitive functioning can taint the process long before the actual decision is made.\(^{125}\) Lastly, Title VII rests on the assumption that decisionmakers are aware of the basis for their decisions.\(^{126}\) However, as with the previous two assumptions, psychological research shows that this is not likely the case; in fact, the opposite may more often be true.\(^{127}\)

After showing that much of Title VII disparate treatment jurisprudence rested on faulty assumptions about human cognitive functioning and the causes of discrimination, Krieger proposed that “[t]he pretext model of individual disparate treatment [theory should] be eliminated

\(^{118}\) Id. at 1187–88.
\(^{119}\) Id. at 1211.
\(^{120}\) Id. at 1181.
\(^{121}\) Id. at 1212.
\(^{122}\) Id. at 1212–13.
\(^{124}\) Id. at 1167, 1213.
\(^{125}\) Id. at 1213.
\(^{126}\) Id.
\(^{127}\) Id. at 1213–15.
entirely and replaced with a unitary ‘motivating factor’ analysis.”  

Under a “motivating factor” analysis, a plaintiff could prevail on a disparate treatment claim by simply showing that her group status played a role—in other words, “made a difference”—in the employer’s action or decision. If the defendant were then able to show that it would have made the same decision absent the biasing effect of the plaintiff’s group status, the plaintiff would be limited to the remedies available for disparate impact cases. However, if the plaintiff could show proof of the defendant’s conscious use of group status, she would be entitled to compensatory and punitive damages as well. Thus, under this approach, the law would take account of the fact that discrimination can arise absent discriminatory intent or purposeful causation.

Like Lawrence, Oppenheimer, and Krieger, other commentators have focused on the unconscious nature of discrimination and the law’s inability to adequately address discrimination of this type. However, in so doing, these scholars have focused more on inherent structural problems that facilitate or perpetuate discrimination rather than individual cognitive or psychological processes. For example, Professor Susan Sturm has illustrated that the nature of the current workplace has changed. In most situations, gone are the days of traditional, top-down, hierarchical structures. Instead, more and more workplaces are characterized by a flatter form of decisionmaking where coworkers function as teams in increasingly mobile environments and where the lines between customers, clients, and suppliers are blurring. Because of the changes in the modern workplace, Sturm argues that the current legal system, largely based on the eroding traditional hierarchical structure, no longer allows us to adequately address the real ways that exclusion, bias, and the exercise of power effect the modern workplace. Accordingly, she proposes that we take a structural approach to antidiscrimination law. This approach would call for “a dynamic and reciprocal relationship between judicially elaborated general legal norms and
workplace-generated problem-solving approaches”\textsuperscript{137} and would embody the underlying assumption that a problem-solving process rather than a rule-enforcement approach would better address current problems in the dynamic workplace.\textsuperscript{138} In a similar vein, Professor Tristin K. Green has also argued that the modern workplace has changed and that we accordingly need a new conceptualization of discrimination that will allow us to combat these modern forms.\textsuperscript{139} Lastly, Professor Ian F. Haney López, in his insightful article \textit{Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination}, examines how inherently biased patterns and structures of decisionmaking and selection can create and perpetuate discrimination and subordination.\textsuperscript{140}

The work of the scholars discussed in this section and others like them demonstrates a shift in the understanding of discrimination, inequality, and subordination underlying our current antidiscrimination system. The following section explicates this shift as well as the difference from the traditional perspective it evidences.

\textbf{B. The Tweaking of the Traditional Perspective}

As identified earlier, the perspective underlying our current antidiscrimination system can be characterized as envisioning discrimination as something purposely or consciously done at a specific point in time on the basis of certain protected characteristics.\textsuperscript{141} It is a perspective that views equality as sameness in treatment and which largely does not countenance a proactive approach to eradicating the problem.\textsuperscript{142} It is a perspective that sees discrimination, subordination, and inequality as anomalies in an otherwise fair and rational system and as problems which can only be eradicated in the face of an identifiable tangible effect.\textsuperscript{143} The proposals for change discussed in the previous section\textsuperscript{144} evidence key shifts in this perspective, but they also show a continued

\textsuperscript{137} Sturm, \textit{supra} note 133, at 522.
\textsuperscript{138} Id. at 475–78.
\textsuperscript{141} See discussion \textit{supra} Part I.B.3.
\textsuperscript{142} See discussion \textit{supra} Part I.B.3.
\textsuperscript{143} See discussion \textit{supra} Part I.B.3.
\textsuperscript{144} See discussion \textit{supra} Part II.A.
belief in aspects of this perspective that are important as well. The following subsections highlight these differences and similarities.

1. Differences in Perspective

The first major difference between the traditional perspective and the view of scholars like those discussed above is the belief on the part of the former that while discrimination can and does occur in the form of blatant and purposeful discrimination it can, and often does, occur in subtle and unconscious or unintended ways. In fact, it was precisely the recognition that not all discrimination and inequality is purposeful that prompted many of these scholars to seek alternatives to our current system, alternatives that would address these unconscious forms of discrimination and bias.

Second, the perspective evident in these scholars’ work also differs significantly from the traditional perspective in that several of them recognize that discrimination can and does occur at points other than at the moment of action. While discrimination may be present at the moment of action or with respect to a particular action, as they highlight, bias can infect all parts of a particular situation or process.

Third, although not necessarily articulated explicitly in each of their works, several of these scholars appear to hold a view of equality that goes beyond the formal equality and colorblindness that informs the current system. A strong argument can be made, which some of these scholars have asserted, that formal equality has largely been achieved. Thus, if that were sufficient, there would be no need to put forth the kinds of proposals they have because equality would already have been achieved.

Lastly, proposals such as those put forth by Sturm and Green, which would specifically and proactively address workplace discrimination through structural change, show a willingness to address inequality and discrimination absent a clearly identifiable tangible effect. Thus, the views informing their work evidence a significant shift in the traditional perspective underlying our antidiscrimination laws.

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145 See discussion supra Part II.A.
146 See discussion supra Part II.A.
147 See supra text accompanying notes 117–140.
148 See supra text accompanying notes 117–140.
149 See discussion supra Part II.A.
150 See discussion supra Part II.A.
151 See supra notes 133–140 and accompanying text.
2. Similarities in Perspective

While the difference in perspective between these progressive scholars and the traditional view is significant, there are some important similarities as well. First, while the underlying view of equality these scholars seem to adopt appears to be more expansive than that held under the traditional perspective, it is not clear how much more expansive or different that view actually is. While it is pretty clear that formal equality, or simply equal access, without meaningful equality of result would not be enough for these scholars, they do not articulate a clear vision of what an equal and nondiscriminatory society would look like. Without that clear vision and an explanation of how their proposals do a better job of getting us to that ideal, these proposals lose some of their normative force. ¹⁵²

Second, while some of these scholars question the importance of and continued reliance on the protected categories we have in place,¹⁵³ few really question whether those categories should be primary constructs regarding the way we understand and address discrimination and inequality. Lastly, and most importantly, while perhaps not wholeheartedly holding to the belief of discrimination as anomaly,¹⁵⁴ none really challenge that belief or explore the implication for our entire antidiscrimination system if that underlying presumption is a faulty one. As a result, even with a shift in perspective and the resulting proposals for reform, key components of the perspective underlying our current system remain intact and largely go unchallenged.

The scholars discussed and cited here and others like them, through their innovative and insightful ideas and desire to address a persistent and very difficult problem, have done much to advance our understanding of inequality and subordination within our society and the law’s role in both helping to perpetuate and to eradicate the persistent problems of discrimination, subordination, and inequality. However, lack of a clearly articulated vision for what constitutes equality, or, in the converse, what constitutes inequality, as well as the absence of

¹⁵⁴ See, e.g., Haney López, supra note 140 passim (noting how racism can permeate whole systems and structures); Lawrence, supra note 70, at 330 (describing racism as “normal” and ubiquitous).
significant challenge to the anomaly assumption and the continued use of categories, points to aspects of the problem that these scholars have overlooked. Failure to recognize these aspects of the problem necessarily leads to a failure to address them and the attendant possibilities for meaningful change that addressing these aspects might present.\footnote{While I do intend to offer a perspective I believe to be different from those discussed here, with the hope that a different perspective will allow us to address aspects of the discrimination and subordination problem I feel we have not sufficiently theorized, it is not at all my intent to diminish or disparage the work of the scholars presented here. Further, I do not mean to imply, nor would I assume, that there are not other aspects to this exceedingly complex and difficult problem that I may be missing as well. It is simply my hope to add to and hopefully expand or alter the direction of the conversation.}

III. What Is Missing?

The proposals discussed above are informed by a more comprehensive and complex understanding of the problem of discrimination and subordination than the current norm, but there is a key aspect of this problem which even they are missing. This important, absent component and the attendant change in perspective it engenders are addressed below.

A. The Truth About Inequality and Discrimination in America

*It is easier for the world to accept a simple lie, than a complex truth.*
—attributed to Alexis de Tocqueville

On July 4, 1776, Thomas Jefferson, writing for a unanimous United States of America, declared:

We hold these truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness.—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.\footnote{The Declaration of Independence para. 2 (U.S. 1776).}
With this declaration we took the first steps toward forming our own country in which equality and inalienable rights were to be the bedrock of the more perfect union we sought to form. Unfortunately, the more perfect union was from the beginning built on shaky ground, at least to the extent it might guarantee and deliver on the promise of equality to all men (not to mention women).

1. Inequality Predates America

Over 100 years before the drafting of the Declaration of Independence, the seeds for our longstanding inequality, subordination, and discrimination problem were sown. Beginning as early as 1565, the first Europeans began to colonize what would eventually become the United States of America.\textsuperscript{157} Over the next several years the number of colonists grew and the need for land increased.\textsuperscript{158} At the same time, the fertility of the American soil became more apparent and the profitability of cultivating cash crops grew.\textsuperscript{159} However, the land the colonizers wanted was already occupied and the cheap labor they desired was not readily available.\textsuperscript{160} It was primarily this need for land and labor that catalyzed the subordinating regime that eventually became woven into nearly all aspects of the American fabric.

Historians have debated for decades the origins of chattel slavery in what eventually became the United States and the concomitant ideological regime of white supremacy, racism, and subordination.\textsuperscript{161} Some have argued that chattel slavery and the ideology of white supremacy

\textsuperscript{157} See Press Release, City of St. Augustine, Fla., St. Augustine Celebrates 441 Years (July 27, 2006), http://www.ci.st-augustine.fl.us/pressreleases/7_06/441-yrs-celebrate.html (noting one of the first colonies on the part of the North American continent that would become the United States was St. Augustine, Florida, founded by Spaniard Don Pedro Menendez de Avilés); see also American Discovery and Colonization Timeline, http://usa-history.info/timeline/ (last visited Mar. 29, 2007).


\textsuperscript{160} See Banner, supra note 158, at 10–20 (describing the complexity of the problem the colonists faced regarding their ability to take land from the Native Americans); Patricia Seed, American Pentimento: The Invention of Indians and the Pursuit of Riches 29–37 (2001) (describing the English view of the Americas as “idle,” unoccupied “waste” land in need of cultivation).

and nonwhite inferiority were present as early as the first record of blacks in the United States in 1619 Virginia. Others argue that the move to an ideology of racism and chattel slavery was more gradual over a longer period. Relying on records of freed blacks, the use of significant numbers of white servants, and the aversion to enslaving Christians regardless of color, these scholars argue that slavery and white supremacist ideology developed over time. Scholars in the latter camp also point to laws of that time, which present the intransigence of the slave system as something that occurred gradually. Regardless of which view one adopts, the important point is that chattel slavery and its accompanying ideology of white supremacy were firmly in place in certain areas of America as early as the 1660s and 1670s and became more firmly entrenched by the 1680s, thus predating the formation of the Union by roughly 100 years.

Similarly, the eventual belief in the right of whites to take Native American lands and to subjugate Native American people also appears to be something that developed over time without clear-cut origins. Early records appear to present a mixed view among the Europeans regarding whether the land in North America was simply theirs for the taking. Some early settlers assumed property and sovereignty rights on the basis of “discovery” of “New World” lands as though the Native Americans were not there simply because they could be conquered. Others justified the taking of land by claiming that Christians had the right, if not the duty, to take land from non-Christians. Still others justified their actions by asserting that Native Americans were a “savage” people who were not able to claim any property rights.

162 Id. at 26.
163 See id. at 26–32.
164 Id. at 27–28, 44.
165 Blackburn, supra note 159, at 219 (stating that there was a period of twenty to eighty years in which “English servants filled the plantation colonies and comprised the principal workforce”).
166 Vaughan, supra note 161, at 43.
167 See generally id.
169 See id. at 32–40.
170 See Banner, supra note 158, at 10–20.
171 E.g., id. at 12–14.
172 Id. at 14–15, 17–18.
173 Id. at 16.
174 Id. at 18–19.
Be that as it may, there were many others, although by no means a unanimous group, who believed that the Native Americans did in fact own the land they occupied and that, at the very least, such land had to be acquired by purchase; it could not be taken without consent under English law. However, a belief in Native American land ownership was not necessarily accompanied by a belief in the equality of Native Americans. Nor was it void of a self-serving purpose on the part of the colonists for, ironically, the same laws that would have recognized land possession by the Native Americans were also the same laws that protected property rights in the claims made by the colonizers. Thus, while some North American colonizers may have recognized Native American property rights, they did so while at the same time viewing Native Americans as barbaric and uncivilized and rarely questioning their right to take Native American land. Further, as the number of colonizers increased and the need for land grew, more and more land was taken without even the fiction of purchase.

In sum, the initial foundation for the United States grew out of the acquisition of land by European colonizers on the North American continent and the ability to make that land commercially productive through the use of cheap labor. Acquiring that land for next to nothing and forcing people to work it for free required the development of an ideology that allowed for and justified the subordination and subjugation of groups of “others.” Thus, the seeds of inequality and subordination were sown into the American foundation long before 1776 and have only grown and matured since that time.

2. The Framer’s View of Equality

Despite the fact that at its inception the United States was declared a nation of equals, the reality was that the ideology of white male supe-

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175 BANNER, supra note 158, at 16–17, 23. Indeed, there is evidence of many purchases made in colonial times under this latter theory. Id. at 24–29.

176 Id. at 42.

177 Id. at 41 (“To suggest that the Indians were not property owners would have been to upset the settled expectations of a large number of English property owners, who would suddenly have found their land titles open to question.”).


179 BANNER, supra note 158, at 35.

180 BLACKBURN, supra note 159, at 235 (explaining how the “voracious demand for plantation products” eventually forced the use of slave labor).
Priority was alive and well before the nation’s founding, and permeated all aspects of American life despite declarations to the contrary. As Chief Justice Taney explained (more honestly than most):

In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument. . . .

. . . .

[Paragraph two of the Declaration of Independence] would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration . . . .

. . . .

[The Framers] perfectly understood the meaning of the language they used, and how it would be understood by others; and they knew that it would not in any part of the civilized world be supposed to embrace the negro race . . . . 181

Chief Justice Taney’s interpretation is supported by other historical documents and commentary of the time. 182 For while some of the founders may have been ambivalent, opposed to slavery, or even accepting of blacks as men, they certainly did not see blacks as equal to whites. 183

Thus, despite the principles upon which this country was founded, equality as viewed by the founders only included white men, and even then only white men with property and status. Poor people of all kinds, women generally, and anyone not considered white in particular were thought to be unequal and relegated to a subordinate status. 184 Any doubts as to whether the founding fathers subscribed to these beliefs

183 E.g., id. (describing the views of Thomas Jefferson).
are belied by many of their actions, for who can own another man or woman and hold that person in bondage or servitude and at the same time see that person as equal? There are some scholars and historians who are quick to point out that, despite these shortcomings, the founders were not nearly as bad or as hypocritical as they are depicted in modern scholarship. However, even if the founders on some level did believe in the equality of all human beings, the need to make a profit on the backs of free labor superseded that belief. Further, the continuation of slavery and the belief in white superiority in the face of a bold declaration to the contrary meant the country would be founded on the basis of an inherent contradiction, and the subordination and inequality would continue, endure, and become part of the fundamental social fabric of America.

3. Inequality and Subordination Are Embedded in the American Government Structure

In the same way that subordination and inequality were part and parcel of the foundation of this country and the views of the founders, they were also embedded into our structure of government and system of laws. The preeminent legal document in this country, the U.S. Constitution, did not affirmatively allow women to vote until 1920, thus al-

\[185\] E.g., Thomas G. West, Vindicating the Founders: Race, Sex, Class, and Justice in the Origins of America, at xi–xv (1997).

\[186\] See Davis, supra note 182, at 196.

Would any one believe that I am Master of Slaves of my own purchase! I am drawn along by ye general Inconvenience of living without them; I will not, I cannot justify it. However culpable my conduct, I will so far pay my devoir to Virtue, as to own the excellence & rectitude of her Precepts & to lament my want of conformity to them.

Letter from Patrick Henry to Robert Pleasants (Jan. 18, 1773), in George S. Brookes, Friend Anthony Benezet 443 (1937), quoted in Davis, supra note 182, at 196.

Jefferson’s record on slavery can only be judged by the values of his contemporaries and by the consistency between his own professed beliefs and actions. . . . One can understand and sympathize with his occasional feelings of despair, as when he wrote in 1820 that “we have a wolf by the ears, and we can neither hold him, nor safely let him go. Justice is in one scale, and self-preservation in the other.” But for Jefferson the scale tipped heavily toward self-preservation, which meant the preservation of a social order based on slavery.

lowing for the disenfranchisement of over half of the population from the beginning.\footnote{187} Similarly, the Constitution provided for the protection of slavery, be it directly or indirectly, in at least twelve places,\footnote{188} and several other constitutional clauses ultimately served to protect the institution when they were interpreted by the courts or implemented by the executive.\footnote{189}

Accordingly, the “more perfect Union” the document was meant to form excluded or subordinated the majority of the individuals in that Union.\footnote{190} Significant changes made nearly a century later in the form of the Thirteenth, Fourteenth, and Fifteenth Amendments helped lessen the problems of inequality and subordination, but those amendments have not been able to eradicate the inequality and subordination embedded at formation. This is due in no small part to the restrictive way in which the U.S. Supreme Court interpreted those sections shortly after their passage.

First, while the Thirteenth Amendment effectively abolished slavery, the Supreme Court interpreted that amendment in such a way that it did little more than remove the shackles. When interpreting the amendment in the \textit{Civil Rights Cases},\footnote{191} the Supreme Court made it clear that the incidents of slavery and servitude that the Thirteenth Amendment was meant to eradicate extended only to instances of “[c]ompulsory service . . . for the benefit of the master, restraint of . . . movement[,] except by the master’s will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities.”\footnote{192} Consequently, the Court refused to accept the plaintiffs’ argument that denial of equal accommodations and privileges constituted subjection to a species of servitude as contemplated by the Amendment.\footnote{193} Stating clearly that “[m]ere discriminations on account of race or color were not regarded as badges of slavery,”\footnote{194} the Court struck down the Civil Rights Act of 1875 and greatly narrowed the scope of the Thirteenth Amendment,\footnote{195} pointing out that:

\footnote{187} U.S. Const. amend. XIX.
\footnote{189} \textit{Id.} at 426.
\footnote{190} U.S. Const. pmbl.
\footnote{191} 109 U.S. 3 (1883).
\footnote{192} \textit{Id.} at 22.
\footnote{193} \textit{Id.} at 23–25.
\footnote{194} \textit{Id.} at 25.
\footnote{195} \textit{Id.}
[t]here were thousands of free colored people in this country before the abolition of slavery . . . yet no one . . . thought that [slavery] was any invasion of his personal status as a freeman because he was not admitted to all the privileges enjoyed by white citizens, or because he was subjected to discriminations in the enjoyment of accommodations in inns, public conveyances and places of amusement . . . .

Thus, while technically free, the recently freed slaves remained in a subordinated status as many of the “badges” of slavery remained intact.

The Fourteenth and Fifteenth Amendments fared little better. In the *Slaughter-House Cases*, the Court applied an extremely strict view of state versus national citizenship in asserting that citizenship of the United States was distinctly different from citizenship of the several states, and therefore section one of the Fourteenth Amendment referred only to citizens of the United States. Accordingly, the Fourteenth Amendment did not protect the privileges and immunities found to fall within the purview of state power. The Court then defined state power as encompassing “nearly every civil right for the establishment and protection of which organized government is instituted.”

In so doing, it effectively read the Privileges and Immunities Clause out of the Fourteenth Amendment and made it a nullity for all time.

Given that at least some of the framers of the Fourteenth Amendment intended the Privileges and Immunities Clause to “protect basic rights from state interference,” the Supreme Court’s refusal to give it any meaningful content was no insignificant act in keeping subordination and inequality embedded in the Constitution. In a similar vein, the reach of the Equal Protection and Due Process clauses were similarly limited from the outset by the Court’s ruling that they too only applied to state action, and by the Court’s determination that equality meant simple, formal equality before the law rather than equality in fact.

Additionally, the backlash to the Court’s strict adherence to freedom of contract doctrine, which served to protect certain classes to the detri-

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196 *Id.* *See The Civil Rights Cases*, 109 U.S. at 25.
197 *83 U.S. (16 Wall.) 36, 74 (1873).*
198 *Id.* at 76.
199 Erwin Chemerinsky, *The Supreme Court and the Fourteenth Amendment: The Unfulfilled Promise*, 25 Loy. L.A. L. Rev. 1143, 1144 (1992) (“Through judicial interpretation, the Court has rendered the Privileges or Immunities Clause a nullity.”).
200 *Id.* at 1145.
ment of others, ultimately led to a reluctance to use substantive due process to address the deprivation of many rights.\textsuperscript{203}

For similar reasons the Fifteenth Amendment was no more helpful than its counterparts. In construing the reach of the Fifteenth Amendment, the Supreme Court once again took an extremely restrictive approach that essentially made the Fifteenth Amendment ineffectual in securing for African Americans and other people of color the right to vote for several decades. In \textit{United States v. Reese}, the Court stated that the Fifteenth Amendment did not actually confer the right of suffrage, but only created the right of an “exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous conditions of servitude.”\textsuperscript{204} It confirmed that view in \textit{United States v. Cruikshank}.\textsuperscript{205} Thus, the Supreme Court opened the door for the many methods of disenfranchisement that would follow; it effectively condoned the behavior at issue in both of those cases, such as refusing to accept William Gartner’s payment of the tax necessary to vote in \textit{Reese},\textsuperscript{206} and permitting the banding together with the intent to injure, threaten, and intimidate Levi Nelson and Alexander Tillman in \textit{Cruikshank}.\textsuperscript{207}

Ironically, even if the Supreme Court had read the Fifteenth Amendment in such a way as to make it effective, the Court still would have only allowed men to vote.\textsuperscript{208} Thus, all women (regardless of color or social status) would still have been disenfranchised, and the accompanying subordination would have still been embodied in our national Constitution. As a result, even with these attempts to rectify its shortcomings, subordination and inequality still remain embodied in the U.S. Constitution and have continued to be embedded in the very foundations of our country.

4. Inequality and Subordination Are Embedded in Our Major Institutions

Whether or not one can say for certain that inequality was embedded in our major social institutions prior to the end of the Civil War, one can certainly argue that such was the case after the Civil War and the end of Reconstruction. Examining closely the time following the

\begin{footnotesize}
\textsuperscript{203} Chemerinsky, \textit{supra} note 199, at 1150–51.
\textsuperscript{204} 92 U.S. 214, 218 (1875).
\textsuperscript{205} 92 U.S. 542 (1875).
\textsuperscript{206} 92 U.S. at 223–25 (Clifford, J., dissenting).
\textsuperscript{207} 92 U.S. at 548–49.
\textsuperscript{208} See generally \textsc{Jeff Hill}, \textit{Defining Moments: Women’s Suffrage} (2006).
\end{footnotesize}
end of Reconstruction up until the passage of the 1964 Civil Rights Act, one can see how the decision in *Plessy v. Ferguson*\(^\text{209}\) and the cementing of de facto and de jure segregation across the United States caused inequality to become entrenched in almost all major social, political, and governmental institutions in the United States. While a complete accounting of how this happened in various parts of society is beyond the scope of this article, what follows are a few highlights that demonstrate the degree to which inequality and subordination became embedded in nearly every aspect of American life.

a. *Politics and Voting*

As early as 1790, through the Naturalization Act, the founding fathers limited eligibility for naturalized citizenship to free white people, who more often than not were men.\(^\text{210}\) Thus, nonwhite immigrants, slaves, and Native Americans were excluded from the beginning.\(^\text{211}\) Yet during the time of Reconstruction, there was a rise in black enfranchisement, voting, and political participation, though these trends did not last long.\(^\text{212}\) The rise of the Ku Klux Klan and other similar groups that used violence to intimidate blacks and sympathetic whites helped keep their victims from the polls and out of political activity.\(^\text{213}\) Furthermore, several states used a variety of legal means to limit black’s participation in the political process; poll taxes, white primaries, and other mechanisms such as literacy tests and grandfather clauses resulted in the widespread disenfranchisement of blacks.\(^\text{214}\) While many of these provisions and tactics were not race specific, their purpose was clear and they resulted in a system rife with intentionally built-in inequity meant to subordinate whole groups of people.\(^\text{215}\) While the civil rights movement, the passage of the 1964 Civil Rights Act\(^\text{216}\) and 1965

\(^{209}\) 163 U.S. 537 (1896). In this case, the U.S. Supreme Court found a Louisiana law providing for the segregation of railway trains constitutional under both the Thirteenth and Fourteenth Amendments, and thus sanctioned such laws across the South, opening the door for widespread legally sanctioned segregation. *See id.*

\(^{210}\) *Juan F. Perea et al.,* *Race and Races: Cases and Resources for a Multiracial America* 583 (2000).

\(^{211}\) *Id.* at 583–84.

\(^{212}\) *See supra* notes 15–18 and accompanying text.

\(^{213}\) *See Michael J. Cassity,* *Legacy of Fear: American Race Relations to 1900,* at 151–55 (1985) (excerpting testimony before a Congressional Joint Select Committee of a Klan victim during Reconstruction); *see also supra* notes 19–21 and accompanying text.

\(^{214}\) *Bell,* *supra* note 15, at 478–82; *Woodward,* *supra* note 15, at 83–85.

\(^{215}\) *See Bell,* *supra* note 15, at 481.

Voting Rights Act\textsuperscript{217} helped alleviate many of these past problems, the widespread disenfranchisement, lack of political participation, and political inequity affecting blacks are still persistent problems today.\textsuperscript{218}

\textbf{b. Employment, Housing, Education, Healthcare, and the Criminal Justice System}

Inequity in employment has long and deep roots in the United States.\textsuperscript{219} Beginning with the system of slavery, inequity in employment has been a continuous problem.\textsuperscript{220} Traditionally, the best jobs were reserved for white males while lower-paying, unskilled positions were left for women and people of color.\textsuperscript{221} This was accomplished through several measures including blatant refusals to hire;\textsuperscript{222} the barring of women and people of color from certain types of jobs within the workforce;\textsuperscript{223} refusals to train so that minorities could not acquire the skills necessary for the job; and by prohibiting the joining of a union, membership of which was sometimes required to enter a particular profession or trade.\textsuperscript{224} As a result of these measures, the means by which one might earn a living and accumulate wealth were largely foreclosed either explicitly by law or implicitly by custom.\textsuperscript{225}

\begin{itemize}
\item \textsuperscript{218} \textsc{Lucius J. Barker & Mack H. Jones}, \textsc{African Americans and the American Political System} 69–73, 84–85 (3d ed. 1994) (noting that, while voter registration has improved since the Voting Rights Act (VRA) became law, blacks have had little effect on policy and there are still relatively few black elected officials and political groups); \textsc{Lani Guinier}, \textsc{The Tyranny of the Majority} 7–12 (1994) (describing post-VRA attempts in some states to dilute black political power through redistricting schemes and manipulation of legislative voting procedures).
\item \textsuperscript{219} \textit{See} Bell, \textit{supra} note 15, at 618–619.
\item \textsuperscript{220} Id.
\item \textsuperscript{221} Id.
\item \textsuperscript{222} \textit{See} Griggs v. Duke Power Co., 401 U.S. 424, 426\textsuperscript{27} (1971) (describing a workforce where, until the passage of the Civil Rights Act of 1964, the company openly discriminated on the basis of race in hiring and assigning employees such that the highest paying jobs were reserved for whites only).
\item \textsuperscript{223} Albermale Paper Co. v. Moody, 422 U.S. 405, 409 (1975); Griggs, 401 U.S. at 426–27.
\item \textsuperscript{225} Daria Roithmayr, \textit{Barriers to Entry: A Market Lock-In Model of Discrimination}, 86 Va. L. Rev. 727, 734 (2000) (arguing that “white dominance in legal education and employment” can be understood as “the product of a locked-in, culturally specific network standard that favors whites” that grew out of “anticompetitive conduct by whites during the segregation era”).
\end{itemize}
Housing was no different. Redlining, discriminatory lending policies, restrictive covenants, and even realtors’ refusal to show certain people houses or rent-available units in a given location meant that even those who had the economic means to live anywhere still were often not able to do so. Such inequality and subordination were also embedded in the education system. As *Brown v. Board of Education*, its predecessor cases, and its progeny made clear, unequal education was the purposeful norm in the United States. While perhaps improving in recent years, segregated and unequal schools continue to be the norm in many parts of the country.

This widespread inequality and embedded subordination continues to permeate other major social institutions as well. For example, until the important decision in *Simkins v. Moses H. Cone Memorial Hospital* and the passage of Title VI of the 1964 Civil Rights Act, segregated healthcare on all levels was the norm throughout America. While segregated medical facilities are largely a thing of the past, the

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228 Roy L. Brooks et al., *Civil Rights Litigation: Cases and Perspectives* 299–301 (2d ed. 2000) (describing (1) “smiling discrimination” where, for example, an African American person may be told there is no unit available for rent while a white person will be given the vacancy or be informed that the unit will be available the following day, and (2) “steering,” a process whereby “real estate agents deliberately direct[] African Americans to minority or mixed neighborhoods and whites to predominantly white neighborhoods”); Johnson, *supra* note 226, at 1612 (speaking of discriminatory action “on the part of realtors and other private actors in the real estate industry [as] a major causative factor” in creating and maintaining ghettos).


inability to access quality healthcare on the part of the poor and minorities remains.\textsuperscript{236}

Furthermore, the inequality inherent in the criminal justice system is legendary, and has been addressed at length in several articles and books by a range of scholars.\textsuperscript{237} The system has been repeatedly used to criminalize certain kinds of behavior that differentially impact minorities primarily as a tool to subdue them.\textsuperscript{238} For example, during the time of slavery, criminal statutes barred slaves from the following:

\begin{itemize}
  \item Learning to read, leaving their masters’ property without a proper pass, engaging in “unbecoming” conduct in the presence of a white female, assembling to worship outside the supervisory presence of a white person, neglecting to step out of the way when a white person approached on a walkway, smoking in public, walking with a cane, making loud noises, or defending themselves from assaults.\textsuperscript{239}
\end{itemize}

These same laws allowed for more severe punishments for crimes committed by slaves as opposed to those committed by whites.\textsuperscript{240} Similarly, after the Civil War, the Black Codes that spread throughout the South criminalized several forms of innocent conduct.\textsuperscript{241} Although presumably neutral on their face, these Codes were enforced only against blacks with the intent that whites would be able to dominate blacks and return them to a position reminiscent of slavery.\textsuperscript{242} Thus, even when laws were stated to appear as if they applied equally to everyone, they


\textsuperscript{237} To understand the voluminous nature of this work one need only run a search on an articles database, or in a library catalogue using keywords such as “race,” “crime,” and “inequality.”

\textsuperscript{238} RANDALL KENNEDY, RACE, CRIME, AND THE LAW 76 (1997).

\textsuperscript{239} Id.

\textsuperscript{240} Id. at 76–77.

\textsuperscript{241} Id. at 84–85; SINCLAIR, supra note 12, at 61–62.

\textsuperscript{242} KENNEDY, supra note 238, at 86 (“Although this and other vagrancy statutes were silent as to race, their authors intended and assumed that they would be applied principally, if not exclusively, against Negroes.”); SINCLAIR, supra note 12, at 59. Kennedy also notes that many such laws were invalidated, repealed, or ignored during Reconstruction. KENNY, supra note 238, at 86.
have been enforced differentially.\textsuperscript{243} The racially biased criminalization of certain behaviors, differential enforcement of crimes, and the failure to guarantee fair and unbiased trials are all problems that persist today.\textsuperscript{244} Accordingly, from housing to education, employment to the criminal justice system, and nearly every institution in between, inequality, and subordination have been embedded into the structures and systems at nearly every level of American society for hundreds of years, and they persist to the present day.

5. Inequality and White Supremacy Are Entrenched in American Culture

If one defines culture as consisting of the customary beliefs and social forms of a social group,\textsuperscript{245} then subordination and inequality are embedded in American culture, attitudes, and beliefs as well. As previously discussed, this country was founded on the ideology of white supremacy.\textsuperscript{246} Inherent in the ideology of white supremacy is the concomitant ideology of the inferiority of everyone else. The degree to which this ideology permeated and continues to permeate the thoughts and beliefs of the vast majority of Americans is formidable, but a few stark examples are sufficient for the present discussion. Chief Justice Taney’s opinion in \textit{Dred Scott} is once again helpful, since he stated clearly:

[Negroes] had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every

\textsuperscript{243} \textit{E.g.}, McClesky v. Kemp, 481 U.S. 279 (1987); \textsc{Marc Mauer}, \textsc{Race to Incarcerate} 142–46 (rev. ed. 2006) (discussing racial bias in prosecuting and sentencing).

\textsuperscript{244} \textit{Mauer}, \textit{supra} note 243, at 130–56.

\textsuperscript{245} \textsc{Webster’s Collegiate Dictionary} 304 (11th ed. 2004); \textit{see also Serena Nanda, Cultural Anthropology} 467 (5th ed. 1994).

\textsuperscript{246} \textit{See discussion supra} Part III.A.1–2.
grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.

And in no nation was this opinion more firmly fixed or more uniformly acted upon than by the English Government and English people.247

Lest we believe that such beliefs are only held by hardcore racists, a couple of other examples are also informative. For example, President Lincoln, often revered and remembered for having freed the slaves,248 certainly did not imagine that they would become full and equal members of society when he stated:

I will say then that I am not, nor ever have been in favor of bringing about in any way the social and political equality of the white and black races—that I am not nor ever have been in favor of making voters or jurors of negroes, nor of qualifying them to hold office, nor to intermarry with white people, and I will say in addition to this that there is a physical difference between the black and white races which I believe will for ever forbid the two races living together on terms of social and political equality. And inasmuch as they cannot so live, while they do remain together there must be the position of superior and inferior, and I as much as any other man am in favor of having the superior position assigned to the white race.249

In a similar vein, Justice Harlan in his famous dissent in *Plessy v. Ferguson*, where he forthrightly declared that “[o]ur Constitution is color-blind,” took great pains to point out in the next breath that this colorblindness did not mean in reality that the races were equal when he stated:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue

248 Although often credited as the document that freed the slaves, a close reading of the Emancipation Proclamation indicates that it only freed those slaves held in states “in rebellion against the United States.” Abraham Lincoln, A Proclamation (Jan. 1, 1863), reprinted in 12 Stat. app. at 1268, 1268.
to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty.\footnote{250} And if one questioned his view that nonwhite races were different and likely inferior, Justice Harlan’s comments regarding those of Chinese descent are also illustrative: “There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race.”\footnote{251}

While such blatant statements of white supremacist beliefs made in mixed company may be largely a thing of the past, it is not clear that such sentiments have entirely faded. Recent psychological studies show that while the vast majority of white Americans outwardly express attitudes evidencing a belief in equality, when put to the test, those same people may not actually embrace those beliefs to the extent they profess.\footnote{252}

A recent study in sociology lends further support to these findings.\footnote{253} In this study, college students on a predominantly white campus in the Mountain West were asked to keep journals as part of a larger national study that sought to document the national atmosphere of racism on college campuses.\footnote{254} Specifically, these students were asked to document racist events in classes, on the university campus, and in the communities in which they found themselves.\footnote{255} The researchers envisioned racism as living along two dimensions: traditional racism, which embodies acts of blatant racism, such as burning a cross or killing a person because of skin color, that nearly everyone would agree are racist, and liberal racism, which can be considered discrimination in its more subtle and unconscious forms.\footnote{256} The researchers then classified the 951 entries that became part of the study into four categories, two falling under the rubric of traditional racism and two falling under the

\footnote{250} Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).
\footnote{251} Id. at 561.
\footnote{252} See, e.g., Dovidio & Gaertner, supra note 37, at 4 (“[M]any of the people who are part of the 85%-90% of the white population who say and probably believe that they are not prejudiced may nonetheless be practicing a modern, subtle form of bias.”); see also discussion supra Part II.A (discussing the modern, subtle, and unconscious forms of bias).
\footnote{253} See generally Margaret M. Zamudio & Francisco Rios, From Traditional to Liberal Racism: Living Racism in the Everyday, 49 Soc. Persp. 483 (2006).
\footnote{254} Id. at 488.
\footnote{255} Id. The study, which lasted a year, collected eighty-seven journals with 1263 entries, though only sixty of the journals met the study protocols. Id. These sixty journals contained the 951 entries used in the study. Id.
\footnote{256} Id. at 486–87.
rubric of liberal racism. They labeled the first of the traditional racism categories “no doubt” racism. This category consisted of incidents evidencing behavior over which there would be little disagreement on the fact that it was racist. They labeled the second traditional category “segregationist racism,” and in that category they put instances of “marked attempts to distance people of color from whites.” The other two categories, which they labeled “Revisionist Racist Narratives” and “Equal Opportunity Racism” fell under the liberal racism rubric. What was most striking about the results of this study was the fact that the incidents recorded in the student journals evidenced “no doubt” racism three times more often than its liberal counterparts, thus directly calling into question the prevailing notion that blatant forms of racism are an infrequent thing of the past. Apart from these more formal studies, it is easy to find personal anecdotes reflecting these same residual subordinating beliefs.

The categories by which we classify people in this country and place them in inferior and subordinated status groups are so entrenched and so much a part of the culture that they have become more than the norm; rather, the nature of embedded inequality and the way we perpetuate it is virtually invisible to most of us. Attendant to the unconscious and invisible bias in our culture is an unawareness towards the privileges experienced by those who sit on the top of the American hierarchy, a set of privileges weighed in favor of particular groups and established in such a way as to keep the hierarchy in

257 Id. at 490.
258 Zamudio & Rios, supra note 253, at 490.
259 Id. at 490–93.
260 Id. at 493. For example, in one instance of reported segregationist racism, a nineteen-year-old female related that her father made clear that he only wanted her dating white men. Id.
261 Id. at 490, 495–98.
262 Zamudio & Rios, supra note 253, at 490.
263 For example, a manager of a roofing company in Cheyenne, Wyoming has had potential customers on more than one occasion state that they did not want “Mexicans” installing their roofs. Interview with Richard Birdslley, Manager, Swede’s Roofing, in Cheyenne, Wyo. (July 5, 2006).
264 See discussion supra Part II.A. For reports on psychological experiments that further demonstrate the unconscious nature of our biases and the embedded nature by which we classify people, see Prejudice, Discrimination, and Racism, supra note 97; Stereotypes and Prejudice, supra note 97; Susan T. Fiske, Stereotyping, Prejudice, and Discrimination, in Gilbert et al., Handbook, supra note 97, at 357; Judith A. Howard & Daniel G. Renfrow, Social Cognition, in Delamater, Handbook, supra note 99, at 259.
Thus, inequality and subordination are woven throughout all facets of our culture whether we realize and acknowledge them or not. Equality is not the norm in America; it is the anomaly.

B. The Perspective Derived from the Truth

By acknowledging America’s discriminatory past and recognizing that such historical inequality and subordination remains embedded in American society, the shift in perspective becomes obvious. If inequality permeates all aspects of our lives and we all participate in American culture, society, and institutions in ways that help perpetuate that problem, then to eradicate inequality, the focus should not be finding individual bad actors who have deviated from a hopefully clear-cut norm or better holding accountable those individuals who discriminate intentionally. Instead, we need to ask ourselves: how do we recognize or identify the thought processes and social institutions that create and perpetuate inequality and, once identified, how do we change them to eradicate the problem.

As an example of how this perspective differs, let us look more closely at *Wards Cove Packing Co. v. Atonio*. The case involved two companies that operated salmon canneries in remote areas of Alaska. Jobs at the canneries were of two types, “cannery jobs” and “noncannery jobs.” Most noncannery jobs were classified as skilled positions and were filled with predominantly white workers hired during the winter months in the cannery offices in Washington and Oregon. The cannery jobs were largely unskilled and filled predominantly with nonwhites hired locally either in villages near the cannery locations or through Local 37 of the International Longshoremen Workers Union. Nearly all of the noncannery jobs paid more than the cannery positions and, further, the noncannery and cannery workers were housed in separate dormitories and ate in separate mess halls.

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266 See generally Judith C. Blackwell et al., Culture of Prejudice (2003).


268 Id. at 646.

269 Id. at 647.

270 Id.

271 Id.

272 Wards Cove, 490 U.S. at 647.
r raced disparity between these two positions was enough to cause the Ninth Circuit Court of Appeals to rule that the plaintiffs had established a prima facie case of disparate impact. However, a majority of the U.S. Supreme Court disagreed. In holding that the plaintiffs failed to establish a prima facie case of disparate impact, the Supreme Court explained that the Ninth Circuit improperly focused its inquiry. Rather than comparing sectors within a workforce for disparity as did the Ninth Circuit, the Supreme Court majority stated that the proper inquiry was between “the racial composition of the [at-issue jobs] and the racial composition of the qualified . . . population in the relevant labor market.” The Court went on to say that “[i]f the absence of minorities holding such skilled positions is due to a dearth of qualified nonwhite applicants (for reasons that are not petitioners’ fault), petitioners’ selection methods or employment practices cannot be said to have had a ‘disparate impact’ on nonwhites.” The Court then concluded that if one allowed a within-workforce comparison to form the basis for liability, the inevitable result would be the use of racial quotas, a result the Court determined was far from the intent of Title VII. The Court stated further that

[a]s long as there are no barriers or practices deterring qualified nonwhites from applying for noncannery positions, if the percentage of selected applicants who are nonwhite is not significantly less than the percentage of qualified applicants who are nonwhite, the employer’s selection mechanism probably does not operate with a disparate impact on minorities.

The majority’s adherence to the traditional perspective is evident in this decision, as are the limits of that perspective in identifying and rooting out disparity and inequality. As previously identified in this article, the traditional perspective has five important components: (1) purposeful, intentional, or consciously committed act; (2) motivation based on a protected category; (3) the assumption that equality exists if

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273 Id. at 648–49. The plaintiffs also brought disparate treatment claims but lost with respect to those claims in both lower courts; they were not pursued at the Supreme Court level. Id. at 645–46, 649 n.4.
274 Id. at 650–51.
275 Id. (alteration in original) (internal quotation omitted).
276 Id. at 651–52 (footnote omitted).
277 Wards Cove, 490 U.S. at 652.
278 Id. at 653 (citation omitted).
everyone is treated the same; (4) the presumption of inequality as an abnormality; and (5) the need for a tangible effect.\footnote{279} That the plaintiffs in \textit{Wards Cove} fit into the protected category of race was obvious and not contested, as was the idea of tangible effect, for if plaintiffs were denied certain jobs on the basis of their race the tangible effect of the canneries’ actions would also be obvious. The Court’s reliance on notions of “same treatment equals equality” is evidenced by the majority’s indication that as long as there were no barriers or practices serving as a deterrent, there was likely no liability.\footnote{280}

While the Court did not focus on intent, since it characterized the case from the beginning as a disparate impact case, the ideas of intent—purposeful and conscious action that brings about a result—still informed its decision.\footnote{281} Even though the majority did not look for an intentional actor per se, the Court still relied on notions of “intent equals culpability” in reaching its decision.\footnote{282} The above quote illustrates this as the Court explicitly states that if there is a dearth of qualified applicants for reasons that are not petitioner’s fault, then there is no disparate impact.\footnote{283} The majority’s reliance on notions of intent is also illustrated by the canneries’ use of Local 37, a predominantly nonwhite local union, in hiring nonwhite cannery workers. In that section of the opinion, the majority explained that the problem was not that nonwhites were underrepresented in noncannery positions due to the hiring practices of the employers, but rather that nonwhites were overrepresented in the cannery positions because of the use of Local 37 to fill those positions.\footnote{284} Thus, the problem lay not with the employer but with the fact that minorities were overrepresented in the union.\footnote{285} In other words, the majority concluded that there was no problem with the selection of noncannery workers, despite the fact that very few minorities held those positions; it just might appear so because too many cannery workers were minorities as a result of the composition of the union, not because of any purposeful or intentional action on the part of the employer.\footnote{286} One can clearly see the majority’s belief that inequality was the abnormality rather than the norm and, unless clearly

\footnote{279}{See supra text accompanying notes 70–96.}
\footnote{280}{See supra note 278 and accompanying text.}
\footnote{281}{\textit{Wards Cove}, 490 U.S. at 651 n.7, 652.}
\footnote{282}{Id.}
\footnote{283}{See supra note 276 and accompanying text.}
\footnote{284}{\textit{Wards Cove}, 490 U.S. at 654–55.}
\footnote{285}{Id.}
\footnote{286}{Id.}
proven otherwise, the employer benefited from the presumption of legitimacy and equality.287 Thus, because of its adherence to the traditional view and its focus on the basis for comparison, the majority was unwilling to sustain a prima facie disparate impact claim for the plaintiffs.

This case would be addressed much differently under the new perspective proposed in this article. Under this new perspective, the fact that the canneries in Wards Cove exhibited such disparities would be enough to justify an inquiry into the situation. The aim would be to try to identify what mechanisms or structures were causing the discriminatory effect. In this case, it would appear, as the plaintiffs alleged, that it was possibly a combination of practices such as “nepotism, a rehire preference, a lack of objective hiring criteria, separate hiring channels, [and] a practice of not promoting from within” the canneries that caused the discrepancy.288 Under this new perspective, the task would then be to examine each of those practices to see if they contributed to a stratified workforce. Put another way, one might inquire as to whether less disparity could be achieved if some or all of the mechanisms and structures used in hiring were changed. Once the nature of the problem is identified in that way, the next step is to discern how it can be addressed in a cost effective manner. Perhaps the canneries could simply seek applicants for all positions both locally and out of state to eliminate the separate hiring channels, enact a policy outlawing nepotism, or seek to employ objective hiring criteria when selecting applicants for a position.289

This example illustrates the advantages of approaching discrimination problems from this new perspective. First, it allows us to address unconscious or structural bias without the difficulty of having to specifically prove it under the existing Title VII rubrics. Second, and more importantly, it allows us not only to address that one instance of dis-

287 The fact that the majority viewed inequality as an abnormality is highlighted by Justice Blackmun’s dissenting opinion in which he questioned “whether the majority still believes that race discrimination—or, more accurately, race discrimination against non-whites—is a problem in our society, or even remembers that it ever was.” Id. at 662 (Blackmun, J., dissenting).

288 Id. at 647–48 (majority opinion).

289 It may seem obvious that addressing the problem as proposed here may not be best accomplished through use of an adversarial court proceeding. That is why I intend to argue in the third article in this series for an alternative mechanism of dispute resolution in this area that will allow the type of back and forth collaboration necessary to identify these types of problems and seek meaningful solutions to them. For a similar approach, see supra notes 133–138 and accompanying text.
carnation, but it allows us to change beneficially the underlying structure even absent the need for a difficult finding of fault.

C. How This New Perspective Would Change Our Approach to Antidiscrimination Law

Approaching inequality, subordination, and discrimination from the perspective proposed here would hopefully allow us to address certain aspects of these problems in ways never before attempted. The following subsections illustrate what those different approaches could be.

1. The Ability to Theorize Around Whole Structures

Because our current system only examines specific actors in specific instances of time and assigns liability based on poor motives, the only aspect of the large inequality problem it can address is what happens in that one point in time. For example, in the recent affirmative action cases of Gratz v. Bollinger and Grutter v. Bollinger, the Supreme Court reviewed the affirmative action admissions policies of the University of Michigan’s undergraduate and law school programs. In both cases there was really no question that both the undergraduate and law school programs resorted to various affirmative action measures as a way to address underrepresentation of minorities in their schools. In evaluating the constitutionality of both programs, the Supreme Court applied strict scrutiny, stating, “We have held that all racial classifications imposed by government ‘must be analyzed by a reviewing court under strict scrutiny.’” In Gratz, the Supreme Court struck down the undergraduate admissions program based on the fact that it did not find the admissions programs to be narrowly tailored to the school’s interest in creating a diverse student body; it did not reach the question of whether diversity is a compelling state interest. However, the Court in Grutter did reach that question by determining first that diversity is a compelling state interest, and then finding the

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290 See supra notes 92–94 and accompanying text.
293 Gratz, 539 U.S. at 253–54; Grutter, 539 U.S. at 315–16.
295 Gratz, 539 U.S. at 270–76.
296 Grutter, 539 U.S. at 327–33.
Michigan Law School admissions program sufficiently narrowly tailored to that interest.\textsuperscript{297}

What is important for purposes of the present discussion is the fact that, in both instances, the Court focused solely on the actions of the University of Michigan and the question of whether the school had impermissibly considered race in conducting the admissions programs.\textsuperscript{298} At no point did the Court address the underlying structural reasons why minorities might be underrepresented, staying true to the current system of examining individual discriminatory offenses. However, even if the Supreme Court allows affirmative action programs as it did in the case of Michigan’s law school, the continuation of such programs does not necessarily address the underlying disparities causing the problem in the first place.

In contrast, an approach that starts from the perspective advocated in this article would allow us to do more than look narrowly at the specific actions of the University of Michigan. Starting from the premise that the underrepresentation of minorities in admission to higher education is likely due to the vestiges of our historical perpetuation of embedded discrimination and subordination instead of asking the question of whether race was impermissibly used as a criteria for admission, the new perspective would approach the problem by asking whether there is a better way to select and prepare students for higher education that would lessen such disparities. While this approach might find that affirmative action measures are helpful, it might also be able to address other problems in our education system that are affecting minority admission rates. This is an issue that, as the Michigan cases demonstrate, is not addressable under the current system.

2. Provides a Justification that Allows Us to Remedy Long-Standing Harms

Apart from potentially allowing us to theorize and address whole structures, the new perspective may also provide another and perhaps better justification for taking steps to remedy persistent discrimination. If inequality has always been embedded in our systems and structures,

\textsuperscript{297} Id. at 333–40.
\textsuperscript{298} Gratz, 539 U.S. at 249–50 (“We granted certiorari in this case to decide whether ‘the University of Michigan’s use of racial preferences in undergraduate admissions violate[s] the Equal Protection Clause of the Fourteenth Amendment . . . .'”) (alteration in original) (emphasis added); Grutter, 539 U.S. at 311 (“This case requires us to decide whether the use of race as a factor in student admissions by the University of Michigan Law School . . . is unlawful.”).
then changing them or taking measures to address the problems they create makes good sense and is easily justifiable. The selection of grand jurors for service in Los Angeles County, which Ian F. Haney López describes in his article *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, provides a good example of the potential beneficial effects of this new perspective and approach.\(^{299}\)

In that article, Haney López describes how people of color, in particular Mexican-Americans, were almost never selected to serve on grand juries despite the fact that they made up a significant portion of the Los Angeles County population.\(^{300}\) This fact was challenged in the cases of *East LA 13* and *Biltmore 6*.\(^{301}\) In both instances, the plaintiffs were left without redress because they were unable to prove purposeful, deliberate, or conscious discrimination, and the court refused to recognize as discriminatory a selection system that consistently resulted in the exclusion of Mexican-Americans.\(^{302}\) Yet it was precisely the system of selection in which the judges participated that resulted in persistent discrimination without purposeful intent.

Haney López explains how the informal, ad hoc process used by the judges in selecting grand jurors likely led to this lack of representation. Specifically, the standard practice for selecting jurors was for the judges to select nominees from among social acquaintances.\(^{303}\) In fact, as many as 83% of the nominations (211 out of 255) for the relevant time period (1959–1968) were social acquaintances of the judges, most often friends; neighbors; spouses of acquaintances; or members of a church, civic organization or club.\(^{304}\) Of the remaining 17% (or 44 jurors), at least 17 were recommended by a “friend, family relation, fellow

\(^{299}\) See generally Haney López, *supra* note 140.
\(^{300}\) Id. at 1728 (noting that, “while Mexican Americans accounted for one of every seven persons in Los Angeles County during the 1960s,” (the period when the two cases were decided), they were only one of every fifty-eight grand jurors).
\(^{301}\) According to Haney López, the names *East LA 13* and *Biltmore 6* are the names given these cases within the Mexican-American community. Id. at 1722. *East LA 13* involved an indictment by grand jury of thirteen activists on a variety of charges. Id. at 1721. *Biltmore 6* involved three of the original thirteen defendants plus three others indicted on arson and burglary charges arising out of a staged protest. Id. at 1721. In both cases, the defendants brought a Fourteenth Amendment challenge resting on the claim that the selectors of Los Angeles grand jurors had excluded Mexican-Americans. Id. at 1722. The jurors were nominated by Los Angeles superior court judges, so, as part of the strategy for proving the discrimination the defendants examined more than 100 judges on the witness stand. Id. The transcripts of those interrogations are the basis for Haney López’s article. Id.
\(^{302}\) Id. at 1758–61.
\(^{303}\) Id. at 1731.
club member, or another judge." The fact that all of the judges picked nearly exclusively from their social acquaintances was not surprising because all of the judges selected jurors in the same way, namely by selecting “persons casually from among their personal acquaintances.” While at first glance this selection process would not appear to be discriminatory, a problem arises because the people with whom the judges were acquainted were a very limited group. The judges knew few, if any, Mexican-Americans, and most of the ones they knew were gardeners or servants, not the people they would consider for jury selection. Moreover, Mexican-Americans were not the only ones excluded from their social circles. Accordingly, although the judges may not have purposely intended to discriminate in the selection of jurors, the process they used still resulted in discrimination as “the judges’ selection practices favored a narrow group of people, and excluded many, many more. Though the favored group supposedly represented the population as a whole, it instead reflected one version of the elite, a group of people on the higher rungs of a host of social hierarchies.”

Even though the discriminatory effect was clear and the reasons for that effect were readily identifiable, the defendants in these cases were still unable to sustain an equal protection claim because they could not prove motive. Given that the current system defines discrimination as something done by bad actors at specific points under the current system, if there is no identifiable act of discrimination or if one cannot prove bad motive, there is no discrimination under the law even if in reality that discrimination is as clear as it was in East LA 13 and Biltmore 6.

However, if the new perspective is utilized such that the presumption is that discrimination is the embedded norm, then the potential exists for addressing the discrimination in cases such as East LA 13 and Biltmore 6. Essentially, the question is no longer whether one can show proof of bad actions on the part of the judges; instead, the question is whether we can identify what is producing the discriminatory result and if so, what can we change to rectify it. As Haney López astutely

305 Id. at 1736.
306 Id. at 1736–37.
307 Id. at 1737–39.
308 Id. at 1740–41.
309 Haney López, supra note 140, at 1741.
310 Id. at 1758–60.
311 See supra notes 70–71, 92–94 and accompanying text.
noted, the problem in the Los Angeles County grand juror selection cases was that judges selected jurors by looking almost exclusively towards social acquaintances, which produced discriminatory results because the social circles from which the judges drew were narrow and exclusionary. Once this problem is identified, the solution (or the approach to the solution) becomes fairly straightforward: the networks by which grand jurors are identified, or the pool from which they are drawn, could simply be changed. The judges could be prohibited from selecting grand jurors from their narrow pool of acquaintances, or a different process designed to attract a broader range of participants could be implemented. The purpose here is not to determine the best specific solution for that problem, but to simply demonstrate that there might be a fairly simple solution, one readily identifiable under the proposed perspective but currently foreclosed under the present system.

Additionally, this new approach has the added benefit of getting us beyond the issue of blame and the questions of fairness that blame raises. When looked at from the perspective of blameworthy bad actors, it is hard to hold the judges blameworthy for simply acting within a system he or she did not create, had not consciously evaluated, or within which he or she was trying to be fair and nondiscriminatory. In contrast, when looked at from the point of view of a presumption of discrimination, the blameworthiness of the defendant is not an issue because the focus is on recognizing and addressing structures, processes, and similar societal and cultural mechanisms that result in inequality and discrimination. Accordingly, we can address an obvious problem or instance of discrimination regardless of how “innocent” the defendant might actually be.

3. Moves Beyond the Restriction of Categories

As discussed earlier in this article, a person typically must fit his or her discrimination claim into a particular category in order for that claim to be actionable under the current system. However, there are many instances of discrimination or unequal treatment where the victim does not fit neatly into a protected category or suspect class.

312 Haney López, supra note 140, at 1759–61. The prosecutor asked each judge on cross-examination whether he intended to discriminate. Id. at 1757. Each responded that they did not intend to discriminate or exclude any particular member of a racial or ethnic group; rather, they felt they were nominating the best qualified to serve. Id. at 1758.

315 See supra notes 72–73 and accompanying text.

314 See supra note 59 and accompanying text.
Scholars have shown that breaking people into groups as the current system requires actually helps create situations of inequality because of in-group and out-group favoritism. Furthermore, scientists have shown that some of the categories, such as race, with which we invest so much meaning are social constructs deriving their salience through repeated use and context.

If our goal is in fact to achieve true equality, then we should be looking to root out subordination and discrimination whenever we know it to exist, not just for the people for whom we happen to be a bit more sympathetic or for those who we feel are worthy of equality. Being a human being should be enough. A perspective that starts from the presumption of inequality may allow us to get beyond the restrictions of categories and hopefully allow us to do a better job of remediying inequality. With its focus on identifying unequal situations rather than individual bad actors that are targeting specific individuals, the proposed perspective may help us eradicate at least some forms of discrimination and inequality that have largely been untouchable under the current system.

To illustrate this point, let us return to *Rene v. MGM Grand Hotel, Inc.* under this new perspective. In that case, Rene worked as a butler on the twenty-ninth floor of the MGM Grand, a position which was entirely staffed by males. During the course of time he worked in that position, his coworkers began subjecting him to horrific treatment including “whistling and blowing kisses at [him], calling him ‘sweetheart’ and ‘muñeca’ . . . telling crude jokes and giving sexually oriented ‘joke’ gifts, and forcing Rene to look at pictures of naked men having sex.” The coworkers also resorted to physical conduct of a sexual nature on numerous occasions, touching him like they would a woman, grabbing his crotch and poking their fingers into his anus through his clothing. There was little question that Rene was subjected to differential treatment and that the coworkers’ actions were discriminatory.

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317 305 F.3d 1061 (9th Cir. 2002).
318 *Id.* at 1064.
319 *Id.*
320 *Id.*
321 *Id.*
and intentional.\textsuperscript{322} Despite this reality, the question in Rene’s case was whether he was treated that way because of his sex or his sexual orientation,\textsuperscript{323} for if treatment were due to his sexual orientation, Rene would have no claim under Title VII regardless of how horrific the conduct because sexual orientation is not a protected category.\textsuperscript{324}

Despite the fact that Rene specifically stated in his deposition that, based on the names his coworkers called him, he thought he received such treatment because of his sexual orientation, a plurality of the Ninth Circuit still determined the harassment was because of sex, not sexual orientation.\textsuperscript{325} However, as pointed out in Judge Hug’s dissent, reaching this conclusion took some doing.\textsuperscript{326} Seizing on the fact that, in harassing Rene, his coworkers touched his sexual organs, the plurality determined that because of the places his coworkers chose to touch him, the harassment that Rene endured was because of sex.\textsuperscript{327} Thus the Ninth Circuit set an odd precedent whereby, as long as the conduct involves touching of a sexual nature as it did in Rene and arguably Oncale, the conduct is actionable even if the harasser makes it clear that he or she is motivated by the victim’s sexual orientation. Yet if the harasser engages in similar conduct but happens to touch the victim in a non-sexual way (such as beating the victim severely), then presumably the conduct would not be actionable because without the touching in a sexual nature, it would not be considered “because of sex.” Therefore, one can be subjected to almost identical discriminatory conduct, yet a slight difference in the way the perpetrator chooses to carry out that conduct will be the difference between redress for the victim or not.

\textsuperscript{322} \textit{Id. at 1065} (“It is clear that Rene has alleged physical conduct that was so severe and pervasive as to constitute an objectively abusive working environment.”).
\textsuperscript{323} The plurality opinion stated, “[i]t is equally clear that the conduct was ‘of a sexual nature.’” 
\textit{Rene}, 305 F.3d at 1065. When asked what he believed was the motivation behind the harassment, Rene responded that it was because he was gay. \textit{Id. at 1064}. Additionally, while the plurality was willing to construe the specific acts of touching Rene’s crotch and anus as enough to meet the “because of sex” requirement for sexual harassment under Title VII, several of the concurring and dissenting opinions did not agree. \textit{Id. at 1068} (Pregerson, J., concurring) (characterizing the case as one of gender stereotyping); \textit{id. at 1069–70} (Graber, J., concurring) (agreeing that Rene’s case was indistinguishable from \textit{Oncale v. Sundowner Offshore Servs., Inc.} 523 U.S. 75 (1998), and therefore actionable, but making a point to note that Title VII does not protect against discrimination based on sexual orientation, and that Rene did not assert a sex stereotyping theory); \textit{id. at 1070} (Hug, J., dissenting).
\textsuperscript{324} \textit{See supra} notes 58–59 and accompanying text.
\textsuperscript{325} \textit{Rene}, 305 F.3d at 1067–68.
\textsuperscript{326} \textit{Id. at 1070–78} (Hug, J., dissenting).
\textsuperscript{327} \textit{Id. at 1067–68} (plurality opinion).
Rene becomes an easier case when reviewed under the new perspective. The first step under this analysis is to identify whether there are indications that an unequal or subordinating situation is present, with the presumption once again being that there likely is. Because of the manner in which Rene was treated and the facts demonstrating that the jobsite was policed by heterosexual, male-dominated norms, it can be easily argued that subordination was present. As a result, the question again becomes: what can be done to remedy the situation? In other words, is there a way to restructure the selection process to prevent this position from being all male? Are there changes that can be made to the management of butlers or the work environment on the MGM Grand twenty-ninth floor that may prevent this kind of treatment, regardless of the motivation behind it? Once again, specific solutions are beyond the scope of this article, but the new perspective opens up a range of possibilities that the current practice and its focus on providing relief for only one ill-treated victim (who may or may not fit into the appropriate rubric for legal remedy) cannot contemplate.

When approached from the new perspective, our need for categories becomes less important because the focus is not on addressing individual instances of inequality, discrimination, and subordination. Rather, the goal is to eliminate those instances in whatever form they might take. Thus, situations like Rene’s can be addressed not because we are willing to address specific instances of intentional discrimination based on sexual orientation, but because we are willing to address any situation in which discrimination and inequality has an impact. Not only would this serve to allow redress of a broader range of claims, but there are added benefits that would not be present under the current system. First, apart from allowing redress where a person does not neatly fit into arbitrary categories but has a viable claim, taking the focus away from the categories helps make them less salient, which in turn helps lessen the law’s role in fostering inequality based on categorization and the notion of in-group and out-group favoritism.

Second, allowing Rene to recover under the current system by squeezing him into a category does not truly address the underlying

328 See supra text accompanying notes 288–289.
workplace problems that led to his harassment. If Rene recovered and MGM paid him money damages, while the victim may have gotten re-dress, nothing much within MGM’s structure has changed. The workplace remains all male and the policing of heterosexual, male-dominated norms likely continues. However, MGM would probably be careful now to make sure that when those norms are policed, it is done in a way that makes it less likely that MGM will be sued or lose if sued. Thus, the underlying unequal and subordinating structure remains intact.

In contrast, a view that focuses on changing the workplace rather than just addressing the discriminatory harm to an individual would allow us to address the underlying workplace problem by focusing on how to change the structure to make it less unequal and discriminatory. This more expansive approach not only allows us to scrutinize the discrimination experienced by Rene, it also requires us to look at institutionalized discrimination existing at the workplace: the apparent inability for women to obtain butler positions at the MGM Grand. Although mentioned briefly in Judge Pregerson’s concurring opinion primarily as a way to explain why the policing of male norms may have been so strong in that context, the major issue of why there are no women holding butler positions goes essentially ignored under the current system due to the focus on individuals. An approach from the new perspective, however, would conceivably allow us to address all aspects of the discrimination problems at MGM, including those not raised by the victim.

4. Provides a Better Set of Tools to Combat Subordination and Inequality in Ways They Are Currently Manifested

One of the reasons for a need to change our antidiscrimination laws is the fact that they do a poor job of addressing discrimination in its current forms. The change in perspective advocated for in this article could help to address this problem in several ways. First, part of why people act in unconsciously biased ways is that these are cognitive

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331 Rene, 305 F.3d at 1069 n.3 (Pregerson, J. concurring) (noting that “[a]ll-male workplaces are common sites for the policing of gender norms and the harassment of men who transgress such norms”).


333 See generally Rene, 305 F.3d at 1069 n.3 (Pregerson, J., concurring).

334 See supra Parts I, III.A.
tools that helps us think more efficiently. Be that as it may, the content of our categories and the nature of our biases are largely culturally and socially determined. At the same time, the norms embodied in the law help provide and make salient the nature of our social world. Accordingly, changing the perspective and attendant norms within the law should help address and change the norms in society generally.

Second, an approach from this new perspective should better help address persistent discrimination to the extent that it is largely manifested in the form of unconscious bias. Not only does this approach point to mechanisms by which we might accomplish this, but it also provides justification for doing so. At the same time, to the extent unconscious bias operates largely in part because of the discriminatory structures that are in place, this approach allows us the means to more effectively address those structures. Lastly, this approach should also allow us to address unconscious bias to the extent that it exists and persists because of cultural norms embedded in the society.

There is one other aspect of redressing unconscious bias that this approach should allow us to address: the problem of being proactive. While it can be helpful to redress wrongs when they occur, it is better to prevent those wrongs in the first place. A focus on recognizing unequal or subordinating situations and then trying to address them should allow us the ability to be more proactive in our approach to this problem. For example, studies have shown that bias can effect hiring. One study conducted by Carl O. Word and his colleagues found that interviewers interacted differently with candidates depending on the candidate’s race. Specifically, interviewers placed themselves farther away from nonwhite candidates, interviewed them for shorter time periods, and made more speech errors in their presence. In a subsequent experiment, they found that interviewees treated in this fashion exhibited

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336 See sources cited supra note 264.
337 See Banks & Eberhardt, supra note 330 and accompanying text.
338 See supra text accompanying notes 288–289.
339 See supra text accompanying notes 299–312.
340 See supra text accompanying notes 331–333.
341 See supra text accompanying notes 336–337.
343 Wang, supra note 342, at 1061–64.
344 Id.
less positive behaviors and were judged more harshly than other applicants, thus causing them to be evaluated less favorably in interview situations.\textsuperscript{345}

In a similar real world situation, an investment company found that it had a problem hiring women.\textsuperscript{346} In a move to address the problem, the profiled company reviewed its thirty-minute interviewing process and changed its approach to interviewing by lengthening the time of interview so as to lessen the reliance on first impressions often forced by a shorter interview.\textsuperscript{347} It also revised its interviewing protocol so as to not ask questions that tended to favor men.\textsuperscript{348} These seemingly minor changes significantly changed the tone and substance of the interviews the firm conducted and, as a result, allowed the interviewers to interact better and gain more insightful information from nontraditional candidates, both men and women.\textsuperscript{349} Though a system that merely addresses individual harms based on discriminatory intent and victim categorization does not provide it, a more progressive approach that seeks to identify entrenched inequality and change structures to address disparate treatment would give employers the incentive to engage in this same kind of proactive reform.

CONCLUSION

Sometimes the solution to a seemingly difficulty problem is easier to see when the problem is viewed from a different perspective, one that at first glance may not be obvious. Consequently, I believe that the current approach to eradicating discrimination and subordination in American society can be enhanced by viewing those persistent problems from a new perspective. This new perspective accepts the reality that bias, discrimination, and subordination are embedded in and permeate all aspects of American society. Until we are willing to address and change the many structures, habits, beliefs, and other aspects of American culture in which discrimination and subordination reside, the seemingly intractable problem of discrimination and subordination will remain.

My goal with this article is simply to begin the conversation surrounding the possibility of viewing this problem from a different point

\textsuperscript{345} Id. at 1063.


\textsuperscript{347} Id.

\textsuperscript{348} Id.

\textsuperscript{349} Id.
of view. In so doing, I am not advocating that we throw out our current system, for I feel it serves a legitimate, proven, and important function that in many cases has rendered positive results. Instead, I am simply advocating that we be willing to go beyond that approach and seek solutions that the current system does not provide. At the same time, I do not seek to diminish, discount, or criticize the work of those I cite in this article and others like them. Rather, I am hoping to simply build on the work they have already done.

The problem of discrimination and subordination in America is an extremely difficult and complex one, so much so that perhaps it is a problem that cannot be solved. Yet I do not believe that we should cease seeking solutions to this problem or pretend it is solved when it is not simply because a remedy appears unattainable. While our current system may not have solved the problem in its entirety, we have made significant progress under that system nonetheless. Though we still have a ways to go, the progress we have made thus far gives me hope for the future.
A DOMESTIC RIGHT OF RETURN?: RACE, RIGHTS, AND RESIDENCY IN NEW ORLEANS IN THE AFTERMATH OF HURRICANE KATRINA

Lolita Buckner Inniss*

Abstract: This article begins with a critical account of what occurred in the aftermath of Hurricane Katrina. This critique serves as the backdrop for a discussion of whether there are international laws or norms that give poor, black Katrina victims the right to return to and resettle in New Orleans. In framing this discussion, this article first briefly explores some of the housing deprivations suffered by Katrina survivors that have led to widespread displacement and dispossession. The article then discusses two of the chief barriers to the return of poor blacks to New Orleans: the broad perception of a race-crime nexus and the general effect of the imposition of outsider status on poor, black people by dominant groups. Finally, the article explores the international law concept of the right of return and its expression as a domestic, internal norm via standards addressing internally displaced persons, and considers how such a “domestic right of return” might be applicable to the Katrina victims.

“As a practical matter, these poor folks don’t have the resources to go back to our city, just like they didn’t have the resources to get out of our city.” . . .

“So we won’t get all those folks back. That’s just a fact. It’s not what I want, it’s just a fact.”

—Joseph Canizaro, member of New Orleans’s rebuilding commission

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Introduction

A. Gone with the Wind, and The Wind Done Gone—Hurricane Katrina and Its Aftermath

On August 29, 2005, Hurricane Katrina, a massive Category Four storm, hit New Orleans, Louisiana and the surrounding Gulf Coast area with a destructive wrath not felt in the area in decades. Eighty percent of New Orleans was flooded. Some of the most severely damaged areas of the city were the Lower Ninth Ward, Central City, and the Seventh Ward, all areas heavily populated by African Americans. In the wake of

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2 See Margaret Mitchell, Gone with the Wind (Scribner 1996) (1936); Alice Randall, The Wind Done Gone (2001). This playful header to a very sobering topic recalls a 2001 book by Alice Randall called The Wind Done Gone and the controversy it generated. E.g., Nancy Pate, A Conversation with Alice Randall, Orlando Sentinel, Aug. 25, 2001, at E1. Randall’s book parodied Margaret Mitchell’s iconic novel of the antebellum South, Gone With the Wind. See Mitchell, supra; RANDALL, supra. In her book Randall takes sharp aim at the saccharine, hackneyed, and thoroughly racist mythology which characterized Mitchell’s book. See Mitchell, supra; RANDALL, supra. In choosing this header, I am consciously “signifying.” See Angelyn Mitchell, The Freedom to Remember: Narrative, Slavery, and Gender in Contemporary Black Women’s Fiction 14 (2002). Signifying is the act of “reversing, revising, or parodying another’s speech or discourse.” Id. Signifying is verbal play that is often dual edged, being simultaneously obtuse and subtle. See Henry Louis Gates, Jr., The Signifying Monkey: A Theory of Afro-American Literary Criticism 80–81 (1988). Its purpose may be anything from didactic to critical to entertaining, and sometimes all three at once. Signifying may occur in various forms including “repetition with a signal difference,” “troping,” or as “a metaphor for textual revision.” See Gates, Jr., supra, at xxiv, 81, 88.

3 Hurricane Katrina Timeline, CBC News Online (Can.), Sept. 4, 2005, http://www.cbc.ca/news/background/katrina/katrina_timeline.html; see Ernest Zebrowski & Judith A. Howard, CATEGORY 5: THE STORY OF CAMILLE, LESSONS UNLEARNED FROM AMERICA’S MOST VIOLENT HURRICANE 234–36 (2005). Hurricane intensity is measured on the Saffir-Simpson Hurricane Scale. ZEBROWSKI & HOWARD, supra, at 223–25. The scale ranges from one to five, with a Category One hurricane being the least intense with wind speeds between 74 and 95 miles per hour, and a Category Five hurricane being the most intense with wind speeds exceeding 155 miles per hour. Id. at 249–50. Hurricane Katrina was a Category Four storm at 140 miles per hour. Hurricane Katrina Timeline, supra.

Prior to Katrina, the last storm to cause significant damage to New Orleans was Hurricane Betsy in 1965. See ZEBROWSKI & HOWARD, supra, at 47–50. However, no storm besides Katrina has wielded such destructive force in the United States since the 1928 Okeechobee Hurricane, which killed over 3000 people in Florida and Puerto Rico and many hundreds more on the Caribbean island of Guadeloupe. See Eliot Kleinberg, Black Cloud: The Great Florida Hurricane of 1928, at xiv (2003). The Okeechobee Hurricane caused an estimated $80 billion in damage in today’s dollars. Id. at 225.

4 Rod Amis, Katrina and the Lost City of New Orleans 32 (2005).

this destruction, many of these areas’ residents, though forced out of their homes, were unable to evacuate the city immediately due to a lack of personal resources.\textsuperscript{6} A number of residents were unable to leave their homes at all, and the death toll ran high as some weathered the storm on rooftops and in attics.\textsuperscript{7} Other residents sought safety in government-established shelters at the Louisiana Superdome and the New Orleans Convention Center.\textsuperscript{8} Both refuges exhibited conditions often seen only in developing countries or during times of war, as occupants remained for days without adequate food, sanitation, or security.\textsuperscript{9} Stories of criminal activity in the shelters, both actual and apocryphal, filled the airwaves.\textsuperscript{10} Media outlets, many of their reporters often safely

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\textsuperscript{6} Brinkley, supra note 5, at 327–30. One commentator described the early departure of those with “cars, money, and good health” as an example of how, in the days immediately preceding Hurricane Katrina, the strong (the well-to-do) failed to care for the weak (those without resources). \textit{Id.} at 328.

\textsuperscript{7} \textit{Id.} at 163–64.

\textsuperscript{8} \textit{Id.} at 275–76. According to Brinkley’s account, by the Tuesday after the storm, the Superdome held over 24,000 people. \textit{Id.} at 275.

\textsuperscript{9} Jon Hanson & Kathleen Hanson, \textit{The Blame Frame: Justifying (Racial) Injustice in America}, 41 Harv. C.R.-C.L. L. Rev. 413, 457 (2006) (remarking that the media images in the aftermath of Hurricane Katrina were, for many viewers, disquietingly “third-worldish”). Yet another observer described the images as evocative of either slavery or slave insurrection, and suggested that they “triggered memories of Jim Crow injustice[s]” and other historic inequalities suffered by African Americans. Brinkley, supra note 5, at 329–30.

\textsuperscript{10} Gary Younge, \textit{Murder and Rape—Fact or Fiction?}, Guardian (London), Sept. 6, 2005, at 5. Various media outlets reported that in the chaos at the New Orleans Superdome in the aftermath of Hurricane Katrina, two babies had their throats slit, a seven-year-old child was raped and murdered, and several corpses were left among piles of excrement. \textit{Id.} None of these stories were ever substantiated. \textit{Id.} Moreover, media attributions of crime may in some cases have depended on whether the actor involved was white or black. See Cheryl I. Harris, Whitewashing Race: Scapegoating Culture, 94 Cal. L. Rev. 907, 930–32 (2006) (reviewing Michael K. Brown et al., Whitewashing Race: The Myth of a Color-Blind Society (2003)); Gregory Kane, \textit{Two Photos Pose Puzzle: When Is It Not Loot- ing?}, Baltimore Sun, Sept. 3, 2005, at 1B. In one well-publicized case, two photos were shown on Yahoo News depicting persons in the aftermath of Katrina carrying food supplies. Harris, supra, at 930; Kane, supra. One of the photos showed a black person with the caption: “A young man walks through chest deep waters after looting a grocery store in New Orleans.” Harris, supra, at 930. The other showed two white persons and was accompanied by the caption: “Two residents wade through chest-deep waters after finding bread and soda from a local grocery store after Hurricane Katrina came through the area.” \textit{Id.} Succumbing to reader pressure, Yahoo later removed the photo depicting whites finding
ensconced in the mostly white, relatively unaffected French Quarter of New Orleans, chronicled the disaster.11

These news reports showed mainstream Americans, some of them dubious about the continued existence of racial discrimination and increasingly reluctant to address it, a vision of American apartheid in the new millennium.12 Cameras scanning the shelters, which had quickly deteriorated into little more than human warehouses, rarely showed a white face.13 Viewers watched with feelings ranging from stark horror to horrid fascination the spectacle of masses of mostly black, mostly poor people abandoned together in despair, filth, and chaos.14 One

food but left the black “looter” along with the original caption. Makani Themba-Nixon, Race, Racism and Media: Field Notes from the Frontlines, in TALKING THE WALK: A COMMUNICATIONS GUIDE FOR RACIAL JUSTICE 5, 9 (Hunter Cutting & Makani Themba-Nixon eds., 2006).

11 Hunter Cutting & Makani Themba-Nixon, Katrina Coverage: Race in Your Face, in TALKING THE WALK, supra note 10, at 118, 118; see also LOGAN, supra note 5, at 12 (noting that the French Quarter was only 4.5% black and suffered minimal damage). As one commentator observed, reporters for some media outlets often confined themselves to the French Quarter in the aftermath of the storm and, as a result, initially reported that little damage had been sustained in New Orleans overall. Cutting & Themba-Nixon, supra, at 118. It took two days for the mainstream press to fully recognize the scope of the disaster. Id.

12 John Powell, Foreword to TALKING THE WALK, supra note 10, at v (describing the media portrayal of the “American apartheid”). As one observer noted, “The recent devastation of Hurricane Katrina revealed the entrenched racial apartheid in America’s cities.” Benjamin Fleury-Steiner, Death in “Whiteface”: Modern Race Minstrels, Official Lynching, and the Culture of American Apartheid, in FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA 150, 175 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006).

13 See Cutting & Themba-Nixon, supra note 11, at 118–21.

14 See id. Throughout this article I use the word “black” to refer to people who themselves originated in—or a significant number of whose ancestors originated from the continent of—Africa, and who embrace the social customs and norms associated with this ancestry. Just what to call such persons has long been a subject of some debate. F. JAMES DAVIS, WHO IS BLACK? 145–46 (1991). It has been suggested that the transition from “Ne-gro” and “colored” to “black” and “African American” was a result of the efforts by persons of African ancestry in the 1960s to achieve a sense of racial pride. Id. Ultimately, however, the word “black,” having become acceptable in public discourse, has remained as the most popular choice in written accounts and conversation. See id. at 32. It has been estimated that “African American” is used only one out of three times over “black” by blacks themselves, and even less often by non-blacks. Gina Philogène, From Race to Culture: The Emergence of African American, in REPRESENTATIONS OF THE SOCIAL: BRIDGING THEORETICAL TRADITIONS 113, 118 (Kay Deaux & Gina Philogène eds., 2001). One likely reason is the relative brevity of the word black. I choose it for this reason and because I think that even if “black” is not as historically or geographically defining as “African American,” it is equally or more culturally defining.

In this article I use the word “poor” to designate the economically disadvantaged, low-income population. While I endeavor to use the word in a purely neutral, descriptive sense, I recognize that it is a term fraught with “mischievous ambiguity.” A. B. ATKINSON,
commentator described the televised presentations of the aftermath of Hurricane Katrina and the squalor that many survivors faced as examples of “disaster pornography.” Some less sympathetic viewers likely thought the spectacle evocative of the circles of Dante’s *Inferno*, with some commenting, both publicly and privately, that “those people” got what they deserved. When it was all over, in addition to the loss of human life and individual property losses, there were communal losses—large portions of neighborhoods that were the bedrock of black New Orleans were all but washed away. With the neighborhoods went

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**Incomes and the Welfare State: Essays on Britain and Europe** 94 (1995) (quoting the British Poor Law Report of 1834). It has been noted that for much of U.S. history the word “poor” conjures two distinct images: the first of the “deserving” poor who lack the ability to work, and the second of the “undeserving” or “unworthy” poor who are fully able to provide for themselves but choose to exploit charity. CHRISTIE W. KIEFER, HEALTH WORK WITH THE POOR: A PRACTICAL GUIDE 3 (2000). Kiefer defends neither image but instead rejects the dichotomy, thus rejecting “the notion that poverty is essentially a matter of personal responsibility.” *Id.* Like Kiefer, I choose to reject the dichotomy, and in doing so, I acknowledge the immense multidimensionality of poverty and the way in which it may intersect with race, gender, or sexual orientation. See *id.*

15 Corey Rayburn, *To Catch a Sex Thief: The Burden of Performance in Rape and Sexual Assault Trials*, 15 COLUM. J. GENDER & L. 437, 470 (2006). The phrase “disaster pornography” has been used to describe the way in which victims suffering in disasters are dehumanized, exploited, and reduced to objects of mass media consumption by sensationalized portrayals. See *id.* at 468–71. These accounts are characterized by excessive repetition, a focus on the grotesque or the obscene, and a complete lack of nuance in reporting the actual problems of victims. See *id.*; see also Kenneth Hewitt, *Excluded Perspectives in the Social Construction of Disaster, in What Is a Disaster?: Perspectives on the Question* 75, 87 (E.L. Quarantelli ed., 1998). Compare the notion of “dismay of images,” a phrase that describes the way in which media portrayals of violence, crime, and disaster distort identity in face-to-face relations. See Arthur Kleinman, *The Violences of Everyday Life: The Multiple Forms and Dynamics of Social Violence, in Violence and Subjectivity* 226, 231–33 (Veena Das et al. eds., 2000). Distortion occurs because such portrayals appropriate images of the victims, normalize suffering, turn empathetic viewers into voyeurs, and thereby alter the experience of social suffering. See *id.* at 292.

16 See Carey Hamilton et al., *When the Spotlight Fades*, SALT LAKE CITY TRIB., Mar. 1, 2006, at A1. One commentator explained this attitude as follows: “Katrina victims are what we’ve termed in social work circles the undeserving poor. The hurricane hits and they become the symbol for how we focus our resources. They were in the headlines, and we could see their poverty and their need.” *Id.* (quoting Mary Jane Taylor, Associate Professor at the School of Social Work, University of Utah).

In Dante’s *Inferno*, one of the three books of *The Divine Comedy*, Hell consists of nine concentric descending circles, with each successive descending circle more gruesome or harrowing than the previous one. See generally DANTE ALIGHIERI, *The Divine Comedy* (Charles Eliot Norton trans., Encyclopedia Britannica 1952) (1308-1321). The circles are occupied by unrepentant sinners whose sins are punished in an ironic fashion—the sinner is inflicted by the chief sin he or she committed for all of eternity. See *id.* See generally W.H.V. READE, *The Moral System of Dante’s Inferno* (Kennikat Press 1969) (1909).

17 See discussion *infra* Part I.
the people and the collective cultural life they infused into their own neighborhoods and into the entire city of New Orleans.

Thousands of these poor, black New Orleanians were able to flee their home city only after Hurricane Katrina had passed, when the national and international spotlight sparked enough outrage to convince local and federal authorities to provide some means of escape.\(^{18}\)

The reaction of national leaders to the crisis caused by Hurricane Katrina was slow, causing many to excoriate the Bush administration for its inadequate response.\(^{19}\) \textit{Newsweek} published a cover photo showing a tearful black infant, a victim of Hurricane Katrina, with the caption “Poverty, Race & Katrina Lessons of a National Shame.”\(^{20}\) Rap singer Kanye West declared during a nationally televised telethon for hurricane victims that “George Bush doesn’t care about black people,” sparking a maelstrom of responses, both critical and approving.\(^{21}\)

Those escaping the deluge and its aftermath were frequently labeled “refugees” by media reports.\(^{22}\) While these persons were not,


\(^{19}\) See id. at 58–65.


\(^{21}\) Adrienne T. Washington, Op-Ed., \textit{Timidity No Answer to Racism in Katrina Debacle}, \textit{Wash. Times}, Sept. 6, 2005, at B2. Secretary of State Condoleezza Rice stated in response to West’s remarks that, “Americans don’t want to see Americans suffer. Nobody, especially the president, would have left people unattended on the basis of race.” Angela Rozas & Howard Witt, \textit{The Dreadful Toll}, \textit{Chi. Trib.}, Sept. 5, 2005, § 1, at 1. Conversely, Scholar Michael Eric Dyson argued that Kanye West’s comments suggested that “the government had callously broken its compact with its poor black citizens, and that it had forgotten them because it had not taken their pain to heart.” Michael Eric Dyson, \textit{Come Hell or High Water: Hurricane Katrina and the Color of Disaster} 28 (2006). However, perhaps the most creative expression of approval of West’s comments was a parodic rap written by Houston rap group The Legendary K.O. The Legendary K.O., \textit{George Bush Doesn’t Care About Black People}, on C.I.G.A.C. Mixtape (2005), available at http://www.k-otix.com/cigac/komixtape.zip. The song, titled \textit{George Bush Doesn’t Care About Black People}, and sung to the tune of Kanye West’s hit single \textit{Gold Digger}, is a powerful statement about the loss and powerlessness of poor, black Katrina victims. \textit{Id.; Kanye West, Gold Digger, on Late Registration} (Roc-a-Fella Records 2005). For a portion of the lyrics to the song, see Appendix A.

\(^{22}\) See Hurricane Katrina Turns ‘Refugee’ into Word of the Year, \textit{Wash. Post}, Dec. 15, 2005, at C7. The word refugee was designated a word of the year by the Global Language Monitor, a language-monitoring group. \textit{Id.; see also Top Word Lists of 2005, Global Language Monitor}, Dec. 16, 2005, http://www.languagemonitor.com/Top_Word_Lists.html. The group pointed to the political storm caused by the use of “refugee” to describe the hundreds of thousands of people who fled Hurricane Katrina. \textit{Hurricane Katrina Turns ‘Refugee’ into Word of the Year, supra} (“Global Language Monitor head Paul J Payack said refugee, which was used five times more often than other words to describe those made homeless by Katrina, triggered a debate on race and political correctness.”). As a result of complaints by storm victims and their ad-
strictly speaking, refugees—generally defined as persecuted escapees from often dysfunctional countries with no immediate prospect of return—in many respects they were adrift and functionally stateless. Some evacuees had never lived anywhere else and had no friends or relations on whom to rely outside of their home city. A good number lost vital documents such as government identifications, birth certificates, and health insurance cards, and hence had great difficulty securing services elsewhere in the state or the country. Some were the victims of scam artists who exploited the evacuees’ lack of documents, often taking what few funds victims possessed in exchange for worthless documentation. Others fell prey to identity theft when thieves gained access to the social security cards and other vital data left behind by their victims in the haste of evacuation.

Those who were last to escape New Orleans often suffered the brunt of the storm, were the least able to evacuate to other places, and were often unwelcome in their new havens. Some towns and cities extended only a lukewarm welcome to the escapees. Other towns, though initially welcoming, soon developed “Katrina fatigue,” or weariness with addressing the concerns of so many continuously needy people. This was apparently the case in Houston, which probably received the bulk of Katrina evacuees. There, Rep. John Culberson (R-Tex.) proposed “one-strike” legislation, which was directed at evacuees and would make it possible to “deport” criminal offenders out of Houston and back to their home cities. The comments of this legislator reflected the widely held, though unsubstantiated, belief that Katrina evacuees were largely responsible for Houston’s upsurge in crime dur-


23 See id.


25 See Alisa Marie DeMao, Katrina Evacuees Tangled in Red Tape, Fla. Times-Union (Jacksonville), Oct. 25, 2005, at B1; Jeb Phillips, Problems Following Evacuees up North, Columbus Dispatch (Ohio), Sept. 23, 2005, at 1A.

26 Michelle Hunter, Fake Driver’s Licenses Fuel Arrests, Times-Picayune (New Orleans), May 12, 2006, at 1 (reporting that evacuees purchased what turned out to be false driver’s licenses in order to secure services in the absence of actual identification documents).


30 See Howard Witt, In Houston, Storm Brews on Evacuees, Chi. Trib., Apr. 26, 2006, § 1, at 3. Estimates are that over 100,000 Katrina evacuees remained in the Houston metropolitan area as of September, 2006. Ellison, supra note 24.

31 Witt, supra note 30.
ing the months following the arrival of the evacuees. At least one town, apparently viewing the poor, black hurricane evacuees as malignant debris left after the storm, actively refused to provide sanctuary. Many of the Katrina evacuees will be, like actual refugees, permanently in exile—they will have great difficulty returning to live in the New Orleans of the future.

B. Many Thousands Gone, Perhaps Never to Return

Poor, black New Orleans residents were frequently the last to escape during the evacuation. They are now among the last to return to New Orleans; in fact, many may never return. This delay in movement is illustrated by analysis of the first U.S. Census Bureau data showing the demographic impacts of Hurricanes Katrina and Rita on the population of the Gulf Coast region. In the New Orleans metropolitan area, the post-hurricane population was “more white, less poor, and more transitory than the pre-hurricane population.” It has been suggested that these changes were the result of the disproportionate evacuation and slower return of lower-income and black residents from the entire metropolitan area after the storms. Moreover, researchers


33 See 60 Minutes: The Bridge to Gretna (CBS television broadcast Dec. 18, 2005) (transcript available on LEXIS, follow News & Business, Combined Sources, Transcripts). Armed police from the town of Gretna, Louisiana, which is just over the Mississippi River from New Orleans, blocked the only connecting route, a bridge called the Crescent City Connection, when hundreds of Katrina evacuees tried to cross on foot in the aftermath of the storm. Id. Town officials argued that they were trying to protect the town. Id. Mayor Ronnie Harris of Gretna, in response to criticism of the town’s behavior, allegedly stated, “This [Hurricane Katrina] was not a 9/11 tragedy with good-heartedness all around. You had anarchy and civil disobedience.” Hurricane Katrina: Voices from Inside the Storm: Hearing Before the H. Select Bipartisan Comm. to Investigate the Preparation for and Response to Hurricane Katrina, 109th Cong. (2005) (opening statement of Rep. Tom Davis, Chairman, H. Select Katrina Response Investigation Comm.).

34 See Brach, supra note 18, at 9. Many poor and working class people, the majority of whom were black, were the last to leave New Orleans chiefly because they had no resources to leave. Id. Some resisted leaving in order to safeguard their possessions. Id.; Lou Dobbs Tonight: Crisis in Louisiana (CNN television broadcast Sept. 8, 2005) (rush transcript available at http://transcripts.cnn.com/TRANSCRIPTS/0509/08/ldt.01.html).

35 LOGAN, supra note 5, at 1.


37 Id. at 8.

38 Id. at 9, 11.
from Brown University have found that if these overwhelmingly poor, mostly black evacuees are prevented from returning to their own neighborhoods, New Orleans stands to lose approximately eighty percent of its black population.\textsuperscript{39}

There are a number of explanations for why poor, black Katrina victims failed to return to New Orleans. First, a lack of personal financial resources may have prevented many evacuees from returning.\textsuperscript{40} Additionally, many evacuees face difficult housing-related barriers. Some of the storm victims were the owners of uninsured or underinsured houses, and thus have insufficient funds to repair or replace damaged homes.\textsuperscript{41} Others were the owners of only marginally damaged houses that have been slated for demolition by city authorities who have made little, if any, effort to contact owners.\textsuperscript{42} Some storm victims were the occupants of public housing that, whether repairable or not, has been slated for demolition or renovation.\textsuperscript{43} These former public housing occupants have, for the most part, been offered no meaningful alternate housing.\textsuperscript{44} Still others have been evicted from fully functioning,

\begin{itemize}
\item \textsuperscript{41} See discussion \textit{infra} Part II.A.
\item \textsuperscript{42} The limited efforts of New Orleans authorities to contact homeowners of the demolition list was documented by a number of entities, among them law students at the University of California, Los Angeles (UCLA) Law School who volunteered to assist storm victims in 2005 and 2006. See, e.g., Audio tape: Panel Discussion, Critical Race Praxis: Reports on Race, Rights, and Reconstruction from the Gulf Coast, at Western Law Professors of Color Conference, Pale Promises: Confronting the Rights Deficit (Mar. 31, 2006) (on file with author) [hereinafter Panel Discussion on Race, Rights, and Reconstruction]. One student commented about the insistence of the city of New Orleans that it had made a good faith effort to reach many of the owners of homes slated for demolition. \textit{Id.} (comments of Panelist Priscilla Ocen, Student Member of the Critical Race Theory Program, UCLA Law School). In the course of a few days’ work, using standard search tools such as the Internet, the students had located a number of previously “lost” homeowners. \textit{Id.}
\item \textsuperscript{43} NBC \textit{Nightly News: New Orleans Residents File Lawsuit to Block Demolition of Public Housing Complexes Damaged by Hurricane Katrina} (NBC television broadcast Dec. 8, 2006) (transcript available on LEXIS, follow News & Business, Combined Sources, Transcripts).
\item \textsuperscript{44} See \textit{Class Action Complaint for Declaratory Relief, Injunctive Relief, and Damages at 2–3, Anderson v. Jackson, No. 06-3298 (E.D. La. June 27, 2006), 2006 WL 2032744. On June 27, 2006, former residents of public housing in New Orleans filed a lawsuit alleging that a federal plan to demolish four public housing complexes in New Orleans was discriminatory and violated international laws that protect people displaced by natural disasters. \textit{Id.} at 25–31. The suit was filed by several residents against the U.S. Department of Housing and Urban Development (HUD) and the Housing Authority of New Orleans, which was effective taken over by HUD four years ago. \textit{Id.} at 7, 16–17.}
\end{itemize}
privately owned housing units that served the working poor and lower middle class before the hurricane.45 Those housing units, like much of the housing available in New Orleans after Hurricane Katrina, are in high demand and thus are being re-rented at often significantly higher rates.46 Finally, the lack of housing is exacerbated by the desire of local authorities to build a “new, improved New Orleans” that excludes “undesirables,” that is, poor, black people.47 As a result, large numbers of New Orleans’s poor blacks are not likely to resume residency in the city.

In the face of so many obstacles to the return of much of New Orleans’s black community, a fundamental inquiry arises—what is the recourse for persons facing housing loss impeding their ability to return home? While there are some standard legal remedies for individuals facing displacement, the question concerns not just the harms to individual housing rights created in the wake of Hurricane Katrina but also harms to the evacuees’ right to live where they, and in many cases generations of their families, have lived for many years.48 Long-term residency imbues a sense of place involving individual as well as collective or communal rights.49 Many of the poor blacks evacuated from New Orleans occupied some of the longest-standing and most vibrant black communities in the United States. Is there a right to return to and resettle these places, and if not, should there be?

Generally, U.S. law provides no explicit right of return for persons who are displaced internally, meaning within the country.50 Although the U.S. Constitution protects freedom of movement and the right to travel, there is no explicit right to return to a previous place of habitation, nor has such a right been held to flow from any articulated consti-

46 Id.
47 See discussion infra Part III.B.
48 The black community in New Orleans has a long history dating back to antebellum New Orleans’s large, influential, and propertied free black—or libre—population, which was unique in the South. See generally KIMBERLY S. HANGER, BOUNDED LIVES, BOUNDED PLACES: FREE BLACK SOCIETY IN COLONIAL NEW ORLEANS, 1769-1803 (1997).
49 See Nadia Lovell, Introduction to Locality and Belonging 1, 1–2 (Nadia Lovell ed., 1998). Some individuals’ sense of belonging arises from not only the individual memory, but also the collective memory associated with a place. Id. at 4. Several sources provide a discussion of the politics of the placement and displacement of particular social groups. See IRWIN ALTMAN & SETHA M. LOW, PLACE ATTACHMENT: A CONCEPTUAL INQUIRY, in PLACE ATTACHMENT 1, 1–12 (Irwin Altman & Setha M. Low eds., 1992) (providing an overview of previous research regarding the characteristics, sources, and roles of place attachment from a multi-disciplinary point of view). See generally SUZAN ILCAN, LONGING IN BELONGING: THE CULTURAL POLITICS OF SETTLEMENT (2002).
50 See discussion infra Parts IV.C, V.
tutional right. Given this void in U.S. domestic law, I turn to international law to find support for a domestic right of return.

C. What This Article Is About

I began this article with a critical account of the aftermath of Hurricane Katrina. This critique serves as the backdrop for a discussion of the extent to which there are international laws or norms that give poor, black Katrina victims, both as individuals and community members, the right to return to and resettle their historical place. This article is framed by a discussion of the neighborhoods that were destroyed and an exploration of some housing deprivations suffered by Katrina survivors that have led to widespread displacement and dispossession. Thereafter the article discusses two of the chief barriers to the return of poor blacks to New Orleans: the broad perception of a race-crime nexus and the effect of the imposition of outsider status on poor, black people. Turning to remedies for the dispossession, I explore the international law concept of the right of return and its expression as a domestic, internal norm and consider how it might be applicable to the Katrina victims. While this article considers only the contours of this complex and multifaceted issue, it is clear that its significance merits further analysis by both theorists and practitioners. Undoubtedly, a right of return would help the poor, black former inhabitants of New Orleans become a part of their city once more.

51 See United States v. Guest, 383 U.S. 745, 764 (1966) (Harlan, J. concurring) (“[T]he right of ingress and regress . . . is a privilege and immunity of national citizenship under the Constitution.” (citing Corfield v. Coryell, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1825) (No. 3230))); Kent v. Dulles, 357 U.S. 116, 125 (1958) (holding that, under the Fifth Amendment, a citizen cannot be deprived of the right to travel without due process of law). The right to domestic travel is said to have three separate components in the United States: “the right of a citizen of one state to enter and leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien . . . and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.” Saenz v. Roe, 526 U.S. 489, 500–03 (1999).

52 Blacks were by no means the only community of color to suffer in the aftermath of Hurricane Katrina. See generally Brenda Muñiz, Nat’l Council of La Raza, In the Eye of the Storm: How the Government and Private Response to Hurricane Katrina Failed Latinos (2006), available at http://www.nclr.org/files/36812_file_WP_Katrina_FNL fnl.pdf. Katrina had a devastating impact on the Latino community for two reasons. See id. at 4–7, 11. The few sources of relief which were made available during and after the storm were sometimes inaccessible to Latinos due to language barriers. See id. at 11. In addition, Latino immigrants, both documented and undocumented, were frequently excluded from receiving benefits due to uncertainty about their eligibility. See id. at 4–7.
I. THE WAY THEY WERE: NEW ORLEANS’S HISTORIC BLACK NEIGHBORHOODS

“I don’t care what people are saying Uptown or wherever they are. This city will be chocolate at the end of the day. . . . This city will be a majority African-American city. It’s the way God wants it to be.”

—New Orleans Mayor Ray Nagin

A. The Lower Ninth Ward

New Orleans, despite being subject to the South’s stringent social codes separating blacks from whites in most avenues of life, was relatively integrated in the period before the U.S. Civil War. This social liberality ended, however, with the onset of Jim Crow laws. The racial division originating during this period resulted in the growth of largely black neighborhoods. Though a number of these primarily black areas sustained significant damage during Hurricane Katrina and in the storm that came less than a month later, Hurricane Rita, the best known of the black neighborhoods was the Lower Ninth Ward.

The Lower Ninth Ward, often called Lower Nine by New Orleanians, consists of the portion of the Ninth Ward that runs along the Mississippi River downriver from the Industrial Canal and stretching to the parish of St. Bernard. The Lower Ninth Ward has long been known for its high number of working-class African American homeowners. However, though much of New Orleans dates back to the eighteenth century, the Lower Ninth Ward was one of the last sections of the city to

55 Id.
57 See Beaumont, supra note 1.
58 See NEW ORLEANS NEIGHBORHOOD MAP, supra note 5; see also AMIS, supra note 4, at 45; Landphair, supra note 56, at 38–39.
be developed.\textsuperscript{60} The area’s poor drainage and relative isolation from the rest of the city explains its late development.\textsuperscript{61} The Lower Ninth Ward was created from a cypress swamp, and initially was populated by poor blacks and immigrant whites unable to afford housing in other sections of New Orleans.\textsuperscript{62} Some black families date their presence in the area to the 1870s, when a number of African American benevolent associations and mutual-aid societies organized to provide support for the large numbers of freedmen whose recent condition of servitude had left them few resources to live on their own.\textsuperscript{63} From their earliest presence in the Lower Ninth Ward, self-help became the watchword for African American families as municipal authorities all but ignored the area’s residents.\textsuperscript{64}

By the early 1920s, a significant portion of the Lower Ninth Ward’s residents were black, and they remained underserved by public officials.\textsuperscript{65} For example, despite much of the wealth generated throughout New Orleans in the early twentieth century, eighty-six percent of the streets in the Lower Ninth Ward remained unpaved as late as the 1960s.\textsuperscript{66} For much of its history, the area also lacked proper drainage and sewers; a number of homes still used outhouses and poorly installed septic tanks.\textsuperscript{67} In September 1965, Hurricane Betsy exacerbated these problems; Betsy killed sixty-five people in New Orleans, with its most devastating effects felt in the Lower Ninth, much of which was left underwater.\textsuperscript{68} However, despite its limited resources, the Lower Ninth Ward was a vibrant neighborhood characterized by an independent “can-do” attitude that developed in response to governmental neglect.\textsuperscript{69} Even in the face of persistent poverty in some areas, by the time Hurricane Katrina hit, sixty percent of the homes in the area were owner-occupied.\textsuperscript{70}

\begin{itemize}
  \item \textsuperscript{60} Amis, \textit{supra} note 4, at 64.
  \item \textsuperscript{61} See \textit{id.}
  \item \textsuperscript{62} \textit{Id.}
  \item \textsuperscript{63} \textit{Id.}; Landphair, \textit{supra} note 56, at 35, 36–37, 40.
  \item \textsuperscript{64} See Craig E. Colten, \textit{An Unnatural Metropolis: Wresting New Orleans from Nature} 114 (2005); Landphair, \textit{supra} note 56, at 40–41.
  \item \textsuperscript{65} E.g., Colten, \textit{supra} note 64, at 97–98, 114.
  \item \textsuperscript{67} Colten, \textit{supra} note 64, at 100; Landphair, \textit{supra} note 56, at 35.
  \item \textsuperscript{68} Brinkley, \textit{supra} note 5, at 59; see Colten, \textit{supra} note 64, at 145–46, 154.
  \item \textsuperscript{69} See Nicolai Ouroussoff, \textit{In New Orleans, Each Resident Is Master of Plan to Rebuild}, N.Y. Times, Aug. 8, 2006, at E1; Landphair, \textit{supra} note 56, at 37, 41, 44.
  \item \textsuperscript{70} Popkin et al., \textit{supra} note 59, at 19.
\end{itemize}
Hurricanes Katrina and Rita destroyed or heavily damaged the vast majority of the Lower Ninth Ward’s housing.\(^71\) Mandatory evacuations of New Orleans resulted in the displacement of a large number of residents, with many unable to return to their homes or even to New Orleans proper.\(^72\) Piles of debris, untreated water, lack of electricity, insufficient housing, and limited public educational facilities and other services are only some of the problems that caused and are still causing the prolonged absence of former residents.\(^73\) The destruction of the Lower Ninth Ward meant the loss of more than just individual homes and businesses; it was the death of a vital institution. The Lower Ninth Ward was not, however, the only predominantly black section of New Orleans to experience such overwhelming loss.\(^74\) Two other areas, the Central City and the Seventh Ward were also hard hit.\(^75\)

B. Other Predominantly Black Areas Sustaining Damage: The Central City and the Seventh Ward

The Central City is a section of New Orleans located just above the central business district.\(^76\) The section was first developed in the 1830s and was initially populated by working-class European, mostly Irish and Jewish, immigrants.\(^77\) Much like the Lower Ninth Ward, the Central City is located in a basin so far below sea level that it has long been considered marginal land.\(^78\) Despite being geographically ill-favored, the central business district contained theaters, music companies, and publishing houses that were part of a mainstream entertainment industry in the early twentieth century.\(^79\)

The Seventh Ward, located near downtown New Orleans and extending from Esplanade Avenue to Elysian Fields, is one of the lesser-known areas of New Orleans yet one of the hardest hit by flooding fol-

\(^71\) Logan, supra note 5, at 11 tbl.3 (indicating that 99.9% of the Lower Ninth Ward was damaged).
\(^72\) See id. at 1 ("[I]f nobody [is] able to return to damaged neighborhoods . . . New Orleans is at risk of losing more than 80% of its black population.").
\(^73\) Evan Thomas et al., New Orleans Blues, NEWSWEEK, Sept. 4, 2006, at 28, 29.
\(^74\) See discussion infra Part I.B.
\(^75\) See discussion infra Part I.B.
\(^76\) See NEW ORLEANS NEIGHBORHOOD MAP, supra note 5.
\(^77\) See Colten, supra note 64, at 91; Robert N. Rosen, The Jewish Confederates 25 (2000).
\(^78\) See Colten, supra note 64, at 82–83.
lowing Hurricane Katrina.80 Throughout much of its early history, the Seventh Ward was home to Creoles—a term which, when employed in the context of New Orleans, refers to persons of mixed black and white ancestry.81 Like the Ninth Ward, it was a long-underserved section of the city, plagued by poor sewage, poor drainage, overpopulation, and frequent attempts by city government to curtail the autonomy of the residents.82 Nonetheless, almost since the founding of New Orleans, the Seventh Ward Creoles formed their own discrete social group with distinctive cuisine and culture.83 Moreover, a number of the city’s best known musicians, artists and craftsmen made their homes in the Seventh Ward.84 One of the nation’s most prosperous black business districts, the Claiborne Avenue neighborhood, was partly located in the Seventh Ward.85

In the late 1960s, the business district along Claiborne Avenue was destroyed to allow for the new Interstate 10 loop.86 The destruction of a large swath of the Ward for the interstate’s construction undermined the integrity of the neighborhood.87 While this caused some homeowners to move or abandon their homes, the neighborhood continued to house various groups of professionals, including skilled laborers such as mechanics, carpenters, and bricklayers.88 More recently, the Seventh Ward was home to publicly funded housing complexes including St. Bernard, the largest of New Orleans’s housing complexes.89

80 See Logan, supra note 5, at 11 tbl.3; New Orleans Neighborhood Map, supra note 5.
82 Colten, supra note 64, at 91, 95, 96.
83 Domínguez, supra note 81, at 125–27.
86 Id. A recent proposal is slated to replace Claiborne Avenue in order to recreate some of the black-owned businesses that once thrived there. See Ouroussoff, supra note 69.
87 Wise, supra note 85.
88 Domínguez, supra note 81, at 253–55; Wise, supra note 85.
The Lower Ninth Ward, the Central City, and the Seventh Ward all faced crippling loss in the aftermath of Hurricane Katrina. The suffering continues even now, long after the storm, as those affected must still deal with displacement and dispossession.

II. Reasons for the Displacement and Dispossession of Poor, Black New Orleanians

“Whether we like it or not, New Orleans is not going to be 500,000 people for a long time... New Orleans is not going to be as black as it was for a long time, if ever again.”

—Housing and Urban Development Secretary Alphonso Jackson

A. Voyage of the Undammed: The Plight of the Uninsured and the Underinsured

Many homes in the range of the storm, and virtually all of those that were mortgaged, had homeowner’s insurance coverage. Nonetheless, a number of poor, black Katrina survivors owning real property found themselves in a difficult position in the aftermath of the storm. One reason for this is that a number of low-income homeowners, having owned their homes long enough to pay off mortgages, were under no obligation to purchase either standard homeowner’s insurance or flood insurance; thus, many did not. For these uninsured homeowners, the only recourse against Katrina damage was to hope for government assistance, which in many cases has been slow in arriving. Even in cases where the homeowners had insurance policies, the payouts

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90 Beaumont, supra note 1.

91 Cf. Martin F. Grace et al., Catastrophe Insurance: Consumer Demand, Markets and Regulation 83 & n.14 (2003) (assuming, for purposes of analyzing demand in the market for homeowners insurance, that “homeowners insurance . . . is essentially mandatory”). Mortgage lenders generally require homeowners to purchase and keep in effect a policy of homeowner’s insurance prior to closing on the loan. See id. at 108; Popkin et al., supra note 59, at 18–19. The lender is named as sole or co-loss payee along with the borrower. See Mary L. Burgner, Assisting Clients in Achieving the American Dream, Mich. Bus. J., Jan. 1996, at 44, 46–47. In many cases, the lender collects funds from the mortgagor and maintains them in an escrow account in order to make the payments to the insurer, thus ensuring compliance with the insurance requirement. See id. at 45–47.

92 See Popkin et al., supra note 59, at 18, 19.

93 Richard Wolf, New Orleans Symbolizes U.S. War on Poverty, USA Today, Dec. 22, 2006, at A13 (“Since Hurricane Katrina struck on Aug. 29, 2005, only 94 homeowners—and no tenants—have received federal aid to rebuild.”).
from insurance companies have also been delayed and insufficient for full recovery, particularly in the case of black claimants.\textsuperscript{94}

Many insurers denied claims made under valid homeowner’s policies for losses caused by Hurricane Katrina, arguing that the losses were caused by flooding resulting from the levee breach and not the hurricane itself.\textsuperscript{95} While standard homeowner’s policies often cover wind and rain, flooding and associated perils are generally excluded from such policies and may only be addressed under flood insurance policies.\textsuperscript{96} Nonetheless, several lawsuits have been filed to force insurers to cover some Katrina losses under standard homeowner’s polices. In some cases, such suits argue the doctrine of “efficient proximate cause,” which provides that if a covered peril causes an excluded peril, coverage is available even for the damage caused by the excluded peril.\textsuperscript{97} Accordingly, if high winds, an included peril under many policies, caused flooding, then such flooding would be covered.\textsuperscript{98} Efficient proximate cause has been the basis of successful claims by the insured in a number of jurisdictions, including Louisiana.\textsuperscript{99} Because of the doctrine’s

\textsuperscript{94} Rukmini Callimachi & Frank Bass, Complaints About Insurance Can Pay Off, Houston Chron., Oct. 26, 2006, at 3. There is evidence to suggest that residents of black areas who actually had insurance and who filed claims under those policies are not being served in the same manner as their counterparts in white neighborhoods. \textit{Id.} An analysis performed by the Associated Press (AP) showed that although more than 8000 Louisiana residents have filed Katrina-related complaints with the state insurance office, almost seventy-five percent of the 3000 insurance cases settled in Louisiana in the first year after Katrina were filed by residents currently living in predominantly white areas. \textit{Id}. Claims filed by households in majority-black zip codes represented only twenty-five percent of settled claims. \textit{Id}. As a result of the slow response from insurance companies, a number of black claimants have given up and accepted amounts representing, in some cases, only a fraction of their original claims. \textit{Id}. The AP analysis also showed that “residents living in white neighborhoods have been three times as likely as homeowners in black areas to seek state help in resolving insurance disputes.” \textit{Id}.  


\textsuperscript{96} \textit{Id}. at 334–35. At least one major insurer is seeking to exempt wind and hail from its standard homeowners policies in hurricane-prone sections of Louisiana. Mike Hasten, Allstate Threatens to Pull out of State, News-Star (Monroe, La.), July 22, 2006, at 1A. Allstate, the state’s second largest insurer, threatened to cancel its 30,000 homeowners insurance policies with customers in eighteen coastal Louisiana parishes if the state did not allow it to make the changes it sought. \textit{Id}. For a discussion of excluded perils, see generally Crusto, \textit{supra} note 95.  

\textsuperscript{97} For a further discussion of the doctrine of efficient proximate cause, see Crusto, \textit{supra} note 95, at 343–44.  

\textsuperscript{98} \textit{See id}.  

success, many insurers had inserted “anti-concurrent causation clauses” in their policies, chiefly in response to paying large numbers of claims from the devastation of Hurricane Camille in 1969.100 Notwithstanding insurers’ efforts to limit the application of efficient proximate cause, a number of lawsuits have been filed by homeowners seeking such coverage.101 These suits have been met with limited success.102 In one such suit, plaintiff Trent Lott, the U.S. Senator from Mississippi, was denied coverage under a standard homeowner’s policy. As a result of the denial, Senator Lott filed suit and the insurer moved to dismiss.103 Though Senator Lott prevailed, the matter continues in litigation. Another legislator, Representative Gene Taylor, a Democrat from Mississippi, has also filed suit after being denied coverage by an insurer.104

100 Spencer M. Taylor, Insuring Against the Natural Catastrophe After Katrina, NAT. RESOURCES & ENV’T, Spring 2006, at 26, 27. “Anti-concurrent causation clauses provide that the insurer will not pay if one of the causes was an excluded loss, even if there are several enumerated causes that played a role in a loss.” Crusto, supra note 95, at 344.


102 Guice v. State Farm Fire & Cas. Co., No.1:06CV001 (S.D. Miss. 2007) (Mem.), available at http://www.mssd.uscourts.gov/Insurance%20Opinions/chi06cv1orderA0322.pdf (denying certification of a class in a suit against State Farm brought by policyholders whose claims were rejected following Hurricane Katrina).

103 See Lott v. State Farm Fire & Cas. Co., No. 1:05-CV-671-LTS-RH, 2006 WL 2728695 at *1 (S.D. Miss. Sept. 19, 2006). In response, in June 2006, Senator Lott and Senator Mark Dayton, a Democrat from Minnesota, proposed a bill, colloquially termed “Honesty is the Best Insurance Policy,” which would require the language of insurance policies to be in plain English. Uniform Insurance Non-Coverage Disclosure Act, S. 3239, 109th Cong. § 2 (2006); Nomi Prins, Op-Ed., Don’t Let Insurers Shirk Responsibility, NEWSDAY (N.Y.), Aug. 30, 2006, at A33. Though the coverage problem was widespread and has caused many to file suit against insurers, some have speculated that because the insurance industry is one of the biggest donors to politicians’ coffers, there is little support in Congress for any change that would harm the interests of insurers. Ana Radelat, Congress Unlikely to Help in Insurance Fights, GANNETT NEWS SERV., Sept. 6, 2006 (on file with author).

104 Ana Radelat, Congress Targets Katrina Claims, CLARION-LEDGER (Jackson, Miss.), Jan. 19, 2007, at 1A. Taylor is also chair of the House Democratic Caucus Hurricane Katrina Task Force, which advocates a number of proposals, among them “ending the insurance industry’s limited antitrust exemption” under the McCarran-Ferguson Act, “requiring homeowners’ policies to cover all perils, and creating a federal regulator to provide over-
Separate flood polices are offered either by private insurers or, more often, by the government in markets that face extreme flood risk. In 1968 Congress created the National Flood Insurance Program (NFIP) in response to the rising cost of taxpayer-funded disaster relief for flood victims and the increasing amount of damage caused by floods. The NFIP makes federally backed flood insurance available in communities that agree to adopt and enforce floodplain management ordinances to reduce future flood damage. A large number of policies made available through the NFIP are administered by the Federal Emergency Management Agency (FEMA), a unit of the Department of Homeland Security. Only owners in participating communities may purchase coverage, and generally this participation is based on an agreement between the local community and the federal government. Because flood insurance is largely unavailable in standard homeowner’s policies, the NFIP, which sells policies directly or through individual agents, assumes all risk of damages in the case of a flood.

Notwithstanding government backing, flood insurance policies are often among the most expensive types of insurance offered to homeowners. The exorbitant cost of such policies means that many

sight of the industry." House Democrats’ Katrina Panel Calls for Federal Insurance Oversight, BestWire, Oct. 20, 2006 (on file with author). For a broad discussion of the homeowner’s insurance problems faced by Hurricane Katrina victims, see generally Crusto, supra note 95.


108 Id. at 1–2.


homeowners choose to forgo flood coverage.\textsuperscript{112} It has been reported that roughly half the damaged properties in Louisiana were covered by flood insurance.\textsuperscript{113} A large number of poor, black New Orleanians were among those lacking flood insurance.\textsuperscript{114} Moreover, another significant factor in the lack of flood insurance in the heavily African American Ninth Ward is that, prior to Hurricane Katrina, FEMA had termed much of the Lower Ninth Ward “low risk” because it was located on relatively high ground and was expected to be protected by the levees.\textsuperscript{115} In summary, many poor, black New Orleanians have been unable to recover and rebuild because they are either uninsured or, if they carry insurance at all, have insufficient coverage.

B. The Threat of Wrongful Demolition

In the immediate aftermath of Hurricanes Katrina and Rita, a number of the homes owned or occupied by evacuees were marked as nuisances by the city and slated for demolition.\textsuperscript{116} Demolition by local authorities in such circumstances is permitted under the general police power granted to states.\textsuperscript{117} However, in order for governmental authorities to act and demolish a structure, there must in fact be a nuisance.\textsuperscript{118} Owners of properties destroyed as nuisances are not granted compensation for those properties, as owners of properties taken for public use are.\textsuperscript{119} Yet owners may contest the finding of nuisance in cases of pending demolition through a public hearing, after proper notice is given.\textsuperscript{120}

\textsuperscript{112} See Jonathan P. Hooks & Trisha B. Miller, The Continuing Storm: How Disaster Recovery Excludes Those Most in Need, 43 CAL. W. L. REV. 21, 28–29 (2006) (“[G]iven their financial constraints, many elderly, fixed-income, and low-income households simply do not purchase or maintain insurance.”).
\textsuperscript{113} E.g., When Government Fails—Katrina’s Aftermath, ECONOMIST, Sept. 10, 2005, at 25, 28.
\textsuperscript{114} See Hooks & Miller, supra note 112, at 34–35.
\textsuperscript{115} Popkin et al., supra note 59, at 19.
\textsuperscript{118} See Freeman, 242 F.3d at 652–53 (“[A] city may not arbitrarily enter abatement orders or declare the existence of nuisances with no underlying standards.”).
\textsuperscript{119} See Willard v. City of Eugene, 550 P.2d 457, 459 (Or. Ct. App. 1976). Actions for wrongful demolition or actions to enjoin such acts by a governmental entity are distinct from actions for inverse condemnation. See id. at 460 (denying plaintiff’s inverse condemnation claim but implying that the facts of the case may have been sufficient to prove the tort of wrongful demolition). An action for wrongful demolition typically contests a finding by governmental authorities that a property is a nuisance and seeks damages for the removal or destruction of the edifice. In contrast, an inverse condemnation claim requires
The issue of notice creates the major problem for poor, black New Orleanian homeowners. As a group of law students from the University of California at Los Angeles reported, New Orleans officials very often indicated that houses were set for destruction by physically marking them with fluorescent paint or by publishing details in local newspapers and referencing GPS coordinates instead of addresses.\textsuperscript{121} None of these forms of notice, of course, was likely to give actual notice to displaced homeowners, who were thousands of miles from New Orleans after Hurricane Katrina, that their homes were slated for demolition.

C. Eviction from Public Housing

Tenants who live in public housing or a federally subsidized apartment complex generally enjoy greater protection against eviction than most other tenants.\textsuperscript{122} However, protections are limited, and housing authorities who assert that units are unsafe or uninhabitable usually prevail in removing tenants.\textsuperscript{123} Moreover, if public housing is renovated or revitalized, residents have no constitutional right to remain after revitalization of their residential units.\textsuperscript{124} Many residents who had occupied public housing units were left with no immediate place of residence.\textsuperscript{125} Many tenants fear that units that remain unoccupied will be gentrified to produce mixed-income units, thus permanently displacing the former residents.\textsuperscript{126} These fears are well-founded if the previous actions of housing officials are any indication of their future intent.\textsuperscript{127} Replacement of older public housing

an assertion that private property was taken for public use without compensation. \textit{See id.} at 459.

\textsuperscript{120} \textit{See} Wantanabe Realty Corp. v. City of New York, 159 F. App’x 235, 237–38 (2d Cir. 2005).

\textsuperscript{121} \textit{See Joe Gyan, Jr., N.O. Serves Notice on Property, Advocate} (Baton Rouge, La.), Feb. 21, 2006, at A1; Panel Discussion on Race, Rights, and Reconstruction, \textit{supra} note 42.

\textsuperscript{122} \textit{See} Evictions from Certain Subsidized and HUD-Owned Projects, 24 C.F.R. § 247 (2006); Shelby D. Green, \textit{The Public Housing Tenancy: Variations on the Common Law that Give Security of Tenure and Control}, 43 CATH. U. L. REV. 681, 732–33 (1994). Generally, eviction from public housing units must be for “good cause,” including but not limited to material noncompliance with the rental agreement, material failure to carry out obligations under any state tenancy laws, or certain types of criminal activity. 24 C.F.R. § 247.3(a).

\textsuperscript{123} \textit{See} 24 C.F.R. § 247.5, .10; Green, \textit{supra} note 122, at 730–34.


\textsuperscript{125} Susan Saulny, \textit{Residents Clamoring to Come Home to Projects in New Orleans}, N.Y. TIMES, June 6, 2006, at A14.

\textsuperscript{126} \textit{Id.}

\textsuperscript{127} \textit{See} Andrew Rice, \textit{The Suburban Solution}, N.Y. TIMES, Mar. 5, 2006, § 6 (Magazine), at 114.
with mixed-income units has been a major result of a federal program called Hope VI.\textsuperscript{128} Hope VI was designed to revitalize the nation’s most damaged and dilapidated public housing.\textsuperscript{129} Envisioned as a “New Urbanism” approach to public housing, Hope VI used a combination of public and private dollars to underwrite the costs of reconstructing public housing.\textsuperscript{130} The funds provided for the construction of conventional subsidized apartments for low-income families, along with market rate apartments and private town homes.\textsuperscript{131} Across the United States, mixed-income developments were built where public housing devoted to the poor once stood.\textsuperscript{132} As a result of Hope VI, New Orleans residents who had lived in now-demolished housing projects were “vouchered-out,” or given Housing Choice (Section 8) vouchers that were often difficult to use because of the dearth of landlords who choose to accept the subsidies.\textsuperscript{133} In the 1990s, the residents of the St.
Thomas project in New Orleans found themselves “vouchered-out” when their building was demolished under Hope VI.  

The St. Thomas project has become the prototype for the future of public housing in New Orleans, as planners envision a wide-scale implementation of mixed-use, market-rate developments.

Before Hurricane Katrina, Hope VI was slated for termination. Proponents of the program argue that it has led to the revitalization of neighborhoods all over the United States and want to see it applied to the renewal of public housing in post-Katrina New Orleans. Critics of the program point to several flaws. Primarily, the Hope VI plan leaves many former housing residents without adequate housing. In New Orleans and beyond, Hope VI, in its zeal to create mixed-use neighborhoods, has ignored the bonds formed among residents of public housing and in so doing has destroyed the sense of community forever. The offer of vouchers instead of newly renovated housing has been upheld as a permissible government response to the problem of housing shortages for the poor. Unfortunately, even in cases where renovated


In view of the international human rights norms discussed in later sections of this article, it may be interesting to consider the extent to which Hope VI or similar programs that require public housing residents to move and that result in gentrification may be viewed as arbitrarily forced relocation under international norms. See Marco Simons, The Emergence of a Norm Against Arbitrary Forced Relocation, 34 COLUM. HUM. RTS. L. REV. 95, 98–103 (2002). Forced relocation includes not only the most egregious human rights violations such as internment in concentration camps, but also “the assertion of control over populations (especially those of persecuted ethnic minority groups)” and “the relocation of populations out of areas designated for resource exploitation or off of lands that they do not own.” Id. at 104.

134 Davis, supra note 133.

135 E.g., Gwen Filosa, Public Housing Still Empty, TIMES-PICAYUNE (New Orleans), Apr. 9, 2006, at 1; Davis, supra note 133.

136 See Rob Nelson, Fischer Low-Rise Set to Be Razed, TIMES-PICAYUNE (New Orleans), Feb. 28, 2003, at A1 (noting that in 2003, “President Bush [sought] to end the 10-year-old federal HOPE VI program, which his administration [said was] riddled with inefficiency and poor planning by local authorities.”).


138 See generally False HOPE, supra note 132.

139 Id. at 7–15. For a further discussion of Hope VI and its impact on communities and the availability of housing for the poor, see generally Pindell, supra note 130, and Wolfson, supra note 131.

140 Wolfson, supra note 131, at 69–70.

141 Darst-Webbe Tenant Ass’n Bd. v. St. Louis Hous. Auth., 339 F.3d 702, 714 (8th Cir. 2003) (finding that even if Congress intended to require HOPE VI grant recipients to
housing reopens in the same communities, there is no guarantee that former residents will have access to the new units.142

D. Market Response Eviction from Private Housing

Eviction from privately owned housing, or the forced removal from leased premises by a landlord or his agents, is usually governed by state and local statutes.143 In many jurisdictions, landlords may evict tenants at the end of a lease term without cause, as long as the landlord uses the appropriate legal process and adheres to procedural requirements.144 There are some jurisdictions where laws bar all but “just cause” evictions, with just cause defined either by the terms of the lease, case law, or a statute that enumerates permissible reasons for eviction.145 Louisiana, however, is not such a jurisdiction. The lack of “just cause” regulation allows for what I have here termed “market response eviction.”

By market response eviction, I mean those evictions that take place in an economic climate wherein it is more economically rewarding for landlords to evict current tenants and seek new tenants who are able to pay much higher rates. In cases where the increase in rent is exorbitant, this is sometimes referred to as price-gouging.146 The issue of large rent increases versus tenant hardship has been described in a number of jurisdictions as the dilemma between “fair rent,” or rents that achieve long-term equilibrium in landlord returns despite limited supply, and “forced subsidy,” which involves rent control legislation that seems to place the burden of rental market failures on the landlord.147 Generally, rent control legislation has been upheld, particularly in times of

provide replacement housing for all displaced tenants, the housing authority met this requirement by offering all displaced tenants Section 8 housing vouchers).

142 See id. at 714–15 (rejecting the contention that a refurbished housing project was required to provide space for all former tenants).

143 See P. A. Agabin, Annotation, Right of Landlord Legally Entitled to Possession to Dispossess Tenant Without Legal Process, 6 A.L.R.3d 177, §§ 1, 5 (1966).

144 See id. § 5.


emergency shortage.\textsuperscript{148} Since Katrina, over 450 complaints of housing-related price-gouging have been lodged with the office of Louisiana Attorney General Charles Foti, Jr.\textsuperscript{149} However, because rent-based price-gouging is not covered explicitly by Louisiana law, the Attorney General has not filed any charges.\textsuperscript{150} A bill introduced in the Louisiana legislature is designed to end the practice by making “unfair residential rent increases” in hurricane-damaged areas illegal.\textsuperscript{151}

Despite efforts to address the problem of exorbitant rents, the problem continues over a year after the hurricane.\textsuperscript{152} According to data collected by the Brookings Institution, the fair market value of a two-bedroom apartment in New Orleans after Hurricane Katrina has risen by thirty-nine percent, meaning that the average price of a two-bedroom apartment has risen from $676 to $940 per month.\textsuperscript{153} This increase in rental price was left largely unameliorated by the actions of the government.\textsuperscript{154} For example, the Louisiana Recovery Authority has set aside $7.5 billion to help homeowners with property recovery efforts and $859 million to assist landlords.\textsuperscript{155} No funds or economic benefits have been slated for direct delivery to tenants.\textsuperscript{156} Hence, while landlords have been able to restore some of their properties and re-rent them, often at the new, higher rates, tenants whose rental housing was destroyed have received little funding to find housing in the higher-priced market.\textsuperscript{157}

\textsuperscript{148} See, e.g., Block v. Hirsh, 256 U.S. 135, 155 (1921) (upholding a rent control ordinance on the theory that World War I had created an economic emergency that “clothed the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law”).


\textsuperscript{150} Id.


\textsuperscript{153} Id. at 4, 5.


\textsuperscript{155} Id.

\textsuperscript{156} Id.

\textsuperscript{157} See id.
III. OTHER BARRIERS TO THE RETURN OF POOR BLACKS TO NEW ORLEANS

A. “Cleaning up the Ghetto”: The Conflation of Race and Crime in Urban Neighborhoods

We finally cleaned up public housing in New Orleans. We couldn’t do it. But God did.

—Representative Richard Baker, Republican Congressman from Baton Rouge

One of the significant barriers to the return of poor blacks to New Orleans is a notion that these persons were undesirable elements in the community. As one observer suggested, “If we’re going to try to recreate the city, why not do it right? Why rebuild it the way it was? New Orleans was a dangerous city even before the hurricane hit.” Comments such as these, expressing an open Schadenfreude at the evacuation and slow return of poor blacks, reflect notions held by many white and economically well-off New Orleanians—that there is conflation between race, crime, and urban residency, and that the face of crime in New Orleans is black.

Accordingly, the widespread evacuation of many poor blacks who previously resided in New Orleans is viewed as the beginning of a “dis-

159 Haya El Nasser, A New Orleans Like the Old One Just Won’t Do, USA Today, Sept. 19, 2005, at 15A.
160 “Schadenfreude” is a German word, usually capitalized, signifying a malicious or perverse pleasure in the misfortune of others. 16 Oxford English Dictionary 611 (2d ed. 1989). It has been imported to English directly in its German form, as it is often said to have no true English equivalent. But see Peter Novobatzky & Ammon Shea, Insulting English 51 (2001) (defining “epicaricacy,” an English word of apparently similar meaning, but appearing in few modern dictionaries). In some of its earliest scholarly usage, Schadenfreude focused upon considerations of interpersonal relations. See generally Fritz Heider, The Psychology of Interpersonal Relations (1958); Friedrich Nietzsche, On the Genealogy of Morals 127 (Walter Kaufmann ed., Walter Kaufmann & R. J. Hollingdale trans., Vintage Books 1989) (1887). In more recent scholarly usage, it has moved beyond the interpersonal to the broader context of intergroup relations, particularly where there are feelings of scorn or superiority held by one group towards another, and for this reason, it has a particular piquancy in the context of some mainstream white attitudes held about poor, black Katrina victims. See Russell Spears & Colin Wayne Leach, Intergroup Schadenfreude: Conditions and Consequences, in The Social Life of Emotions 336, 336–38 (Larissa Z. Tiedens & Col in Wayne Leach eds., 2004). Spears and Leach argue that Schadenfreude is an important aspect of group social identity because of the way that it implies both “psychological distance” from and “emotional divergence” between one group and another. Id. at 338.
aster dividend,” or an unexpected bonus arising from the adversity.\textsuperscript{161} This dividend has helped to hasten the “urban renewal” process that has been part of the fabric of New Orleans and other American cities since the 1950s, resulting in such wholesale elimination of communities of color, especially black communities, that it is often cynically called “negro removal.”\textsuperscript{162}

This process of eliminating blacks from the urban fabric reflects anthropologist Claude Lévi-Strauss’ work on societies’ response to difference.\textsuperscript{163} Lévi-Strauss suggests that societies use two mechanisms for addressing the “otherness” of Others: anthropopoemic (expelling the Other) or anthropophagic (swallowing or appropriating the Other).\textsuperscript{164} In primitive societies these devices were often literal and were seen in the use of exile and cannibalism.\textsuperscript{165} Lévi-Strauss argues that these strategies of domination are mutually exclusive.\textsuperscript{166} More recent commentators have viewed the anthropophagic and anthropopoemic processes as coexisting mechanisms, which may function at the same time in societies although they may be in the province of differing institutions or may only be applied to certain segments of the population.\textsuperscript{167}
These mechanisms are often present in modern society in “upgraded” or “refined” forms via the appropriation of cultural artifacts or other attributes of the Other, spatial separation, the establishment of urban ghettos, and measures that make it impracticable for the displaced to return to their former homes. Indeed, the final mechanism may be at work in the case of blacks in New Orleans. Yet Hurricane Katrina is not the first time that the dislocation and destruction caused by a major disaster has driven some dominant white interests to seek the removal of a community of color.

Probably the best known historical example of a post-disaster effort to eliminate a community of color was seen in San Francisco’s Chinatown following the earthquake of 1906. The 1906 earthquake was of immense proportions, estimated to have been at 8.3 on the Richter Scale. The earthquake and subsequent fire that it caused damaged much of the city. Chinatown, centrally located on a hill in one of the prime commercial quarters of San Francisco, was all but destroyed by the earthquake. City leaders, and even out-of-town critics, immediately reprised attempts from the 1870s to move Chinatown from its central, geographically favorable location to a more marginal neighborhood.

In the wake of the destruction caused by the earthquake in San Francisco, it was argued that the entire neighborhood should be relocated, for the “safety” and “happiness” of the Chinese themselves, and


May Joseph, Nomadic Identities: The Performance of Citizenship 131–32 (1999) (discussing “ideological cannibalism” and the way in which postcolonial societies consume the cultural corpus of Others as an exercise in state-building). Although Lévi-Strauss seemed to see the two impulses as being starkly opposed and viewed “primitive” societies as anthropoemic and modern societies as anthropophagic, Bauman sees both impulses in modern society. Bauman, supra note 167, at 179–81; Lévi-Strauss, supra note 163, at 287–88.


Ann Weil, Earthquakes 24 (2004). The Richter magnitude test scale, more accurately described as the local magnitude $M_l$ scale, was developed in 1935 and credited to Charles Richter. Id. at 4; see Bruce A. Bolt, Engineering Seismology, in Earthquake Engineering: From Engineering Seismology to Performance-Based Engineering 2-1, 2-13 to 2-15 (Yousef Bozorgnia & Vitelmo V. Bertero eds., 2004). The scale uses a base ten logarithmic scale to assign a single number to quantify the size of an earthquake. Bolt, supra, at 2-13. Approximating tools have allowed scientists to assign the 1906 San Francisco earthquake a place on the scale. Id.

Fradkin, supra note 169, at 3–4.

Id. at 34–35, 289.

Id. at 34–37.
to eliminate the “blight” that Chinatown had caused to the central city. But for the intervention of the Dowager Empress in China, San Francisco’s Chinatown would have been rebuilt on a vastly smaller scale with fewer inhabitants on the mudflats near the city’s slaughterhouses. Like the Chinese in San Francisco in 1906, the poor blacks in post-Katrina New Orleans face dispossession and dislocation. Desires to reduce the number of certain people in order to fight urban blight or crime stand as one of the most insurmountable barriers to the renewal of neighborhoods chiefly occupied by blacks and especially poor blacks. Unfortunately, no powerful defender, either in the United States or abroad, has thus far stepped forward to aid black New Orleanian efforts to reestablish their neighborhoods.

**B. The Race, Crime, and Urban Residency Triad**

“Some of the people shouldn’t return.” . . . “The (public housing) developments were gang-ridden by some of the most notorious gangs in this country. People hid and took care of those persons because they took care of them. Only the best residents should return. Those who paid rent on time, those who held a job and those who worked.”

—Housing and Urban Development Secretary Alphonso Jackson

One of the principal reasons for the undesirability of poor, black Katrina victims is the belief, expressed by public figures and private actors, of a significant link between the black, mostly poor inhabitants of New Orleans and high crime rates. Therefore, the story goes, the evacuation of poor, black areas and the subsequent destruction of housing which make broad reoccupation impossible means a reduction in crime rate in New Orleans because the “criminals” were cleaned out by

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174 Id. at 294–96.
176 See discussion infra Part III.B–C.
177 See discussion infra Part III.B–C.
179 See Dyson, supra note 21, at 114–15. Author Michael Eric Dyson writes that Louisiana Governor Kathleen Blanco, responding to media reports that blacks in many parts of New Orleans were looting and rioting out of control, authorized National Guard troops to shoot “hoodlums.” Id. at 114.
the hurricane. In the aftermath of Katrina, stories abounded of the criminal propensities and improvidence of these areas’ former residents. The media reported that government or private issue emergency funds were misused to buy expensive toys, other luxury items, and in some cases drugs. Popular culture in the form of gangsta rap quickly picked up this strain. In the months following the hurricane, New Orleans rappers and deejays, exiled to locations all over the United States, released songs chronicling the events of Hurricane Katrina and its aftermath. In some cases it was not clear whether it was a case of art imitating life or art imagining life.

In one instance, Councilman Chris Roberts of Jefferson Parish, a town near New Orleans that was slated to accept a number of families under the federally funded Housing Choice Voucher Program (formerly Section 8) wanted to legislate a requirement that landlords who accept federal housing subsidies must hire around-the-clock security. Meghan Gordon, Councilman Takes Back Security Plan, TIMES-PICAYUNE (New Orleans), July 27, 2006, at 1. Roberts, as a result of studying incident reports and riding along with local police, concluded that there was a “direct correlation between frequent crime and apartments that the ‘government is giving away for free.’” Id. According to the councilman, “It’s no secret that if you go in New Orleans, the majority of the crime happens in public housing complexes . . . . ‘Unfortunately, in Jefferson Parish, they have turned private apartments into public housing complexes.’” Id. The proposed required security detail, in Roberts’s opinion, would have reduced crime in the parish. Id. Roberts later withdrew the proposal in the face of criticism that it was discriminatory. Id.

E.g., Reckdahl, supra note 29.

See id.

See, e.g., JUVENILE, Get Ya Hustle On, on REALITY CHECK (Atlantic Records 2006); TENTH WARD BUCK, What Is Your FEMA Number?, http://b.rox.com/media/fema-number.mp3 (transcript available at http://b.rox.com/archives/2006/03/29/what-is-your-fema-number/). One artist sang a paean to the chaos after Katrina:

The loamin hard sparkle like glass
Main bitch right behind me lookin sharp in the Jag
Security say you don’t know me so I talk to ‘em bad
If a nigga want somethin I got somethin for his ass
Choppers—I’m already knowin that it’s a G thang
Ever since they tried to drown a nigga on the eastbank
Everybody need a check from FEMA
So he can go and sco’ him some co-ca-in-e
Get money! And I ain’t gotta ball in the Beemer
Man I’m tryin to live, I lost it all in Katrina (damn)
And nobody cares what the police thank
Everybody fuckin with ki’s cause it’s a street thang.

JUVENILE, supra. Yet another rap artist, in his salute to Hurricane Katrina, wrote and performed a song titled What is Your FEMA Number? See Appendix B (providing lyrics as performed by rap artist Tenth Ward Buck).

These artists perform a variant of hip hop music particular to New Orleans called bounce music. Bounce music is characterized by call and response party chants and dance call-outs and frequently has an undercurrent of techno-funk sound. It is akin to rap, but involves “festive beats” and “exuberant chants” yet basic lyrics. Kelefa Sanneh, Gangsta
The conflation of poverty, blackness, and urban residency with lawlessness is, writes one observer, one of the results of the so-called War on Poverty. The War on Poverty, rather than addressing the mainstream institutional power arrangements that created and continue to sustain poverty, treats poverty and its ills as more attributable to internal factors such as the failings of black individuals and communities. In this view, poverty in black neighborhoods does not result from widespread, external, and systemic social and political failings but instead is framed as an internal, localized, episodic, urban, self-generating, and overwhelmingly black problem which “naturally” engenders crime.

This take on race, crime, and poverty is reproduced frequently by apparently well-meaning observers and even by some members of the black community. One commentator, in an effort to spur blacks to

184 See Keith Negus, Music Genres and Corporate Cultures 91 (1999); Imani Perry, Prophets of the Hood: Politics and Poetics in Hip Hop 90 (2004). One of the critiques of the gangsta rap genre is that it not only glorifies actual violence but also imagined violence, and that it thus presents life in ghettos and poor neighborhoods as excessively violent or profane and ultimately not true to reality. See Perry, supra, at 90. This is done in order to gain market share and “street cred,” or authority as one knowledgeable about life in poor minority neighborhoods. See id. Many of those involved in songwriting, production, and often the performance of gangsta rap are themselves well-educated products of middle-class homes. See Negus, supra, at 91–92. For a discussion of the relationship between class, race, and rap, see generally Adam Krims, Rap Music and the Poetics of Identity (2000).

185 Steven Gregory, Black Corona: Race and the Politics of Place in an Urban Community 105 (1999).

186 See id.

187 See id.

188 See Juan Williams, Op-Ed., Getting Past Katrina, N.Y. Times, Sept. 1, 2006, at A17. Juan Williams writes that one of the biggest barriers to the return of poor blacks to New Orleans is not lack of government financing to rebuild housing but “poverty of spirit.” Id. Black comedian and recent social critic Bill Cosby, while acknowledging the hardships suffered by poor, black Katrina survivors, chided survivors for their failures to adequately parent and the consequent high crime rate in New Orleans before the hurricane. Cosby Charms, Chastises Crowd, Chattanooga Times Free Press, June 12, 2006, at B2.
take greater responsibility for the problem of black crime, decried the spread of a “cultural illness” in the black community.\textsuperscript{189} This illness produces sufferers who “don’t snitch on criminals, seldom marry, frequently abandon their children, refer to themselves in the vilest terms (niggers, whores, etc.), spend extraordinary amounts of time kicking back in correctional institutions, and generally wallow in the deepest depths of degradation their irresponsible selves can find.”\textsuperscript{190} Such accounts subvert and distort the meaning of culture, giving sustenance to notions such as the “culture of crime.” These rhetorical constructions posit crime as a socially transmitted, wholly voluntary set of traits that are characteristic of an entire group of people instead of the anomalous perversion of social norms that it is. The ideological sibling of the culture of crime is the culture of victimhood, based on a “rhetoric of grievance” and “ressentiment” that become part of a group’s “constitutive traits.”\textsuperscript{191}

These claims about culture in poor, black communities, often made by persons who are socially and politically outside of those communities, rely on assertions of the inherent neutrality of mainstream culture and ignore the social, political, and economic contexts of the people under discussion.\textsuperscript{192} They impose “culture from above” wherein external forces ascribe to members of a particular group a corrupt, arid, and perverse form of culture based on the ethnic or racial identity of the group to which they are presumed to belong.\textsuperscript{193} Such claims are

Scholar Michael Eric Dyson writes that some of the most prominent bashers of the black urban poor, or what he terms the “ghettocracy,” are members of the black middle and upper middle classes, which he calls the “Afristocracy.”

\textit{Michael Eric Dyson, Is Bill Cosby Right?: Or Has the Black Middle Class Lost Its Mind?}, at xiii–xiv (2005).


\textsuperscript{190} \textit{Id.} For a broader discussion of this point of view, see generally \textit{Juan Williams, Enough: The Phony Leaders, Dead-End Movements, and Culture of Failure That Are Undermining Black America—and What We Can Do About It} (2006).


often the morally troubling signal of a fatigue with the problems of others and an effort to create social distance. In such accounts, innocent, hardworking poor or working-class blacks become peripheral and are sidelined. When such innocent blacks suffer or fail, they are portrayed as marginal, barely existing victims of the prevailing “criminal” culture of the black community. When they succeed, which is rare because success is measured in giant steps rather than in small, measured steps, they are held up as bootstrapping role models to be plucked from the degradation of the ghetto and cultivated as hothouse flowers in mainstream white America.

C. “Identity Cleavages” and “Vacuums of Authority”

One observer has suggested that the problems experienced by persons displaced in a disaster are often the result of or exacerbated by the “differentiated identities” of the victims. These identities may be based on a variety of factors such as race, ethnicity, or religion, any one of which may effectively serve as “identity cleavages.” Identity cleavages sever members of the differentiated group from the dominant group in a society. When these persons also happen to be members of a marginalized or disfavored group already in conflict with the dominant group, the rights of citizenship are rarely fully available to them during a crisis of displacement. In such a case, displaced persons are not “protected and assisted” as mainstream citizens during a crisis, but instead are “identified as part of the enemy, neglected and even persecuted.” For these displaced persons, many of the guarantees of civic membership are absent, and citizenship becomes, if not contested, certainly contingent. Because they are disconnected from the enjoyment of the rights normally associated with the dignity of being a citizen, their marginalization “becomes tantamount to stateless-

above” from the notion of “ethnicity from above” which has been used to describe the way in which an empowered minority of persons exercise hegemony via the imposition of politicized racial categories that serve to perpetuate inequality. Id.


Id.

Id.

Id.

Id.

See Deng, supra note 195, at 219.
ness.”201 In these cases, there is frequently no governmental authority willing to assume responsibility for the displaced, and thus there is a “vacuum of responsibility” that may be filled by international law.202

The dual concepts of identity cleavage and the vacuum of responsibility illuminate certain aspects of the situation facing poor, black Katrina evacuees.203 Almost immediately after the hurricane, there were statements disclaiming responsibility for victims by local, state, and federal authorities.204 This response, or rather lack of response, was one of the hallmarks of the crisis; the government’s continual finger pointing and buck-passing conveyed the extent to which many of Hurricane Katrina’s victims were viewed with contempt.205 It was a poignant reminder of the way in which legal and political discourse concerning people of African ancestry involves an active and continual “othering” of blacks, which renders them outsiders.206

I have set forth some of the reasons for the displacement and dispossession of poor, black New Orleanians and shown how many of those barriers are housing related or based on the notion that poor blacks pose a security risk or are undesirable. I will now turn to possible remedies for dispossession and focus on how international law may be a source of a domestic right of return.

IV. INTERNATIONAL HUMAN RIGHTS IN THE CONTEXT OF HURRICANE KATRINA

A. An Overview of the Development of International Law as a Source of Rights

The word “rights” carries great weight and raises expectations. Rights are entitlements, rights are freedoms, and ultimately, in all cases, rights are power. While the notion of rights has certainly been at the heart of most Western legal and social systems, rights have not necessar-
ily been expressed in positive terms.  

Historically, rather, the rights that guided and shaped the day-to-day lives of persons living in Western societies were often subtle, implicit, and not necessarily recorded. It has been argued, for example, that early peoples living in proto-government societies lived by social contract.  

These contracts were implicit agreements whereby each person understood that in order to receive rights, they had to perform some duty in return.  

With the development of nation-states, the contractual aspect of rights became one wherein the exchange was between the individual and a sovereign leader.  

Social contract theory offered an account of social and political relationships within the nation-state and ultimately of rights themselves.  

However, for the most part, social contract theory as it was initially conceived left the international arena, those spaces external to the individual nation-state, relatively undefined.  

In these interstitial spaces between nations, there was no fixed legal framework or international sovereign, and nations existed in a “state of nature” wherein there was always the specter of war.  

Though modern nations have historically filled the void outside of the nation-state, some would argue that we are still in a state of nature regarding laws that govern international relations.  

Such laws, though perhaps more nuanced and refined than in past centuries, are still only provisionally valid.  

Nonetheless, there has long been a well-understood system of laws and norms that govern international relationships, including both customary laws and basic forms of conventional law.  

Since the period after World War I, however, there has

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209 See id. at 5.

210 See id. at 5–6.

211 See id. at 4.


213 See Stauffer, supra note 208, at 3–4.

214 See id.


216 See, e.g., Michael Byers, Custom, Power and the Power of Rules: International Relations and Customary International Law 3–4 (1999) (describing custom-
been an intensive focus on formalizing the process of developing international law by coalitions of governments.\footnote{See Mark E. Villiger, Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources \textit{69–74} (2d ed. 1997) (1985). There have long been private attempts to codify the law of nations. \textit{Id.} at 65--67. These were undertaken by a diverse group of private individuals. \textit{Id.} at 65--66. Among these private drafters were Jeremy Bentham and David Dudley Field, the drafter of the Field Code. \textit{Id.} at 65. Some private organizations that undertook the codification of international law included entities such as the International Law Association and the \textit{Institut de Droit International}. \textit{Id.} at 66–67.} The idea was to form a “government of governments,” and international law, rather than evolving only as the need arose, became the subject of continuous contemplation by international bodies created solely for this purpose.\footnote{See generally 3 Akira Iriye, \textit{The Cambridge History of American Foreign Relations: The Globalizing of America, 1913–1945}, at 62--68, 205, 209–13 (1993). One of the earliest efforts was the League of Nations. Franz Cede, \textit{Historical and Legal Framework for Activities of the United Nations}, in \textit{The United Nations: Law and Practice} \textit{3, 3} (Franz Cede & Lilly Sucharipta-Behrmann eds., 2001). The League of Nations was the first international intergovernmental organization. \textit{Id.} at 3--4. It was formed after World War I to promote international cooperation among nations and to achieve peace. \textit{Id.} at 3. It functioned from 1920 until it was dissolved in 1946, after World War II. \textit{See id.} at 5. Out of the League of Nations grew the United Nations, which was created in 1945 as another international rule-making body. \textit{Id.} at 6–7. The United Nations has 192 member states, which includes most internationally recognized independent nations. See United Nations, United Nations Member States, http://www.un.org/members/list.shtml (last visited Apr. 17, 2007).} These bodies create rules which ideally have a legitimizing and constraining effect upon both the international and intra-national behavior of member nations.\footnote{Byers, \textit{supra} note 216, at 6–7.} It is within this framework of international law that the notion of international human rights has developed.

\textbf{B. The International Bill of Human Rights}

tions [are] determined . . . to reaffirm [their] faith in fundamental human rights.” However, one query arising in a discussion of the concept of international human rights is whether they are “rights” at all under a general understanding of rights. Nonetheless, norms for international human rights are clearly a well-entrenched part of international law.

Though international human rights have developed from a number of sources and over a long period of time, the International Bill of Rights presents a comprehensive normative framework. It encompasses several instruments, including: the Universal Declaration of Human Rights; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the Optional Protocol to the International Covenant on Civil and Political Rights; and the Second Optional Protocol to the International Covenant on Civil and Political Rights. Within some of these instruments, support for a domestic right of return may be found for displaced Katrina victims.

C. International Human Rights, Hurricane Katrina and the Right of Return

The right to return is hollow without a plan for transportation and a place to stay.

—Rev. Jesse Jackson, speaking at a news conference at the site of the now famous levee breach on the Industrial Canal

Invoking international human rights norms in the domestic context is not a novel idea, and the use of international human rights law

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222 U.N. Charter, supra note 221, pmbl.; van Boven, supra note 221, at 462.
224 See Henkin, supra note 223, at ix.
225 See id. at 1–2 (describing the evolution of the contemporary notion of human rights); van Boven, supra note 221, at 463 (describing the International Bill of Human Rights).
in United States domestic cases is increasing.\textsuperscript{228} With this heightened focus on the benefits of international law in domestic contexts, it is progressively clearer that there are few detailed international standards for disaster relief and prevention and that development of such standards must take into account the role of both international and domestic actors.\textsuperscript{229}

To the extent that there are existing international law norms to address disasters and the problems of those affected by them, few of these norms were followed after Hurricane Katrina. For example, a number of activists and NGOs have cited much of the chaos and depri-
vation occurring in the wake of Katrina, and the way in which those deprivations were disproportionately suffered by poor blacks, as an indictment of the U.S. government’s clear violations of sections of the International Covenant on Civil and Political Rights. Moreover, it has been observed that victims of Hurricane Katrina might be better served if the United States incorporated the socioeconomic rights of international law into its domestic regime.

One way of deploying international human rights norms in the context of Katrina would be to apply explicit international norms regarding what could effectively be called a “domestic right of return.” Such norms are found in the Guiding Principles of Internal Displacement. Protections for the internally displaced are also detailed in the London Declaration of International Law Principles on Internally Displac-
placed Persons (London Declaration).\(^\text{234}\) I will forgo discussion of the London Declaration in favor of a fuller discussion of the Guiding Principles of Internal Displacement. First, I will discuss the right of return in international law as it applies to movements between nation states, and then I will discuss the norms for internal displacement.

V. THE RIGHT OF RETURN IN INTERNATIONAL LAW

A. The Right of Return in General

The right of return is a concept in international law that allows for repatriation to a country of origin by former citizens or their descendants.\(^\text{235}\) In some right of return regimes, the claimants may have no clearly articulated claim to descent from former citizens of a country; in such cases the right of return is offered based on generalized racial, religious, or ethnic background of the claimant.\(^\text{236}\) The right of return typically presumes that right holders will have access to all of the rights held by other citizens of a particular country.\(^\text{237}\)

B. The Relationship Between the Right of Return and the Right to Abode

As the phrase is commonly understood, the right to abode, sometimes stated as the right of abode, refers to the right of a person to remain indefinitely in a country without seeking explicit permission from the government. It is most often associated with citizenship or permanent residency rights, though holders of the right of abode need not


\(^{236}\) See, e.g., Ayelet Sachar, Citizenship and Membership in the Israeli Polity, in From Migrants to Citizens: Membership in a Changing World 386, 394–96 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2000). One example is Israel’s Right of Return for persons of Jewish ancestry. Id. The Israeli Right of Return, however, exists in stark contrast to the claims to a right of return made by former Palestinian residents of the same geographical territory. See Salman Abu Sitta, The Implementation of the Right of Return, in The New Intifada: Resisting Israel’s Apartheid 299, 299 (Roane Carey ed., 2001). A more recent example is Ghana’s creation of a right of return (or right of abode as it is interchangeably called), which would allow U.S. citizens of African ancestry the right to live and work in Ghana as permanent residents, but would not necessarily confer any right to political participation. See Godfrey Mwakikagile, Relations Between Africans and African Americans: Misconceptions, Myths and Realities 353–56 (2d ed. 2006).

\(^{237}\) See, e.g., Guiding Principles, supra note 232, § 1, Principle 1, ¶ 1; id. § 5, Principle 28, ¶ 1.
have the full panoply of rights granted to citizens. Typically, individual nations make their own laws and norms regarding such issues as citizenship and permissions to enter or remain. A frequently cited example is the right of abode granted to some Hong Kong residents by Great Britain.

C. The Source of Normative Law Supporting the Right of Return

Countries that grant a right of return do so under the authority of their own national laws. However, there are also a number of international human rights instruments that address the freedom of movement as well as the right of return. For example, the Universal Declaration of Human Rights (UDHR) states that “[e]veryone has the right to freedom of movement and residence within the borders of each State . . . Everyone has the right to leave any country, including his own, and to return to his country.” While the UDHR does not have the force of law, it is a guiding document which “set up a common standard of achievement for all peoples and all nations.” The UDHR has been described as ranking with the Magna Carta, the French Declaration of the Rights of Man and of the Citizen, and the American Declaration of Independence.

The provisions of the UDHR were rearticulated in two treaties drafted in 1966 and put into effect in 1976. The first is the Interna-

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239 See id.
240 British Nationality (Hong Kong) Act 1990, ch. 34, § 1, sched. 1 (Eng.).
242 UDHR, supra note 226, art. 13.
245 See ICCPR, supra note 226; ICESCR, supra note 226.
tional Covenant on Civil and Political Rights (ICCPR).\textsuperscript{246} The other is the International Covenant on Economic, Social and Cultural Rights (ICESCR).\textsuperscript{247} The two treaties effectively bifurcated the types of rights that were being articulated in the UDHR.\textsuperscript{248}

Because the UDHR encompasses a wide range of rights that go well beyond political and civil rights and into the realm of social, economic, and cultural rights, it could not garner the international consensus necessary to become a binding treaty.\textsuperscript{249} In particular, a divide developed between some western industrialized nations with capitalist economic systems, such as the United States, and countries with socialist or mixed economies.\textsuperscript{250} Capitalist countries generally favored guaranteeing only civil and political rights, or what are known as first generation rights, while socialist nations favored guaranteeing only economic, social, and cultural rights, or second generation rights.\textsuperscript{251} The dispute was solved by the development of the two separate treaties, the ICCPR and ICESCR, to which nations acceded according to their particular philosophies.\textsuperscript{252}

The U.S. Senate ratified the ICCPR in 1992, with a number of reservations, understandings, and declarations.\textsuperscript{253} On June 4, 1992, President George H. W. Bush signed the instrument of ratification.\textsuperscript{254} The Senate declared that “the provisions of Article 1 through 26 of the Covenant are not self-executing.”\textsuperscript{255} Therefore, the ICCPR did not create a private cause of action in U.S. courts and hence was of no authoritative value in domestic situations.\textsuperscript{256} However, even if there

\begin{flushleft}
\textsuperscript{246} ICCPR, \textit{supra} note 226.
\textsuperscript{247} ICESCR, \textit{supra} note 226.
\textsuperscript{248} See ICCPR, \textit{supra} note 226; ICESCR, \textit{supra} note 226; UDHR, \textit{supra} note 226.
\textsuperscript{250} See Diana G. Zoelle, \textit{Globalizing Concern for Women’s Human Rights: The Failure of the American Model} 81 (2000). It has been suggested that the ICESCR is problematic from a capitalist perspective because it raises the specter of global redistribution and concerns itself with a global society rather than a global market. \textit{Id.} at 79–80.
\textsuperscript{251} \textit{Id.} at 80–81.
\textsuperscript{252} See \textit{id.} at 80–82.
\textsuperscript{255} 138 Cong. Rec. S4784.
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were such a cause of action, and particularly applying the provisions on internal freedom of movement and even analogizing the right to return, the problem still remains that these rights encapsulated in the ICCPR do not place explicit duty upon the government to ensure that conditions are such that evacuees have the tools they need to fully reestablish themselves, much less that conditions would permit their presence.\textsuperscript{257} Can the ICCPR, even if applicable, place a duty on the government?

The ICCPR includes a right of return, along with provisions on the right of free internal movement in Article 12:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.\textsuperscript{258}

Whether this provision supports a domestic right of return is not clear from its terms alone.\textsuperscript{259} To bridge this gap, the United Nations acted to create more explicit standards.\textsuperscript{260}

VI. A “DOMESTIC RIGHT OF RETURN”? THE GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT

Though the victims of Hurricane Katrina who fled their homes were frequently referred to as “refugees,” they are not, of course, refugees in the common meaning of the word.\textsuperscript{261} Therefore, such persons may not rely on international provisions referring to refugees or other

\textsuperscript{257} See Christine Bell, Peace Agreements and Human Rights 236–37 (2000).
\textsuperscript{258} ICCPR, supra note 226, art. 12.
\textsuperscript{259} See id.
\textsuperscript{260} See discussion infra Part VI.
externally displaced persons.262 Even though they are not “refugees,” for the period immediately after the hurricane and in some cases much longer, many of them found themselves in the same material conditions as refugees—bereft of home, family, and friends, while lacking basic necessities.263 Katrina evacuees are thus more similar to internally displaced persons within the meaning of the 1998 Guiding Principles on Internal Displacement.264

No specific treaty protects the rights of persons displaced within their own national borders by natural disasters or other causes.265 To address this void, the United Nations Commission on Human Rights prepared a set of guidelines to be used in cases of internal displacement.266 The resulting document, the Guiding Principles on Internal Displacement (Guiding Principles), sets forth thirty principles detailing international laws that protect the human rights of internally displaced persons.267 The Guiding Principles outline the scope and purpose of the document and state general principles for ensuring humanitarian assistance.268 They also describe procedures for three phases of internal displacement: pre-displacement; displacement; and return, resettlement, and reintegration.269 While the Guiding Principles have not been

262 See Kirgis, supra note 261.
263 See id. For a discussion of the distinction between refugees and internally displaced persons, see Catherine Phuong, The International Protection of Internally Displaced Persons 13–37 (2005). Phuong considers whether the exclusion of the internally displaced from the refugee category is justified, and concludes that the distinction should remain in place. Id. at 37. It has been argued by the United Nations High Commission on Refugees that “internally displaced persons are persons who would be refugees had they left their country,” and that hence the distinction between the two is so narrow as to not constitute a substantive difference. Id. at 29 (citing Representative of the Sec’y-Gen., Comprehensive Study Prepared by Mr. Francis M. Deng, Special Representative of the Secretary-General on the Human Rights Issues Related to Internally Displaced Persons Pursuant to Commission on Human Rights Resolution 1992/73, delivered to the Commission on Human Rights, U.N. Doc. E/CN.4/1993/35 (Jan. 21, 1993) and Office of the U.N. High Comm’r for Refugees, Div. of Int’l Protection, UNHCR’s Operational Experience with Internally Displaced Persons (Sept. 1994)).
265 Stavropoulou, supra note 264, at 735.
267 See Guiding Principles, supra note 232.
268 See id. §§ 1, 4.
269 See id. §§ 2, 3, 5.
explicitly incorporated in any treaty, they have been accorded recognition by United Nations member states.\textsuperscript{270}

The Guiding Principles describe individuals, such as the exiled Katrina survivors, as:

persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized [international] State border.\textsuperscript{271}

Guiding Principle 28(1) effectively creates a domestic right of return for internally displaced persons by charging states with the “primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country.”\textsuperscript{272} Principle 29(2) further details the duties of states to effectuate the return of displaced persons in such matters, stating:

Competent authorities have the duty and responsibility to assist returned and/or resettled internally displaced persons to recover, to the extent possible, their property and possessions which they left behind or were dispossessed of upon their displacement. When recovery of such property and possessions is not possible, competent authorities shall provide or assist these persons in obtaining appropriate compensation or another form of just reparation.\textsuperscript{273}


\textsuperscript{271} \textit{Guiding Principles}, \textit{supra} note 232, intro. ¶ 2.

\textsuperscript{272} \textit{Id.} § 5, Principle 28, ¶ 1.

\textsuperscript{273} \textit{Id.} § 5, Principle 29, ¶ 2.
One significant caveat to the use of the Guiding Principles is that they do not have the force or effect of a treaty and therefore it can be argued that they are only advisory in nature. However, as one commentator has observed, despite their non-binding status and relatively recent creation as an international norm, they have frequently been cited by countries addressing problems of internal displacement. In addition, several countries have added provisions modeled on the Guiding Principles to their domestic laws. Regional organizations have also made use of the principles. Perhaps surprisingly, even some “non-state actors,” as rebel army groups are sometimes called, have begun to employ the Guiding Principles. Finally, even without having the force of law, the Guiding Principles may be significant tools in helping governments develop their own legal standards because the Guiding Principles offer “an authoritative statement of the rights of the internally displaced in one document.”

It is clear that the Guiding Principles, if applied to the evacuees of New Orleans, would provide the numerous poor, black victims of Hurricane Katrina the basic, yet currently non-existent, right to return to

276 Id. at 371. “Colombia, Uganda, Sri Lanka, and Indonesia have adopted, or are in the process of adopting, the Guiding Principles, in various forms, into their domestic legal systems.” Id.
277 Francis Deng, International Response to Internal Displacement: A Revolution in the Making, HUM. RTS. BRIEF, Spring 2004, at 24, 25. Some regional organizations who have employed the Guiding Principles in their work or have further encouraged their dissemination are the Organization of African Unity Commission on Refugees, the Economic Community of West African States, the Inter-Governmental Authority on Development, the Organization for Security and Cooperation in Europe, and the Council of Europe’s Parliamentary Assembly. Id.
278 Id. One example of such a non-state actor that has addressed the Guiding Principles is “the Sudan’s Peoples Liberation Movement/Army, which has referred to them in its consideration of its own internal rule-making on dealing with the internally displaced.” Id.
A “non-state actor” is any social actor that is not a recognized state but may in some contexts have the authority of a state. See Richard Desgagné, European Union Practice in the Field of International Humanitarian Law: An Overview, in The European Union and the International Legal Order: Discord Or Harmony? 455, 461–63 (Vincent Kronenberger ed., 2001). Although traditionally only states were held responsible for human rights violations, there is a trend towards also making non-state actors accountable. Id. Non-state actors are generally divided into two principle types: private sector corporate actors such as multinational and transnational corporations, and non-governmental organizations. Richard A. Higgott et al., Introduction: Globalisation and Non-State Actors to Non-State Actors and Authority in the Global System 1, 1–2 (Richard A. Higgott et al. eds., 2000).
279 Cohen & Deng, supra note 274, at 76.
their homes. Though no such binding authority currently exists providing this basic human right, it is certainly a goal that our country and its internal localities should adopt to prevent the permanent dislocation of peoples from their homes due to natural disaster, subsequent government coercion, or culturally tainted removal as in the current case of New Orleans.

Conclusion

Using international human rights as the source of a domestic right of return for poor, black New Orleanians may result in the beginning of the kind of broad-based restorative justice that black people in the United States have lacked since their emancipation from slavery. A domestic right of return in this circumstance, however, would impact well more than just the immediate victims. In the aftermath of Hurricane Katrina, New Orleans is enmeshed in plans for a renaissance which includes a focus on economic revitalization and gentrification. This two-pronged focus may cause the city to forget Katrina’s poor, black victims who are already disenfranchised by the unfolding drama. New Orleans’s vitality arises from the existence and affirmation of its black community and its unique culture and contributions; any attempt to recreate New Orleans without this vital group would result in a sterile imitation of the city that once was.
APPENDIX A

I ain’t saying he’s a gold digger
But he ain’t messing with no broke niggas[Repeat once]

George Bush don’t like black people[Repeat four times]

Hurricane came through, fucked us up ‘round here
Government acting like it’s bad luck down here
All I know is that you better bring some trucks ‘round here
Wonder why I got my middle finger up ‘round here

People lives on the line you declining to help
Since you taking so much time we surviving ourself
Just me and my pets, and my kids, and my spouse
Trapped in my own house looking for a way out

Five damn days, five long days
And at the end of the fifth he walking in like “Hey!”
Chilling on his vacation sitting patiently
Them black folks gotta hope, gotta wait and see
If FEMA really comes through in an emergency
But nobody seem to have a sense of urgency
Now the mayor’s been reduced to crying
I guess Bush said, “Niggas been used to dying!”280

APPENDIX B

Wat is yo FEMA numba? (FEMA) (huh?)
Yo FEMA numba (who?)
Wat is yo FEMA numba? (FEMA) (huh?)
Yo FEMA numba (who?)
Wat is yo FEMA numba? (FEMA) (huh?)
Yo FEMA numba (who?)
I think it start wit 9
I think it start wit 3

Look I ain’t gettin’ off the phone till you give me me
Man I walked through the flood wit these shoes on my feet
And I need a fresh pair give me my 23
So I can walk to the conda store
 Spend up the 23 so I can ask for more
 I smoke, I roll, I gamble, I save
But I don’t know how I got broke in 2 days
 I’m lose and I’m low
FEMA drop by and give me 50 more (oh)
Red Cross came thru and gave me a couch
Now I’m at the town getting golds in my mouth

. . . .

93105 wit the dash
That’s my FEMA numba so gimme my cash
I’m headed to the mall, shop at all the stores
Don’t matter if I go broke you betta get yours
You see I’m the CEO I just want you to know
When I got my FEMA check baby I went bazerc
I got golds and rims and all the tims
I got a house wit my voucher from the disaster shelter
Drop and give me 50
23, 50
Please FEMA give me
Wat you got to give me
I need some more
So I can go
To the shoppin center and buy some more clothes.\textsuperscript{281}

\textsuperscript{281} Tenth Ward Buck, supra note 183.
STUDENT INTERROGATIONS BY SCHOOL OFFICIALS: OUT WITH AGENCY LAW AND IN WITH CONSTITUTIONAL WARNINGS

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Abstract: When public school students admit to violating of school rules to their principals, they may also be admitting to a violation of criminal law. Increasingly, principals share these confessions with local law enforcement and the students are charged in a criminal proceeding. Because principals, knowing the evidence will be turned over to law enforcement per school policies, are seeking evidence to use against their students, these students should be so warned before an interrogation with their principal. Though most prior case law involving student interrogations has been decided under agency law, the Supreme Court’s decision in Ferguson v. City of Charleston suggests a new framework to analyze student interrogations by school officials. Ferguson dealt with a Fourth Amendment search, but suggested the same analysis would be applicable in Fifth Amendment cases. Because Fourth Amendment school cases often value the same factors as in the Ferguson analysis, Ferguson’s test, which requires constitutional warnings when state actors seek out incriminating evidence, should also be applied in Fifth Amendment school cases.

Introduction

Imagine you are a public high school student who has brought marijuana to school. You sell some of the drugs to a fellow student, who is caught with them and gives the principal your name as her source.¹ The principal takes the confiscated marijuana to the local police department and informs the police that, upon her return to school, she is planning to question you.² The principal calls you to her office, explains to you that she has reason to believe you are carrying drugs, and

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* Articles Editor, Boston College Third World Law Journal (2006–2007). Thanks to my mom for showing me the importance of social justice and action, and to all my students from Marshall Fundamental Secondary School (Pasadena, California) for the many, many lessons they taught me.

¹ See generally State v. Tinkham, 719 A.2d 580 (N.H. 1998). All of the facts in this Introduction come from Tinkham. See id. at 580, 581, 582.

² See id. at 581.
asks you to empty your book bag.\textsuperscript{3} You comply.\textsuperscript{4} The principal finds a small wooden container with a peculiar odor, which she seizes and explains will be turned over to the police.\textsuperscript{5} After this search, the principal tells you that another student has implicated you as selling drugs in the school parking lot which you confirm.\textsuperscript{6} You fill out a student-referral form to give your version of events.\textsuperscript{7} After doing so, the principal informs you that you will be suspended for five days and that further action will likely be taken against you.\textsuperscript{8} Then the principal contacts the police, tells them about the suspicious item she confiscated as well as the details of her conversation with you, and gives them your written confession.\textsuperscript{9}

Eventually, you are charged with selling marijuana to another student on school property.\textsuperscript{10} At your trial, you move to suppress the wooden container and the student-referral form.\textsuperscript{11} You claim the search that revealed the wooden item was unconstitutional and that your version of events (essentially, a confession) on the student-referral form was given without \textit{Miranda} warnings.\textsuperscript{12} Unfortunately, the law on school searches is well-established; courts only require that searches by school officials be reasonable under the circumstances, so the motion is denied and the ruling is later affirmed on appeal.\textsuperscript{13}

You might think, however, that your argument for the suppression of your statement has a good chance of success. After all, the principal had already given the police potentially incriminating evidence and informed them that she was going to question you, specifically.\textsuperscript{14} From her statements to you and to the police, it was clear that the principal had every intention of turning any further evidence over to the police.\textsuperscript{15} You have watched enough television to know that anything you say to the police “can and will be used against you in a court of law,” but

\textsuperscript{3} See id.
\textsuperscript{4} See id.
\textsuperscript{5} See id. at 582.
\textsuperscript{6} See \textit{Tinkham}, 719 A.2d at 581.
\textsuperscript{7} See id. at 582. A student-referral form is used when disciplinary action is taken against a student and provides space for both the student and administrator to explain their versions of the events at issue. See id.
\textsuperscript{8} See id.
\textsuperscript{9} See id.
\textsuperscript{10} See id. at 582.
\textsuperscript{11} See \textit{Tinkham}, 719 A.2d at 581.
\textsuperscript{14} See \textit{Tinkham}, 719 A.2d at 581.
\textsuperscript{15} See id.
you were talking (and confessing) to your principal—not a police official.\textsuperscript{16} You knew you might be punished for violating school rules, but you never considered that anything you told your principal might be used against you in a criminal situation.\textsuperscript{17} Indeed, if you had, perhaps you would not have admitted anything or filled out a student-referral form without first speaking to a lawyer, such as the kind police on television shows always offer suspects when reciting \textit{Miranda} rights.\textsuperscript{18} Unfortunately for you, however, school officials do not have to give students any type of \textit{Miranda} warnings before they conduct interrogations, even if they have every intention of turning over evidence to the police, just as your principal had.\textsuperscript{19} As a result, your motion is denied and the denial is upheld on appeal.\textsuperscript{20}

Lest you think you just happened to be in an unfriendly jurisdiction, you should know that many jurisdictions have similarly ruled that school officials do not need to give \textit{Miranda} warnings before questioning students.\textsuperscript{21} Courts have ruled this way based on two lines of reasoning. First, because school officials are not law enforcement officers and do not have the same objective or purpose as law enforcement officers, they are not per se required to give \textit{Miranda} warnings.\textsuperscript{22} Second, if school officials are acting as agents of law enforcement at the time of the interrogation, courts will only require \textit{Miranda} warnings in specific situations.\textsuperscript{23} This basis of analysis is somewhat misleading, however, because courts rarely find that such an agency relationship exists.\textsuperscript{24}

Without dispute, school officials and society have an important and legitimate interest in preventing drug distribution, or any crime for that matter, on school property.\textsuperscript{25} And, as the Supreme Court and many state courts have found, school officials should have more latitude than

\begin{enumerate}
\item See \textit{id.} at 581–82.
\item See \textit{Miranda}, 384 U.S. at 444.
\item See \textit{id.}
\item See \textit{Tinkham}, 719 A.2d at 584.
\item See \textit{Tinkham}, 719 A.2d at 583.
\item See \textit{Tinkham}, 719 A.2d at 583.
\item See \textit{id.}; see also \textit{Navajo Co. Juvenile Act. No. JV91000058}, 901 P.2d at 1249; Snyder, 597 N.E.2d at 1369; Brendan H., 372 N.Y.S.2d at 477.
\end{enumerate}
law enforcement officers when investigating offenses on school property because of the unique nature of public schools.\textsuperscript{26} School officials have a “custodial and tutelary responsibility” for their students, and are responsible for maintaining a safe and orderly environment that is conducive to learning.\textsuperscript{27} Because of this responsibility, school officials are necessarily allowed to closely supervise their students and enforce rules that would be unenforceable against adults, or even minors outside of the school setting.\textsuperscript{28} At the same time, however, the Supreme Court’s decision in \textit{Ferguson v. City of Charleston} reveals that the Court is wary of non-law enforcement actors seeking out evidence with a primary objective of turning that evidence over to law enforcement.\textsuperscript{29} Looking back to the real-life facts that introduced this Note, what was the principal’s intent? Although she certainly intended to keep her campus drug free, she also had a clear intent to turn any evidence over to law enforcement.\textsuperscript{30} Because of her goal to assist law enforcement, the principal should have given the student the appropriate constitutional warning under the reasoning of \textit{Ferguson}.\textsuperscript{31}

This Note takes a fresh look at school interrogations after the \textit{Ferguson} decision, exploring how that case should change the area of interrogations by school officials. The Note concludes that the \textit{Ferguson} decision provides the proper framework for analyzing school interrogations and that the decision requires school officials to give constitutional warnings in some school-based interrogations. Part I examines the \textit{Ferguson} decision and its resulting test. Part II argues that the \textit{Ferguson} decision should be applied in the school context based on other Supreme Court decisions about school-based constitutional rights. Part III provides external support for applying the \textit{Ferguson} decision in school interrogation cases based upon the close relationship between school officials and law enforcement, as evidenced by crime reporting statistics and school policies. Part IV addresses some concerns application of the \textit{Ferguson} test could have on the practicalities of school officials should they be required to provide constitutional warnings in student-interrogations.

\textsuperscript{27} See \textit{Earls}, 536 U.S. at 830; \textit{Vernonia}, 515 U.S. at 656; \textit{T.L.O.}, 469 U.S. at 339.
\textsuperscript{28} See \textit{Earls}, 536 U.S. at 830; \textit{Vernonia}, 515 U.S. at 656; \textit{T.L.O.}, 469 U.S. at 339.
\textsuperscript{30} See \textit{Tinkham}, 719 A.2d at 581.
\textsuperscript{31} See \textit{Ferguson}, 532 U.S. at 85; \textit{Tinkham}, 719 A.2d at 581.
I. Ferguson and Its Aftermath

A. Introduction to Ferguson

In Ferguson v. City of Charleston, state hospital workers administered drug tests to pregnant women without the women’s consent.32 The testing was implemented after hospital staff became concerned about a perceived increase in the number of pregnant women using drugs.33 If a woman received a positive test result, she would be referred to a drug treatment program with the county substances abuse commission.34 During the time of the testing, there was no noticeable decline in the number of pregnant women testing positive.35 Then, a nurse at the hospital heard a news report that police would arrest pregnant drug users and informed the hospital’s general counsel, who in turn contacted the Charleston Solicitor, to offer the hospital’s assistance in any future criminal actions the police might be taking against pregnant drug users.36 The Solicitor set up a task force, consisting of representatives of law enforcement, the hospital, the County Substance Abuse Commission, and the Department of Social Services.37 The task force produced a twelve-page policy manual, “POLICY M-7,” which explained the new policy entitled “Management of Drug Abuse During Pregnancy.”38 The policy outlined the hospital’s role in identifying patients suspected of drug use, the chain of custody that should be used for the urine samples used to test for drug use, the referral process for those women that tested positive to place them in a substance abuse clinic, and the threat of criminal prosecution and sanctions to “provide[] the necessary ‘leverage’ to make the policy effective.”39

The Supreme Court ruled that “POLICY M-7” violated the pregnant women’s Fourth Amendment right to be free from nonconsensual, warrantless, and suspicionless searches.40 First, the Court found that because the hospital was a state hospital, its employees were governmental actors and therefore limited by the Fourth Amendment.41

32 Ferguson, 532 U.S. at 70.
33 Id.
34 Id.
35 Id.
36 Id. at 70, 71.
37 Ferguson, 532 U.S. at 69, 71.
38 Id. at 71.
39 Id. at 72.
40 Id. at 86.
41 Id. at 76.
Next, the Court found that a urine test was a search for Fourth Amendment purposes.42 Finally, the Court applied a search balancing test, weighing the privacy intrusion against the governmental interest in preventing drug use among pregnant women, and ruled in favor of the women.43

In the first part of the balancing test, the Court found that the degree of invasion of privacy was quite substantial because the test results were turned over to a third-party.44 The Court compared and distinguished the drug testing regime in Ferguson to four prior drug testing cases it had considered.45 The distinguishing factor in Ferguson was that the hospital staff had turned over test results to law enforcement, a third-party, for criminal sanctions.46 In Treasury Employees v. Von Raab, the Court found that drug tests for U.S. Customs Service employees seeking promotion to certain high-level positions were constitutional, and in Vernonia School District 47J v. Acton (discussed later in depth), the Court held that requiring public high school athletes to submit to drug testing in order to participate on a school sports team was constitutional.47 Neither in Von Raab nor Vernonia were the results of the drug tests turned over to law enforcement.48 Therefore, using test results within an organization solely to deny a promotion or participation in extracurricular athletics is a lesser privacy intrusion than when test results are given to law enforcement for criminal sanctions.49 The Ferguson decision made a distinction between internal (within job or within school) sanctions and external (criminal justice) sanctions.50 Furthermore, in the prior drug testing cases, there were protections to ensure that the test results were not revealed to third-parties, including law enforcement.51 In comparison, not only did the Ferguson policy not provide protections against test results being revealed to third-parties, part

42 Ferguson, 532 U.S. at 76.
43 See id. at 69, 78, 86.
44 See id. at 78.
45 See id. at 77, 78.
46 See id.
48 See Vernonia, 515 U.S. at 658; Von Raab, 489 U.S. at 665–66.
49 See Ferguson, 532 U.S. at 69, 77, 78.
50 See id. at 72, 78.
51 See id. at 80 n.16. For example, in Von Raab, test results were not used in a criminal prosecution of the employee without the employee’s consent, and, in Vernonia, test results were disclosed to a limited number of school personnel “who have a need to know” and not turned over to law enforcement. See Vernonia, 515 U.S. at 658; Von Raab, 489 U.S. at 665–66.
of the policy intended to actively turn the results over to law enforce-
ment.52

The prior cases were further distinguished by looking at the gov-
ernmental interest in the testing program.53 In the prior cases, a clear
distinction existed between the governmental interest in the specific
testing regime and a general governmental interest in law enforcement
of drug laws.54 For example, in Vernonia, a clear governmental interest
in deterring drug use among student-athletes existed, separate from
any potential law enforcement interest in punishing student-athletes for
drug use.55 Similarly, in Von Raab, the government had a clear interest
in not promoting an employee who used drugs to a sensitive high-level
government position, divorced from a general interest in pursuing a
criminal prosecution of an employee who tested positive.56 Addition-
ally, in Skinner v. Railway Labor Executives’ Ass’n, the government tested
federal railroad employees for drug use “not to assist in the prosecution
of [those] employees, but rather to ‘prevent accidents,’” which again
reflects the independence of the governmental interest in testing from
the law enforcement interest in enforcing drug laws.57

By contrast, in Ferguson, the primary governmental interest was the
use of law enforcement to coerce patients into treatment; thus, this
governmental interest was indistinguishable from a general interest in
law enforcement.58 The policy itself blurred the line between a gov-
ernmental interest in ending drug use among pregnant women and a
governmental interest in drug law enforcement, as it included very
specific information about the chain of custody of test results, possible
criminal sanctions for violations of the policy, and the logistics of police
notification and arrest of women who tested positive.59 Additionally, the
city attorney and local police were involved at every stage of the crea-

52 See Ferguson, 532 U.S. at 72.
53 See id. at 79, 80.
54 See id.
55 See id. at 69, 80 n.16; Vernonia, 515 U.S. at 658. The Court was concerned about the
risk of “immediate physical harm” to student athletes (and their opponents) who used
drugs while participating in school sports. See Vernonia, 515 U.S. at 662.
56 See Ferguson, 532 U.S. at 80 n.16; Von Raab, 489 U.S. at 665–66.
57 See Ferguson, 532 U.S. at 80 n.16; Skinner v. Railway Labor Executives’ Ass’n, 489 U.S.
602, 620–21 (1989). The fourth prior drug testing case, Chandler v. Miller, examined re-
quired drug tests of candidates running for certain state offices, a testing program the
court found to be unreasonable and unconstitutional. 520 U.S. 305, 312 (1997).
58 See Ferguson, 532 U.S. at 80.
59 See id. at 82. In fact, one of the lower court judges wrote, “[I]t . . . is clear from the
record that an initial and continuing focus of the policy was on the arrest and prosecution
of drug-abusing mothers.” See id.
tion and implementation of the policy, even when determining the criteria for which pregnant women would be tested. These factors only emphasized that neither the hospital staff nor the government’s interest in the testing program was primarily motivated by a medical concern for the detection and treatment of drug use among pregnant women, but instead revealed that the primary interest was to locate and secure evidence against potential criminal defendants. Although the ultimate goal may have been to help pregnant drug users stop using, the “immediate objective . . . was to generate evidence for law enforcement purposes.” This was a crucial distinction because law enforcement always serves a greater goal; thus, the Court reasoned that if this testing regime were constitutional, then any non-consensual, suspicionless search would also be constitutional because there could always be a purported non-law enforcement “ultimate” goal.

Finally, the Court analyzed the immediate objective of the testing, and found a critical distinction between happening upon evidence and seeking out evidence. The hospital employees, like any private citizen, might inadvertently acquire evidence in the course of routine conduct (or routine prenatal treatment) and choose to turn that evidence over to police. This is significantly different from the situation in Ferguson, where hospital employees sought out evidence “for the specific purpose of incriminating” their patients and coercing them into treatment. Because of this distinction, the Court reasoned that when non-law enforcement actors seek out incriminating evidence, they have a “special

60 See id.
61 See id. at 82–84.
62 See Ferguson, 532 U.S. at 69, 82, 83, 84.
63 See id.
64 See id. at 84–85.
65 See id. Compare this with United States v. Chukwubike, 956 F.2d 209, 211 (9th Cir. 1992), where a doctor extracted balloons from a patient, tested them, found they were filled with heroin, and later turned the test results over to police. The doctor performed surgery to remove the balloons and tested them for medical reasons, including to determine what substances might have leaked into the patient in order to provide proper treatment. See id. at 212. The doctor later chose to turn the balloons and the test results over to police. See id. at 211. Here, the doctor performed the surgery and tests as a part of necessary treatment for a potential overdose and later chose to turn over the evidence to police, unlike in Ferguson where the drug tests, performed for a nominal medical reason, were conducted primarily to collect evidence to turn over to police. See id. at 212.
66 See Ferguson, 532 U.S. at 80, 85. In fact, some of the hospital staff questioned their role of acting like law enforcement officers in the policy. See id. at 85 n.24. Though they noted that medical personnel might legally or ethically be required to report some criminal activity to law enforcement, the staff still questioned the propriety of the “active pursuit of evidence to be used against individuals presenting for medical care.” See id.
obligation” to make sure the subjects of the purposeful evidence collection are “fully informed about their constitutional rights, as standards of knowing waiver require.” This conclusion—that non-law enforcement actors, when seeking out evidence, should give constitutional warnings—was a radical departure from previous jurisprudence on who must give constitutional warnings and in which situations these warnings must be provided. Thus, the Ferguson decision has important ramifications in areas other than drug testing cases, such as in Fifth Amendment school interrogation cases where school officials seek out evidence (often, written confessions) from their students.

B. The Ferguson Test

The Ferguson analysis produced the following workable test: when non-law enforcement actors are collecting evidence with the intent to assist law enforcement, constitutional rights are implicated and constitutional warnings are necessary to prevent any violations of these rights. To help determine the intent of the actor, courts consider two factors: whether the evidence collected is turned over to police for criminal sanctions or only used for internal sanctions, and whether the actors had a general crime control motive when they acted (an ultimate or immediate goal analysis).

C. Ferguson and Agency Law

The Court reached its decision in Ferguson by applying a balancing test, just as in the prior drug testing cases decided by the Supreme Court. In doing so, the Court retained intact the balancing test crite-

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67 See id.
69 See Ferguson, 532 U.S. at 85; see also Miranda, 384 U.S. at 444; Snyder, 597 N.E.2d at 1363, 1369; Tinkham, 719 A.2d at 581.
70 See Ferguson, 532 U.S. at 83–85.
71 See id.
ria, but also considered other factors, such as the separation (or lack thereof) of the governmental interests in the testing program and in general crime control and the intent and motive of the testers, both of which were important factors in the prior cases.\textsuperscript{73} The Court’s consideration of additional factors in \textit{Ferguson} may lead to a wider application of the \textit{Ferguson} test than if that case had been decided under agency law.\textsuperscript{74} Generally, constitutional protections (such as the Fourth Amendment’s prohibition of unreasonable searches or the Fifth Amendment’s prohibition of compelled self-incriminating statements) only mitigate governmental intrusions, not intrusions by private individuals.\textsuperscript{75} The exception is when private individuals act as instruments or agents of the government, and, if they act as such, even private individuals are constrained by constitutional mandates.\textsuperscript{76} To determine whether a private individual is an agent that must adhere to constitutional requirements, courts look to two factors: (1) whether the government knew of and acquiesced to the intrusive conduct and (2) whether the private party performing the search intended to assist law enforcement efforts as opposed to inadvertently assisting law enforcement while furthering his or her own ends and goals.\textsuperscript{77} \textit{Ferguson} could have been an easy case in which an agency relationship was found between the hospital staff and law enforcement based on existing agency law without expanding agency law analysis.\textsuperscript{78}

Though the lower court found an agency relationship between a hotel manager who intended to assist law enforcement in a drug investigation, the Court could have found an agency relationship between the hospital staff and law enforcement, based upon the hospital staff’s intent to seek out evidence against patients.\textsuperscript{79} In \textit{United States v. Reed}, the court found an agency relationship between a hotel assistant manager and local police.\textsuperscript{80} The hotel worker contacted police about a guest who he believed was using the hotel to sell drugs, and asked that a po-

\textsuperscript{73} See \textit{Ferguson}, 532 U.S. at 78; see also \textit{Earls}, 536 U.S. at 822; \textit{Vernonia}, 515 U.S. at 658; \textit{Skinner}, 489 U.S. at 621; \textit{Von Raab}, 489 U.S. at 663.

\textsuperscript{74} See \textit{Ferguson}, 532 U.S. at 77–78; United States v. Reed, 15 F.3d 928, 931 (9th Cir. 1994); United States v. Walther, 652 F.2d 788, 791 (9th Cir. 1981); United States v. Gomez, 614 F.2d 643, 645 (9th Cir. 1979).

\textsuperscript{75} See \textit{Reed}, 15 F.3d at 930–31.

\textsuperscript{76} See \textit{id.} at 931.

\textsuperscript{77} See \textit{id.}

\textsuperscript{78} See \textit{Ferguson}, 532 U.S. at 79, 82.

\textsuperscript{79} See \textit{id.} at 82; \textit{Reed}, 15 F.3d at 931. As of yet, there have been no reported cases testing agency law in Fifth Amendment, \textit{Miranda}-interrogation cases. See \textit{Reed}, 15 F.3d at 933; \textit{Walther}, 652 F.2d at 791; \textit{Gomez}, 614 F.2d at 645.

\textsuperscript{80} See 15 F.3d at 930, 933.
lice officer come to the hotel while the manager checked the room.\textsuperscript{81} Accompanied by two police officers, the manager entered the room and began looking around, even opening drawers and a latched briefcase.\textsuperscript{82} The first prong of the agency test was easily met because the officers knew of and acquiesced to the search; they were present during the search, did nothing to discourage the search of the room occupant’s personal belongings beyond what was required to protect hotel property, and were in the role of lookout rather than incidental bystander.\textsuperscript{83} The lower court held that the second prong was met because the manager did not have a legitimate motive for the search “\textit{other than crime prevention.}”\textsuperscript{84} This was shown by the manager’s continued search of the room even after he had established that the room was in good condition, which was his alleged motive for entering the room.\textsuperscript{85} Because, however, there was no need to open drawers or the briefcase to ensure there was no damage to hotel property, the court concluded that the manager had intended to assist law enforcement and that the proffered reason of protecting hotel property was only a pretext to enter the room to search for drugs.\textsuperscript{86} Furthermore, the court noted that the manager’s motivation of general crime prevention was not a legitimate, independent motivation and thus could not be saved from meeting the second prong by offering crime prevention as his purpose.\textsuperscript{87}

By contrast, in \textit{United States v. Gomez}, when an airline employee opened a suitcase in the presence of police officers and found drugs, there was not an agency relationship because the airline employee acted to further airline policy, not to assist law enforcement, even though the police officers knew of and acquiesced to the search.\textsuperscript{88} A police officer noticed a suitcase, without any identification information on it, that had fallen off the luggage conveyor belt.\textsuperscript{89} The officer notified the airline’s supervisor who took the suitcase into a back room, accompanied by two police officers, and proceeded to open the suitcase to identify the owner.\textsuperscript{90} When the supervisor had trouble opening the suitcase, one of the officers assisted him by tapping the lock, which

\textsuperscript{81} See id. at 930.
\textsuperscript{82} See id.
\textsuperscript{83} See id. at 931.
\textsuperscript{84} See id. at 932.
\textsuperscript{85} See Reed, 15 F.3d at 931, 932.
\textsuperscript{86} See id. at 933.
\textsuperscript{87} See id. at 932.
\textsuperscript{88} See 614 F.2d 643, 644–45 (9th Cir. 1979).
\textsuperscript{89} See id. at 644.
\textsuperscript{90} See id.
caused it to open. The supervisor continued opening the suitcase and saw a gun, at which point he turned the suitcase over to the police who were standing with him. The police continued to search the suitcase and found cocaine. Although the first prong of the agency test was met because the police officers knew of the search and even assisted in the search by helping unlock the suitcase, the second prong was not met. The airline supervisor’s motive for opening the suitcase was to further his company’s policy of attempting to reunite lost luggage with its owner, rather than to assist law enforcement. Thus, the airline employee’s legitimate, independent motivation for the search saved the action from becoming a governmental search by an agent.

Applying the agency test to the facts of Ferguson, the Court easily could have found an agency relationship. First, the government knew of and acquiesced to the search (drug tests) because they had helped to formulate and implement the drug testing policy, thus meeting the first prong of the agency test. The Solicitor and police were “pervasively” involved at every stage of the testing program, from determining which women would be tested to coordinating arrests of women who tested positive. Second, the Court found that members of the hospital staff intended to assist law enforcement by administering the tests, rather than conducting the tests for their own purposes of detecting and ending drug use among pregnant women. The Court compared the hospital staff’s ultimate and immediate objectives and found that, although helping pregnant drug users was an ultimate (and worthy) goal, the immediate goal of the hospital staff was to obtain evidence of criminal conduct to turn over to police. So, while there was a proffered legitimate motive for the search, it was not an independent motivation to “further [the hospital’s] own ends,” and thus satisfying the second prong of the agency test.

91 See id.
92 See id.
93 See Gomez, 614 F.2d at 645.
94 See id.
95 See id.
96 See United States v. Walther, 652 F.2d 788, 792 (9th Cir. 1981); Gomez, 614 F.2d at 645.
97 See United States v. Reed, 15 F.3d 928, 932 (9th Cir. 1994); Walther, 652 F.2d at 792; Gomez, 614 F.2d at 645.
98 See Ferguson v. City of Charleston, 532 U.S. 67, 84 (2001); Reed, 15 F.3d at 931.
99 See Ferguson, 532 U.S. at 82, 85.
100 See id. at 82–83; Reed, 15 F.3d at 931, 932.
101 See Ferguson, 532 U.S. at 82–84.
102 See id. at 83–85; Reed, 15 F.3d at 931.
Therefore, if Ferguson had been evaluated under agency law, the hospital staff likely would have been found to have acted as agents of law enforcement.103 If the court found an agency relationship, then the hospital staff would have to adhere to the same constitutional mandates as law enforcement in a criminal search situation.104 Therefore, the hospital staff in Ferguson would have needed to obtain warrants before conducting the drug tests and would have had to give constitutional warnings, the same conclusion the Court reached (though using a different analysis).105 A decision on the basis of agency law would have significantly limited the impact of the Ferguson decision.106 As shown, if Ferguson had been decided using agency law, there would be no extension of current jurisprudence on school-based interrogations by school officials because the facts of Ferguson can easily be shown to meet the two prongs of the agency test.107 Instead, however, the actual Ferguson decision has left the case and its test applicable in a wider array of situations than had the decision been based on agency law.108 The Ferguson decision focused on whether non-law enforcement actors intended to assist law enforcement by collecting evidence, considering both whether the collected evidence was turned over (or whether the party intended to turn it over) to police and what the actors’ motivation was (general crime control or not).109 Put differently, the Ferguson rule is essentially only the second prong of the agency test, along with guidance as to how to determine the actor’s motive.110

However, nothing in Ferguson suggests that the Court was formulating a new test for agency consisting of only the second prong; in fact, the decision does not even mention agency law or consider whether the hospital staff acted as agents when it conducted the drug tests.111 This is significant because most school interrogation cases are analyzed using agency law.112 Almost without exception, when a student-defendant tries to suppress a statement made to a school official (usually a principal or vice principal) that was later turned over to law enforcement and

103 See Ferguson, 532 U.S. at 83–85; Reed, 15 F.3d at 932, 933.
104 See Reed, 15 F.3d at 932–33.
105 See Ferguson, 532 U.S. at 85; Reed, 15 F.3d at 933.
106 See Ferguson, 532 U.S. at 85; Reed, 15 F.3d at 933.
107 See Ferguson, 532 U.S. at 83–85; Reed, 15 F.3d at 932–33.
108 See Ferguson, 532 U.S. at 85; Reed, 15. F.3d at 934; United States v. Walther, 652 F.2d 788, 792 (9th Cir. 1981); United States v. Gomez, 614 F.2d 643, 645 (9th Cir. 1979).
109 See Ferguson, 532 U.S. at 83–86.
110 See id.
111 See id.
112 See cases cited supra note 21.
used against the student in a criminal proceeding, courts use agency law to determine whether the school official was required to give *Miranda* rights before the interrogation. In these analyses, courts have found that, at the time of the interrogation, school officials were not acting as agents of police because the police either did not know or acquiesce to the conduct (failing to meet the first prong) or because the school officials acted to further their own ends (failing to meet the second prong).

If *Ferguson* had relied upon agency law, the decision would not impact school interrogation cases because it would have only reinforced the two-prong test to determine agency, and school officials will almost always be able to claim a non-law enforcement ultimate objective, such as maintaining school discipline and safety. But *Ferguson* approached the issue differently by focusing primarily upon the intent of the actor and considering such factors as whether any evidence obtained was turned over to law enforcement and whether that evidence was happened upon or sought out. The *Ferguson* test makes a more nuanced distinction than agency law in determining if the actor was intending to assist law enforcement or only intending to further her own legitimate, independent motives. Because of this more refined analysis, situations that would have failed the agency test may meet the *Ferguson* test.

Specifically, the *Ferguson* test is much more likely to be triggered in school interrogation cases, and thus will require constitutional warnings—even when a school official is conducting the interrogation. The *Ferguson* test is more easily triggered than agency law in school interrogation cases because of *Ferguson*’s consideration of how evidence was obtained, what will happen to that evidence, and the ultimate/immediate goal analysis, all of which cut in student-defendants’ favor.

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115 See *Ferguson*, 532 U.S. at 86; *Snyder*, 597 N.E.2d at 1369; *Tinkham*, 719 A.2d at 583–84; *Biancamano*, 666 A.2d at 202–03.

116 See *Ferguson*, 532 U.S. at 84, 85, 86.

117 See id. at 84–85; *United States v. Walther*, 652 F.2d 788, 791 (9th Cir. 1981).

118 See *Ferguson*, 532 U.S. at 84–85.

119 See id.; *Snyder*, 597 N.E.2d at 1368; *Tinkham*, 719 A.2d at 584.

120 See *Ferguson*, 532 U.S. at 84–85.
II. Why the Ferguson Test, Not Agency Law, Is the Proper Test in School Interrogation Cases

Although the Ferguson case itself would likely have come out the same way if decided under agency law, many school interrogation cases would likely not be decided the same under the Ferguson test (a topic which is explored more below). But before getting to that analysis, the threshold question is: why should school interrogation cases be analyzed under the Ferguson test and factors instead of being analyzed under agency law? The answer is that the Supreme Court’s reasoning in school cases addressing other constitutional rights, such as Fourth Amendment searches, are remarkably similar to the Ferguson reasoning. Though Ferguson dealt with an unconstitutional search, the case itself suggests that it is not limited to only Fourth Amendment concerns, but with all constitutional rights, thus encompassing the Fifth and Sixth Amendment protections at issue in school interrogation cases. Consequently, if Fourth Amendment-school drug testing cases follow similar analyses as Ferguson and that case extends to other constitutional rights, then the Ferguson test is the appropriate framework in Fifth Amendment school interrogation cases.

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121 See id.; Snyder, 597 N.E.2d at 1369; Tinkham, 719 A.2d at 584. The Ferguson test is only applicable in public schools because, absent an agency relationship, only public employees are subject to constitutional limitations. See Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 828 (2002); Ferguson, 532 U.S. at 76; Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652 (1995); New Jersey v. T.L.O., 469 U.S. 325, 336 (1985).

122 Compare United States v. Reed, 15. F.3d 928, 934 (9th Cir. 1994), United States v. Walthier, 652 F.2d 788, 792 (9th 1981), and United States v. Gomez, 614 F.2d 643, 645 (9th Cir. 1979), with Ferguson, 532 U.S. at 85.

123 See Earls, 536 U.S. at 833, 834; Ferguson, 532 U.S. at 84–85; Vernonia, 515 U.S. at 658, 659. All three cases use a balancing test approach, considering factors such as the scope of the privacy intrusion of the drug tests, the reasons for conducting the tests, and with whom the results were shared. See Earls, 536 U.S. at 833, 834; Ferguson, 532 U.S. at 84–85; Vernonia, 515 U.S. at 658, 659.

124 See Ferguson, 532 U.S. at 85.

125 See Earls, 536 U.S. at 833, 834; Ferguson, 532 U.S. at 85; Vernonia, 515 U.S. at 658, 659, 660. Neither Vernonia nor Earls cites Ferguson. See Earls, 536 U.S. at 833, 834; Ferguson, 532 U.S. at 84–85; Vernonia, 515 U.S. at 658, 659. All three cases, however, rely on the same factors as emphasized in Ferguson. See Earls, 536 U.S. at 833, 834; Ferguson, 532 U.S. at 84–85; Vernonia, 515 U.S. at 658, 659. Additionally, Earls cites heavily to Vernonia, which was an extremely similar case; Vernonia affirms drug-testing of athletes and Earls affirms drug-testing of students in any extracurricular activities. See generally Earls, 536 U.S. 822. Thus, the Earls Court may not have needed to address Ferguson, which found an adult drug-testing program unconstitutional. See id. at 830; Ferguson, 532 U.S. at 86.
A. School Drug Testing Cases and the Importance of the Intent of the Actor, Whether Evidence Is Sought Out, and with Whom Evidence Is Shared

The Supreme Court has found two different school drug testing programs constitutional.\(^{126}\) In *Vernonia*, the Court upheld a program that required all middle and high school students to submit to random drug testing as a prerequisite to participating in school-sponsored athletics.\(^{127}\) A few years later, in *Earls*, the Court upheld another school district’s similar program that required students participating in any extracurricular activity to submit to random drug testing.\(^{128}\) In both decisions, the Court found it significant that the tests were conducted to help students who were using drugs, not to catch and punish users.\(^{129}\) Further, both school districts used the test results only to exclude certain students from extracurricular activities, not for school discipline, and neither school district shared the test results with any law enforcement agency or other third-party.\(^{130}\) This benevolent motivation of the school officials and lack of criminal punishment are the type of considerations factored into the *Ferguson* test.\(^{131}\)

In *Vernonia*, the Vernonia School District implemented a policy that required all student-athletes to submit to random drug testing as a condition of participating in school athletics.\(^{132}\) The Supreme Court used a search balancing test and held that the policy was constitutional.\(^{133}\) Preliminarily, the Court found that public school officials are state actors who are constrained by the Fourth Amendment, although they are not held to as high standards of suspicion as law enforcement because of the special circumstances of schools and their responsibility to maintain order and safety.\(^{134}\) In the first part of the balancing test, the Court found that students do have an expectation of privacy even in school, but that the expectation is lessened because of the compet-

\(^{126}\) See *Earls*, 536 U.S. at 839; *Vernonia*, 515 U.S. at 666.

\(^{127}\) See 515 U.S. at 650.

\(^{128}\) See 536 U.S. at 825.

\(^{129}\) See id. at 833, 834, 839; *Vernonia*, 515 U.S. at 658, 666.

\(^{130}\) See *Earls*, 536 U.S. at 833, 834, 839; *Vernonia*, 515 U.S. at 658, 666.


\(^{132}\) See *Vernonia*, 515 U.S. at 650.

\(^{133}\) See id. at 652, 666. In such balancing cases, the court balances the degree of privacy of the individual searched against the governmental interest in the searching program. See id. at 658–61; Treasury Employees v. Von Raab, 489 U.S. 656, 665–66 (1989); Skinner v. Railway Labor Executives’ Ass’n, 489 U.S. 602, 617 (1989).

\(^{134}\) See *Vernonia*, 515 U.S. at 655; see also New Jersey v. T.L.O., 469 U.S. 325, 341 (1985) (noting that searches conducted by school officials do not require probable cause, but must be reasonable under all the circumstances).
ing responsibilities that schools have in maintaining order and safety in
the educational setting.\footnote{See Vernonia, 515 U.S. at 656.} In addition, student-athletes have an even
lesser expectation of privacy because they are subjected to preseason
medical exams and must change and shower in communal locker
rooms.\footnote{See id. at 657.} The Court balanced this lessened privacy interest with the
governmental interest in detecting and discouraging drug use among
students, and particularly student-athletes who would be more prone to
injuries because of the mix of drugs and physical activity.\footnote{See id. at 661. The Court also found that, in the Vernonia school district, student-
athletes were seen as the leaders of the school and thus discouraging drug use among these
students would have a trickle down effect on the rest of the student body. See id. at 665.}

The Court emphasized the concern for student well-being by the
fact that the test results were only used to encourage the student to get
treatment and were never turned over to law enforcement or even used
for any type of school sanction.\footnote{See id. at 658.} The only sanction for a positive test
was an immediate re-test; if the second test also came up positive, the
school would call a meeting of the student, her parents, and the principal.\footnote{Id. at 651.} At the meeting, the student would be given the option of par-
ticipating in a six-week treatment program or a suspension from all ath-
etics for the current and following seasons.\footnote{Vernonia, 515 U.S. at 651.} The Court again empha-
sized the focus on treatment in the testing program, when it noted,
“[T]he search here is undertaken for prophylactic and distinctly non-
punitive purposes.”\footnote{See id. at 658 n.2.} The high governmental interest balanced with
the limited intrusion of a urine test and the students’ lessened expecta-
tion of privacy led the Court to find the testing program constitu-
tional.\footnote{See id. at 664–65.}

Likewise, in \textit{Earls}, the Court emphasized the intent of the actors
and use of test results (or lack thereof) in finding a policy requiring
students who participated in any extracurricular activity to submit to
drug testing constitutional.\footnote{See 536 U.S. 822, 825, 833–34 (2002).} Again, the Court balanced the degree of
invasion of students’ privacy with the governmental interest in main-
taining the health, safety, and discipline of students.\footnote{See id at 830–31.} These govern-
mental interests were separate from a crime control interest because
the testing program was “not in any way related to the conduct of criminal investigations.”145 Test results were never used for school discipline or academic consequences nor turned over to law enforcement, which demonstrates the distinct governmental interests of student health and safety and general drug law enforcement.146

As in Vernonia, the only consequence of a positive drug test in Earls was a meeting between the student, her parents, and the principal and possible suspension from extracurricular activities.147 Because the testing policy applied to all extracurricular activities, not just athletics, the school district (and the Court) could no longer justify the policy by relying upon the special safety and health dangers to athletes engaging in drug use and physical activity.148 Instead, the Court focused upon students’ somewhat lessened expectation of privacy in school and upon the school and governmental interest in curbing drug use among students.149 Justice Breyer’s concurrence highlighted this reasoning, noting that the policy’s focus on treatment, counseling, “and avoiding the use of criminal or disciplinary sanctions” were significant factors in finding that the policy did not violate the Fourth Amendment.150

Thus, in both of the school drug testing cases upon which the Supreme Court has ruled, it has relied, in part, upon the fact that neither policy utilized external criminal sanctions.151 Neither school district turned the drug test results over to law enforcement though they would likely have led to criminal sanctions.152 Furthermore, neither policy even provided for school sanctions, such as suspension or expulsion from the school, which might normally be associated with

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145 See id. at 829.
146 See id. at 833–34.
147 See id.; Vernonia, 515 U.S. at 658. Upon the first positive drug test, the student could continue to participate in extracurricular activities if she entered drug counseling; upon a second positive test, she would be mandated to undergo drug counseling and be barred from extracurricular activities for fourteen days; upon a third positive test, she would be barred from participating in extracurricular activities for eighty-eight school days or the remainder of the school year, whichever was longer. Earls, 536 U.S. at 833–34.
148 See Earls, 536 U.S. at 833–34; Vernonia, 515 U.S. at 662. In her dissent, Justice Ginsburg emphasized the difference between the physical risks of student-athletes who are using drugs and the lack of those risks for students in a variety of other extracurricular activities. See Earls, 536 U.S. at 846 (Ginsburg, J., dissenting). Justice Ginsburg wrote, “[I]nterscholastic athletics similarly [to adults who choose to work in highly regulated professions such as railroads] require close safety and health regulation; a school’s choir, band, and academic team do not.” Id. (Ginsburg, J., dissenting).
149 See Earls, 536 U.S. at 834, 838.
150 See id. at 838–39.
151 See id. at 833, 834; Vernonia, 515 U.S. at 658.
152 See Earls, 536 U.S. at 833; Vernonia, 515 U.S. at 658.
drug use or possession on school property.\textsuperscript{153} The only possible punishments were exclusion from the student’s extracurricular activity, and even this could be avoided if the student entered a drug counseling or treatment program.\textsuperscript{154} The Court’s reliance upon school officials’ motivation to help students end their own drug use, rather than a motive of general drug law enforcement, as demonstrated by the lack of criminal and school sanctions, has an important consequence for other scenarios in which the Court must balance school-related constitutional concerns.\textsuperscript{155} When constitutional rights are implicated in school policies (as the Fourth Amendment was in the school drug testing cases or the Fifth Amendment in school interrogation cases), courts are unlikely to find an actionable constitutional violation if there is no involvement of the criminal justice system.\textsuperscript{156} The converse is also true: courts are more likely to find an actionable in-school constitutional violation if the outcome of the alleged violation includes involvement of the criminal justice system (which in turn raises the constitutional issues in the proper forum, with available remedies, such as use of the exclusionary rule).\textsuperscript{157}

The \textit{Vernonia} and \textit{Earls} decisions are consistent with \textit{Ferguson}, despite the fact that, in \textit{Ferguson}, the testing program was unconstitutional.\textsuperscript{158} In \textit{Vernonia} and \textit{Earls}, the students’ test results were only used to encourage students to get help, or alternatively, to bar them from

\textsuperscript{153} See \textit{Earls}, 536 U.S. at 833, 834; \textit{Vernonia}, 515 U.S. at 658. But see State v. Tinkham, 719 A.2d 580, 582 (N.H. 1998) (relating that the student was suspended for five days for possessing marijuana on school property).

\textsuperscript{154} See \textit{Earls}, 536 U.S. at 833; \textit{Vernonia}, 515 U.S. at 651.

\textsuperscript{155} See \textit{Earls}, 536 U.S. at 833, 834; \textit{Vernonia}, 515 U.S. at 658, 661.

\textsuperscript{156} See \textit{Earls}, 536 U.S. at 833, 834; \textit{Vernonia}, 515 U.S. at 658, 666. This is not new in constitutional jurisprudence. See \textit{Chavez} v. Martin, 583 U.S. 760, 766–67 (2003). The Supreme Court has frequently held that Fourth, Fifth, and Sixth Amendment violations are not actionable or remediable until criminal proceedings have begun or the evidence illegally obtained is offered at a trial against the criminal defendant. See \textit{id}. For example, in \textit{Chavez}, the Court held that there was no \textit{Miranda} violation until and unless the government sought to use the statement made without a \textit{Miranda} warning at a criminal trial. See \textit{id}. A police officer did not read \textit{Miranda} warnings to Mr. Martinez before questioning him in an emergency room where he was being treated for gunshot wounds. \textit{id}. at 764. Mr. Martinez filed a 42 U.S.C. § 1983 claim against the officer for violating his Fifth Amendment rights. \textit{id}. at 756. The Court ruled that the Fifth Amendment could not be the basis for his lawsuit because those rights had not been violated since the statement he gave was never offered against Mr. Martinez in a criminal proceeding. See \textit{id}. at 766–67. However, the Court did hold that Mr. Martinez might be able to proceed in his lawsuit by alleging a due process violation rather than a Fifth Amendment violation. See \textit{id}. at 776.


\textsuperscript{158} See \textit{Earls}, 536 U.S. at 833, 834; \textit{Ferguson}, 532 U.S. at 84–85; \textit{Vernonia}, 515 U.S. at 658, 666.
participating in sports or other extracurricular activities.\textsuperscript{159} The results were not used for school sanctions, such as suspensions or expulsion, nor were they turned over to law enforcement for criminal sanctions.\textsuperscript{160} This use (or non-use) of the drug test results bolsters the fact that the school officials were not acting with the intent to assist law enforcement, unlike the hospital staff in \textit{Ferguson}.\textsuperscript{161} Continuing the \textit{Ferguson} analysis, in \textit{Vernonia} and \textit{Earls}, the school officials did not have a general interest in crime control since the test results were never used for school or criminal sanctions.\textsuperscript{162} Put another way, the school officials’ immediate goal and ultimate goal were the same—to discourage drug use among students.\textsuperscript{163} This is unlike the situation in \textit{Ferguson}, where the hospital staff’s immediate goal was to assist law enforcement by collecting and turning over evidence of drug use, even if their ultimate goal was to deter drug use by pregnant women.\textsuperscript{164} In both \textit{Vernonia} and \textit{Earls}, the Court applied factors similar to those in the \textit{Ferguson} test, and the reasoning and methods of analysis were similar, producing a consistent methodology, even though the school testing programs were constitutional and the hospital drug testing program was unconstitutional.\textsuperscript{165}

\textbf{B. From the Fourth Amendment to the Fifth Amendment}

\textit{Ferguson}, \textit{Vernonia}, and \textit{Earls} underscore the importance of the intent of the actor to assist (or not assist) law enforcement and whether any evidence is turned over to law enforcement in evaluating if there has been a Fourth Amendment violation.\textsuperscript{166} \textit{Ferguson}, however, extended

\textsuperscript{159} See \textit{Earls}, 536 U.S. at 833, 834; \textit{Ferguson}, 532 U.S. at 84–85; \textit{Vernonia}, 515 U.S. at 658, 666.
\textsuperscript{160} See \textit{Earls}, 536 U.S. at 833, 834; \textit{Ferguson}, 532 U.S. at 84–85; \textit{Vernonia}, 515 U.S. at 658, 666.
\textsuperscript{161} See \textit{Earls}, 536 U.S. at 833, 834; \textit{Ferguson}, 532 U.S. at 84–85; \textit{Vernonia}, 515 U.S. at 658, 666.
\textsuperscript{162} See \textit{Earls}, 536 U.S. at 833, 834; \textit{Ferguson}, 532 U.S. at 84–85; \textit{Vernonia}, 515 U.S. at 658, 666.
\textsuperscript{163} See \textit{Earls}, 536 U.S. at 833, 834; \textit{Ferguson}, 532 U.S. at 84–85; \textit{Vernonia}, 515 U.S. at 658, 666.
\textsuperscript{165} See \textit{Earls}, 536 U.S. at 838; \textit{Ferguson}, 532 U.S. at 84–85; \textit{Vernonia}, 515. U.S. at 658.
\textsuperscript{166} See \textit{Earls}, 536 U.S. at 833, 834; \textit{Ferguson}, 532 U.S. at 82–84; \textit{Vernonia}, 515 U.S. at 658.
\textit{But see} New Jersey v. T.L.O., 469 U.S. 325, 340 (1985). In \textit{T.L.O.}, the Court wrote, “[R]equiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools.” \textit{See id.} at 340. The Court went on to formulate a less stringent level of suspicion than probable cause when school officials conduct a school-based search. \textit{See id.} at 341. The Court’s concern about impeding a school investigation even when there was a criminal law infraction is interesting, though, because it suggests that the Court, by referring to “disciplinary procedures,” expected even a school investigation into a criminal law matter to \textit{only} result in school punishment, not criminal sanctions. \textit{See id.} at 340. Even \textit{T.L.O.}, while allowing school officials more flexibility than police in conducting school searches, still reflects the same concern as in \textit{Vernonia}, \textit{Earls}, and
this analysis beyond just the scope of the Fourth Amendment and the drug testing policy in that case.\textsuperscript{167} \textit{Ferguson} suggested that its analysis extended to Fifth Amendment rights as well, noting that “when [public hospital employees] undertake to obtain such evidence from their patients for the specific purpose of incriminating those patients, they have a special obligation to make sure that the patients are fully informed about their constitutional rights, as standards of knowing waiver require.”\textsuperscript{168} Because the \textit{Ferguson} test is applicable in Fifth Amendment cases, and the Court considered and based its reasoning on similar factors in the Fourth Amendment school cases, the \textit{Ferguson} test should also be applicable in school cases that involve the Fifth Amendment.\textsuperscript{169}

Because of the similar method of reasoning and consideration of factors in the analysis, it is likely that the student drug testing policies would have been unconstitutional if the test results had been turned over to law enforcement, putting the students, like the pregnant women in \textit{Ferguson}, in the way of criminal sanctions.\textsuperscript{170} This would likely be true even if the level of involvement between the schools and law enforcement was not as great as in \textit{Ferguson}.\textsuperscript{171} The degree of collaboration between the hospital staff and law enforcement was not a defining characteristic; instead, it was important as a demonstration of the hospital staff’s intent to assist law enforcement.\textsuperscript{172} Similarly, if the motivation behind the school drug testing policies was to curb general crime control or catch suspected drugs users, as shown by more emphasis on criminal sanctions and school discipline than on counseling and treatment, the policies would likely have been found unconstitutional.\textsuperscript{173} The reasoning in \textit{Vernonia} and \textit{Earls} support this conclusion because both decisions emphasized the nonpunitive uses of the drug tests.\textsuperscript{174} Thus, by analogy to a Fifth Amendment school case, if a school official questions a student with a purpose of general crime control and intent to turn any evidence, such as written statements, over to law enforce-

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\textit{Ferguson} about what will be done with the results of the search (or drug test)—will they be revealed to law enforcement or not? See \textit{Earls}, 536 U.S. at 833; \textit{Ferguson}, 532 U.S. at 85; \textit{Vernonia}, 515 U.S. at 658; \textit{T.L.O.}, 469 U.S. at 340.

\textsuperscript{167} See \textit{Ferguson}, 532 U.S. at 85.

\textsuperscript{168} See \textit{id}.

\textsuperscript{169} See \textit{Earls}, 536 U.S. at 833, 834; \textit{Ferguson}, 532 U.S. at 84–85; \textit{Vernonia}, 515 U.S. at 658, 660.

\textsuperscript{170} See \textit{Ferguson}, 532 U.S. at 85.

\textsuperscript{171} See \textit{id}.

\textsuperscript{172} See \textit{id.} at 82–83, 85.

\textsuperscript{173} See \textit{Earls}, 536 U.S. at 833, 834; \textit{Ferguson}, 532 U.S. at 84–85; \textit{Vernonia}, 515 U.S. at 658.

\textsuperscript{174} See \textit{Earls}, 536 U.S. at 833, 834; \textit{Vernonia}, 515 U.S. at 658.
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ment, then the Ferguson test requires school officials to warn students of their constitutional rights, which in this case means Miranda warnings.  

C. The Ferguson Test in Action in Paradigmatic School Interrogation Cases

Return to the scenario that opened this Note, taken from State v. Tinkham, a 1998 New Hampshire case. A public high school student, the defendant, sold some marijuana to a fellow student, who was caught with the drugs and turned in the seller. The principal then took the drugs to the local police department and told the police she planned to question the defendant as soon as she returned to school. The principal called the defendant to her office, explained she believed he had drugs, and asked to search his book bag. He acquiesced to the search. The principal found more marijuana and told the defendant she would turn the drugs over to the police. The principal questioned the defendant regarding his sale of drugs to another student and he confessed, both orally and in writing, to selling drugs on a student-referral form. The principal then suspended the student for five days, told him further action would be taken, and then contacted the police, giving them the defendant’s written statement and the drugs from his backpack. The defendant was charged with selling marijuana to another student on school property and moved to suppress the written statement and the drugs. The trial court denied both motions, the defendant was convicted, and the New Hampshire Supreme Court affirmed the denial of the motion to suppress and upheld the conviction on appeal.

The court ruled that the principal was not required to give Miranda warnings before questioning the defendant because the principal was neither a law enforcement officer nor functioning as an agent of law.

175 See Earls, 536 U.S. at 833, 834; Ferguson, 532 U.S. at 84–85; Vernonia, 515 U.S. at 658.  See 719 A.2d 580, 581 (N.H. 1998). Tinkham was decided before the Ferguson decision; nevertheless, Tinkham is a typical school interrogation case that shows how Ferguson would apply in such cases. See id. Tinkham involves a Fourth Amendment search issue and a Fifth Amendment confession issue, as do many of the school interrogation cases. See id. at 583; see also cases cited supra note 21.

177 See id. 178 See id. 179 See id. 180 See id. 181 See id. 182 See Tinkham, 719 A.2d at 581. 183 See id. at 582. 184 See id. 185 See id. at 582, 584.
In determining that the principal was not a law enforcement officer, the court relied upon the fact that school officials are not trained to conduct police investigations and that school officials’ mission is to create safe and healthy learning environments, not to enforce the law. The court acknowledged that if the principal had been acting as an agent of law enforcement, *Miranda* warnings would have been required. Yet, because the principal approached the police and they did not direct or advise the principal in her course of action, the principal had not been an agent of police. Furthermore, the intentions of the principal were irrelevant to the analysis—the principal’s clear intention to turn evidence over to law enforcement did not transform her into an agent. Since the principal was neither a law enforcement officer, nor an agent of law enforcement, she was not required to give *Miranda* warnings.

If the *Ferguson* test had been applied to *Tinkham*, the defendant still might have been convicted, but by requiring *Miranda* warnings, the *Ferguson* test would change the process and ensure that the defendant was aware of and given an opportunity to exercise his Fifth Amendment rights. The *Ferguson* test requires non-law enforcement actors to give constitutional warnings if they are seeking out and collecting evidence for incriminating purposes and with the intent to turn that evidence over to law enforcement. In *Tinkham*, the principal’s intention to turn evidence over to law enforcement was clear—she had contacted the local police and told them as much, as well as telling the defendant further action would be taken. Moreover, she was intending to assist law enforcement before she questioned the defendant and obtained his written confession. The principal did not inadvertently acquire the confession in the course of a school discipline situation and then turn it over to police. Instead, she sought to obtain evidence from the defendant “for the specific purpose of incriminating [that student],”

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186 See id. at 583, 584.
187 See *Tinkham*, 719 A.2d at 583.
188 See id. at 583, 584.
189 See id. at 584.
190 See id.
191 See id.
193 See id.
194 See *Tinkham*, 719 A.2d at 582.
195 See id. at 581.
196 See id.
much like how the hospital staff sought to obtain incriminating evidence against their pregnant patients in *Ferguson*.\(^{197}\)

Put another way, although the principal’s ultimate goal may have been to prevent drug use and drug sales on her campus, the principal’s immediate goal was to “generate evidence for law enforcement purposes” demonstrated by her immediate efforts to contact the police and turn evidence over to them.\(^{198}\) As much as this distinction between ultimate and immediate goals mattered in the context of hospital drug tests, it also matters in school interrogation cases.\(^{199}\) It is interesting that the New Hampshire court noted that a principal’s primary mission was not to enforce the law, even though school officials are responsible for discipline within the school, which can include inquiries into violations of both school rules and criminal law.\(^{200}\) That is precisely the lesson of *Ferguson*—patients (or students) do not expect their doctors (or principals) to be law enforcement officers nor collect evidence as does law enforcement.\(^{201}\) And if non-law enforcement actors are going to act like law enforcement and collect evidence with the intent to turn any collected evidence over to law enforcement, the subjects of the inquiries ought to receive fair warning.\(^{202}\)

Under a *Ferguson* analysis, the principal should have given the defendant *Miranda* warnings, much as the Supreme Court said that the hospital personnel should have given constitutional warnings to their pregnant patients.\(^{203}\) If the principal failed to do so, the defendant’s statement would likely be inadmissible because of the exclusionary

\(^{197}\) See *Ferguson*, 532 U.S. at 85; *Tinkham*, 719 A.2d at 581.

\(^{198}\) See *Ferguson*, 532 U.S. at 85; *Tinkham*, 719 A.2d at 581.

\(^{199}\) See *Ferguson*, 532 U.S. at 85; *Tinkham*, 719 A.2d at 581.

\(^{200}\) See *Tinkham*, 719 A.2d at 583.

\(^{201}\) See *Ferguson*, 532 U.S. at 85; *Tinkham*, 719 A.2d at 581.

\(^{202}\) See *Ferguson*, 532 U.S. at 85; see also State v. Heirtzler, 789 A.2d 634, 640 (N.H. 2001). In the *Heirtzler* case, a typical school interrogation case with an atypical outcome, the court found an agency relationship between law enforcement and school officials. 789 A.2d at 641. The local police department had assigned an officer to the high school because the police believed that school officials had been handling matters that should have been investigated by the police. *Id.* at 636. The school police officer and the principal had a “silent understanding” that allowed the officer to pass information to the school officials about possible criminal activity on school grounds in order for the school officials to investigate and “gather evidence otherwise inaccessible [to the officer] due to constitutional restraints.” *Id.* at 637. In finding an agency relationship, the court said that students “must be protected against school officials who inadvertently assume the role of law enforcement.” See *id.* at 640. This is what the *Ferguson* test seeks to do. See *Ferguson*, 532 U.S. at 85.

\(^{203}\) See *Ferguson*, 532 U.S. at 85; *Tinkham*, 719 A.2d at 581.
rule.\textsuperscript{204} In turn, without the confession, perhaps the defendant would have been found not guilty.\textsuperscript{205} Similarly, if the principal had given the defendant \textit{Miranda} warnings, the defendant still may have confessed and subsequently still been found guilty.\textsuperscript{206} Whatever the outcome, application of the \textit{Ferguson} test to this situation, or any school interrogation, would uphold the integrity of the confession and resulting criminal justice process and ensure that the student-defendant was fully informed of his “precious” right against self-incrimination.\textsuperscript{207}

In a similar Massachusetts case, \textit{Commonwealth v. Snyder}, a principal was not required to give \textit{Miranda} warnings to a student because the principal was not acting as an agent of the police.\textsuperscript{208} In \textit{Snyder}, a student told a teacher she had seen the defendant with marijuana, and in turn, the teacher reported the information to the principal.\textsuperscript{209} The principal located the defendant in the crowded student center during lunchtime but, because she did not want to arouse suspicion, she waited until the beginning of the next class period to search the defendant’s locker and to question the defendant.\textsuperscript{210} After finding drugs in the defendant’s book bag, the principal and vice principal questioned the defendant in the principal’s office.\textsuperscript{211} The defendant then admitted he had offered to sell marijuana in school.\textsuperscript{212} After follow-up questions, the principal called the defendant’s mother while another school official called the police, in accordance with a school policy to turn any drugs found on school property over to law enforcement.\textsuperscript{213} After an officer came to the school, the principal repeated what the defendant had admitted.\textsuperscript{214}

\textsuperscript{204} See \textit{Ferguson}, 532 U.S. at 85; \textit{Tinkham}, 719 A.2d at 581. \textit{Mapp v. Ohio} held that the admission of evidence obtained in violation of the Constitution was inadmissible in state court. 367 U.S. 643, 655 (1961). An earlier case had held unconstitutionally obtained evidence inadmissible in federal court. \textit{Id.} at 654. The theory behind this concept, known as the exclusionary rule, is that suppression of evidence is the best (and really, only) deterrent for government officials to adhere to constitutional mandates in criminal investigations and prosecutions because civil actions for damages and criminal prosecutions against governmental officials are either ineffective or not pursued. \textit{Id.} at 652 & n.7.

\textsuperscript{205} See \textit{Tinkham}, 719 A.2d at 581.

\textsuperscript{206} See \textit{id.}

\textsuperscript{207} See \textit{Ferguson}, 532 U.S. at 85; \textit{Tinkham}, 719 A.2d at 581; see also \textit{Miranda v. Arizona}, 384 U.S. 436, 442 (1966) (“These precious rights were fixed in our Constitution only after centuries of persecution and struggle.”).

\textsuperscript{208} See 597 N.E.2d 1363, 1369 (Mass. 1992).

\textsuperscript{209} See \textit{id.} at 1364.

\textsuperscript{210} See \textit{id.} at 1365.

\textsuperscript{211} See \textit{id.}

\textsuperscript{212} See \textit{id.}

\textsuperscript{213} See \textit{Snyder}, 597 N.E.2d at 1365.

\textsuperscript{214} See \textit{id.}
Then, the police officer read the defendant his *Miranda* rights, and the defendant confirmed his prior admission.\(^{215}\) The defendant was eventually charged and found guilty of three drug-related offenses and sentenced to two years in jail.\(^{216}\)

Because the principal had not been acting as an agent of police, the principal was not required to give *Miranda* warnings (nor would any other private citizen) to the defendant before questioning him.\(^{217}\) The fact that the principal had every intention of turning over any evidence she obtained to the police did not change the Massachusetts court’s analysis.\(^{218}\) As in *Tinkham*, the *Ferguson* test would have required the principal to give the defendant *Miranda* warnings before questioning him.\(^{219}\) Given the school policy of turning any confiscated drugs over to police, after the principal had found drugs in the defendant’s book bag, she knew that any statements the defendant made during her questioning would also be given to the police.\(^{220}\)

Furthermore, the principal’s conduct during the investigation seemed less like a school official inadvertently coming across evidence while ensuring the safety and order of her building and more like a law enforcement officer seeking to generate evidence for criminal sanctions.\(^{221}\) The principal did not want to arouse suspicion, so she postponed searching and questioning the student even after the possible school and criminal drug violation was brought to her attention.\(^{222}\) This behavior seems more designed to obtain the maximum amount of evidence, which the principal knew would be turned over to police, per school policy.\(^{223}\) Even after the police officer arrived, the principal assisted in the interrogation, repeating the incriminating statements the defendant had made to her in the presence of the police officer, which may have influenced the defendant’s decision to confirm the confession even though he had now been given *Miranda* warnings.\(^{224}\)

\(^{215}\) See id.

\(^{216}\) See id. at 1365–66.

\(^{217}\) See id. at 1369.

\(^{218}\) See Snyder, 597 N.E.2d at 1369.


\(^{220}\) See Snyder, 597 N.E.2d at 1365 n.1.

\(^{221}\) See id. at 1365.

\(^{222}\) See id.

\(^{223}\) See Ferguson, 532 U.S. at 85; Snyder, 597 N.E. 2d at 1363. The record is unclear as to whether the defendant knew of the school policy in question. See Snyder, 597 N.E.2d at 1365.

\(^{224}\) See Snyder, 597 N.E.2d at 1363. Assuming the *Ferguson* test were law and required the principal to give the defendant *Miranda* warnings, the defendant may have had some success in suppressing his later statement to the police officer had the principal failed to pro-
principal’s very deliberate actions throughout the incident indicate that her immediate goal was to generate evidence, even if her ultimate goal was to maintain the safety of her school building.\textsuperscript{225} If her immediate goal was the safety of the school building, she should have searched and questioned the student right away, rather than wait so as not to arouse suspicion.\textsuperscript{226} Either way, the principal’s actions met the \textit{Ferguson} test—she sought to generate evidence with the intent to turn the evidence over to law enforcement—and thus she should have given the student \textit{Miranda} warnings.\textsuperscript{227}

As in the analysis of \textit{Tinkham} under a \textit{Ferguson} test standard, whether or not the defendant is convicted in a case like \textit{Snyder} may not change.\textsuperscript{228} Perhaps, if given \textit{Miranda} warnings, the defendant would have confessed anyway, leading to a conviction.\textsuperscript{229} Perhaps he would not have confessed, but there still would have been enough other evidence to convict him.\textsuperscript{230} Perhaps, if the principal had not given the defendant \textit{Miranda} warnings, even if she were required to, the statements may have been suppressed—which could have led to a not guilty verdict.\textsuperscript{231} In choosing a jurisprudence to evaluate school interrogation cases, the emphasis should not be on the eventual outcome, but on a process that protects student-defendants and informs them of their Fifth Amendment rights in situations where their school officials are seeking out evidence to be used not just in school disciplinary proceedings, but in criminal proceedings.\textsuperscript{232}

\begin{itemize}
  \item vide those warnings. See Missouri v. Seibert, 542 U.S. 600, 603 (2004). In \textit{Seibert}, a prior non-warned statement tainted a later statement made after the provision of \textit{Miranda} warnings. See \textit{id.} at 603. The two confessions were separated by a brief twenty-minute break and were both made in the same police station; the second round of questioning did not involve a specific acknowledgement that the prior confession could not be used against the suspect. \textit{id.} at 602. The Supreme Court suppressed the later statement, not wanting to legitimize the police practice of purposefully obtaining an illegal confession, then giving \textit{Miranda} warnings, and confusing or tricking suspects into simply repeating themselves. See \textit{id.} at 601, 602. In \textit{Snyder}, the defendant was allowed to meet with his girlfriend between the two confessions, but the close proximity in time (less than forty-minutes) and the lack of a specific warning and any pressure from already having confessed to the principal would favor suppression. See \textit{Snyder}, 597 N.E.2d at 1363.
  \item See \textit{Ferguson}, 532 U.S. at 85; \textit{Snyder}, 597 N.E. 2d at 1365.
  \item See \textit{Ferguson}, 532 U.S. at 85; \textit{Snyder}, 597 N.E. 2d at 1363.
  \item See \textit{Ferguson}, 532 U.S. at 85; \textit{Snyder}, 597 N.E. 2d at 1363.
  \item See \textit{Ferguson}, 532 U.S. at 85; \textit{Snyder}, 597 N.E. 2d at 1363.
  \item See \textit{Ferguson}, 532 U.S. at 85; \textit{Snyder}, 597 N.E. 2d at 1369.
  \item See \textit{Snyder}, 597 N.E.2d at 1363.
  \item See \textit{id.}
  \item See \textit{id.}
\end{itemize}
III. EXTERNAL SUPPORT FOR APPLYING THE FERGUSON TEST IN SCHOOL INTERROGATION CASES

When school officials act with the intent to assist law enforcement, as demonstrated by collecting evidence and turning that evidence over to police and by analyzing the school officials’ immediate and ultimate goals (general crime control, assisting law enforcement, or separate school-related ends), the Ferguson test would require that school officials give constitutional warnings.\(^{233}\) Although the Ferguson test is a fact-specific inquiry based on each case and their attendant circumstances, a general trend exists towards a close collaboration among school officials and law enforcement, which bolsters the inference that school officials’ immediate goals are often to assist law enforcement, even if the ultimate goal is enforcement of school rules.\(^{234}\) Furthermore, a close connection between school officials and law enforcement is frequently mandated by school district policies requiring school officials to turn evidence over to law enforcement, and statistics reflect a growing increase of schools reporting crime to law enforcement.\(^{235}\)

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\(^{233}\) See Ferguson, 532 U.S. at 85.


A. School Policies Concerning Student Interrogations

Many school districts have policies that both allow principals to interrogate students without giving constitutional warnings and require that principals turn over any evidence of a crime to law enforcement.\textsuperscript{236} A typical policy is that of the Las Cruces (New Mexico) Public Schools which provides that when a student is a suspect or accused of a crime, “a principal may interview the student, without the presence of parents, and without giving the student constitutional warnings, if breach of school discipline, health or safety of the student or the student body, or presence in the school building or grounds or illegal matter is involved.”\textsuperscript{237} These broad areas in which a student may be interrogated without warnings will cover almost any infraction, from a minor violation of school rules to a serious felony.\textsuperscript{238} Importantly, this broad application covers the set of circumstances with which the \textit{Ferguson} test is concerned—situations in which the school official is acting to assist law enforcement and turn evidence over to law enforcement.\textsuperscript{239} The policy goes on to require school officials to report evidence of “any felony, or distribution or possession of any amount of drugs” to law enforcement.\textsuperscript{240} Additionally, school officials are instructed to “cooperate with [any] law enforcement agency and not withhold information which the agency deems relevant to its investigation.”\textsuperscript{241} This sounds remarkably similar to the unconstitutional policy in \textit{Ferguson} which was “designed to obtain evidence of criminal conduct by the tested patients that would be turned over to the police and could be admissible in subsequent criminal prosecutions.”\textsuperscript{242}

Thus, in Las Cruces public schools, a student could be interrogated by a school official, with that school official having every intention to assist law enforcement without giving the student Miranda warnings.\textsuperscript{243} Notably, if a school official calls a law enforcement officer to the school to conduct the very same interrogation about the same incident, the law enforcement officer would be constitutionally required to give

\begin{footnotes}
\footnote{\textsuperscript{236} See Las Cruces Regulation, \textit{supra} note 235, at 5.}
\footnote{\textsuperscript{237} See \textit{id}.}
\footnote{\textsuperscript{238} See \textit{id}.}
\footnote{\textsuperscript{239} See \textit{Ferguson}, 532 U.S. at 85.}
\footnote{\textsuperscript{240} See Las Cruces Policy, \textit{supra} note 235, at 1, 3.}
\footnote{\textsuperscript{241} See \textit{id}.}
\footnote{\textsuperscript{242} See \textit{Ferguson}, 532 U.S. at 86.}
\footnote{\textsuperscript{243} See Las Cruces Policy, \textit{supra} note 235, at 5.}
\end{footnotes}
the student *Miranda* warnings.\textsuperscript{244} Applying the *Ferguson* test, the principal would be required to give *Miranda* (or similar) constitutional warnings because the school official is acting for the purpose of and with the intent to assist law enforcement, by collecting incriminating evidence against the student while knowing she would turn that evidence over to law enforcement as required by district policy.\textsuperscript{245}

Many school policies have similar requirements that school officials turn evidence of certain crimes (often specifying drug-related incidents) over to law enforcement and allow school officials to question students for any reason without notifying the students’ parents or guardian or giving any constitutional warnings regarding the right to silence and an attorney.\textsuperscript{246} Interestingly, many school policies require the exact opposite when law enforcement officials conduct investigations on school premises.\textsuperscript{247} When law enforcement agents (as opposed to school officials) conduct an interrogation, many policies require school officials to notify a student’s parents or guardian, require that the parents be present during the interrogation, or require a parent to give consent before an interrogation is conducted on school grounds.\textsuperscript{248} The differing stance of treatment of interrogations by school officials and law enforcement suggests that school officials recognize the gravity of a law enforcement interrogation.\textsuperscript{249} Some school districts even require their school administrators to apprise law enforcement of any disabilities or limitations of an interviewed student.\textsuperscript{250}

School districts take differing views on whose responsibility it is to assure compliance with constitutional mandates during law enforcement interrogations.\textsuperscript{251} Some districts expect the law enforcement offi-

\begin{footnotes}
\textsuperscript{245} See *Ferguson*, 532 U.S. at 85; Las Cruces Policy, supra note 235, at 1, 5; see also Commonwealth v. Snyder, 597 N.E.2d 1363, 1369 n.9 (Mass. 1992) (noting that, though it seemed unlikely that the court would require school officials to give students *Miranda* rights in all situations, it might make good policy sense to give students a warning that any statements could be used as evidence against them when “incriminating evidence has already been seized and where, pursuant to established practice, the evidence is to be turned over to the police”).
\textsuperscript{246} See sources cited supra note 235.
\textsuperscript{247} See Hayward Policy, supra note 235; Jefferson County Policy, supra note 235.
\textsuperscript{248} See Hayward Policy, supra note 235; Jefferson County Policy, supra note 235.
\textsuperscript{249} See Hayward Policy, supra note 235; Jefferson County Policy, supra note 235. Interrogations by school officials, like those performed by law enforcement agents, can be an entry into the criminal justice system, and thus, perhaps, they require similarly stringent standards. See *Ferguson*, 532 U.S. at 85; *Snyder*, 597 N.E.2d at 1369; State v. Tinkham, 719 A.2d 580, 581 (N.H. 1998).
\textsuperscript{250} See Hayward Policy, supra note 235.
\textsuperscript{251} See sources cited supra note 235.
\end{footnotes}
cers to self-govern, while others instruct their respective school officials to ensure that the law enforcement officers apprise the student of her *Miranda* rights. The Jonesport (Maine) School District policy is atypical in that it mandates its school officials to take an active role in protecting students’ constitutional rights. The policy states, “[I]t is the responsibility of the school administration to assure that the legal rights of students are not violated” during the school day or during school-sponsored activities, and further directs school officials to protect students from coercion or illegal restraint during law enforcement interrogations. School districts’ imposition of additional safeguards during law enforcement interrogations, given the serious consequences of such questioning, is incongruous with the policies’ specific exemption of school personnel from giving constitutional warnings during interrogations with school officials even though a confession to a school official can just as easily lead to serious consequences in the criminal justice system.

B. School Crime and Reporting Statistics

Even as the occurrence of crimes at schools has been declining, schools are reporting more crimes to law enforcement, which reflects an increasingly close collaboration between school officials and law enforcement. More urban schools and schools with higher minority enrollments report more crimes to law enforcement. This suggests a disparate impact upon urban and minority students of student confes-

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252 Compare Jefferson County Policy, *supra* note 235 (placing no obligation on principals to ensure law enforcement officers comply with constitutional safeguards), with Knox County Policy, *supra* note 235 (instructing principal to confirm that the law enforcement officer provided constitutional warnings), and Jonesport Policy, *supra* note 235 (requiring principals to ensure that the law enforcement officer gives constitutional warnings).

253 See Jonesport Policy, *supra* note 235.

254 See *id*.


256 See DeVoe et al., *supra* note 234, at 28, 71, 81. The two most suggested theories to explain why there has been increase in crimes reported to police (even though crime is actually declining) are the proliferation of zero-tolerance policies and the increasing use of the criminal justice system to handle school-based offenses that were formerly handled within schools with detention, suspension, and counseling. See generally Annette Fuentes, *Zero Tolerance Policies Have Created a ‘Lockdown Environment’ in Schools*, NATION, Dec. 15, 2003, at 17; Richard Luscombe, *Student Arrests Test Rules of a Post-Columbine World*, CHRISTIAN SCI. MONITOR, Feb. 3, 2005, available at [http://www.csmonitor.com/2005/0203/p01s01-ussc.html](http://www.csmonitor.com/2005/0203/p01s01-ussc.html); Sara Rimer, *Unruly Students Facing Arrest, Not Detention*, N.Y. TIMES, Jan. 4, 2004, at A1.

257 See DeVoe et al., *supra* note 234, at 29, 84.
sions as an entry into the criminal justice system.\textsuperscript{258} Both the close connection between schools and law enforcement and the unequal reporting rates demonstrate the need for the \textit{Ferguson} test to establish uniform standards since school officials often knowingly intend to share evidence with law enforcement, a situation of which students should be fully informed.\textsuperscript{259}

Between 1992 and 2003, overall youth crime declined by approximately half, both at school and away from school, while during the same time period, schools reporting at least one crime to law enforcement rose from 57\% to 63\%.\textsuperscript{260} Breaking this figure down by type of crime, 36\% of schools reported a violent crime (including 15\% of a serious violent crime), 28\% reported a theft, and 52\% reported other crimes.\textsuperscript{261} The incidence of crimes and of crimes reported to police is not uniform across different urbanicities, however.\textsuperscript{262} In all three reporting categories, city schools had a higher incidence of crime and higher reporting levels to police.\textsuperscript{263} For example, the overall violent crime report rate was 36\%, although 44\% of city schools reported a violent crime to police, while only 35\% of urban fringe, 40\% of town, and 29\% of rural schools reported a violent crime to police.\textsuperscript{264} The pattern is similar in the other categories—city schools report rates higher than the overall figure, followed in decreasing order by town, urban fringe, and rural.\textsuperscript{265} The higher reporting rates for city schools suggests that

\textsuperscript{258} \textit{See id.}

\textsuperscript{259} \textit{See Ferguson v. City of Charleston}, 532 U.S. 67, 85 (2001); \textit{DeVoe et al., supra} note 234, at 28.

\textsuperscript{260} \textit{DeVoe et al., supra} note 234, at iv. “At school” includes crimes that took place in school buildings, on school grounds, or on school buses during normal school hours or during school-sponsored events or activities. \textit{See id.} at 29. Regarding “at school” incidents, in 1992, there were 144 total crimes per 1000 students and only 73 per 1000 students in 2003. \textit{Id.} at 71. “Away from school” crimes were committed by 138 per 1000 students in 1992 and declined to 60 per 1000 students by 2003. \textit{Id.}

\textsuperscript{261} \textit{DeVoe et al., supra} note 234, at 27. Serious violent crime includes rape, sexual battery, physical attack or fight with a weapon, threat of physical attack with a weapon, and robbery with or without a weapon. \textit{Id.} Other incidents include possession of a firearm or explosive device, possession of a knife or sharp object, distribution of illegal drugs, possession or use of alcohol or illegal drugs, sexual harassment, or vandalism. \textit{Id.}

\textsuperscript{262} \textit{See id.} at 29. As might be expected, incidents and reports of crimes in all four categories are lowest at the primary school level, increasing at the middle school level, and significantly increasing at the high school level. \textit{Id.} at 28.

\textsuperscript{263} \textit{DeVoe et al., supra} note 234, at 28.

\textsuperscript{264} \textit{Id.} at 29.

\textsuperscript{265} \textit{Id.} The overall report rate for theft was 29\%: 34\% for city schools, 28\% for urban fringe schools, 30\% for town schools, and 24\% for rural schools. \textit{Id.} For “other crimes” the overall rate was 52\%: 61\% for urban schools, 49\% for urban fringe, 55\% for town schools, and 47\% for rural schools. \textit{Id.}
more students in those schools are likely to find themselves in a situation where the Ferguson test would be applicable.\footnote{266 See Ferguson v. City of Charleston, 532 U.S. 67, 85 (2001); DeVoe et al., supra note 234, at 29.}

Schools’ reports of crimes to police also vary depending on the percentage of minority enrollment.\footnote{267 See DeVoe et al., supra note 234, at 84.} Schools with the highest minority enrollments have the highest rates of reporting crime to police.\footnote{268 See id.} The overall report rate for violent incidents was 36%, but for schools with a minority enrollment of 75% or more, the report rate for violent crime was 45%.\footnote{269 See id.} For schools with minority enrollment of less than 10%, the report rate was 31%; for schools with minority enrollment of 10 to 24%, the report rate was 36%; for schools with minority enrollment of 25 to 50%, the report rate was 37%; and for schools with a minority enrollment of 50 to 74%, the report rate was 39%.\footnote{270 Again, the same trend exists in the subset of serious violent crime and in the “other incidents” categories. See id.} The trend was less significant in the theft category, where the schools with the lowest minority enrollment had a report rate of 27% and schools with the highest minority enrollment had a report rate of 31%.\footnote{271 See id. In the subset of serious violent crimes reported to police, schools with the lowest minority enrollment of less than 10% had a report rate of 10%; schools with 10 to 24% minority enrollment had a report rate of 14%; schools with 25 to 50% minority enrollment had a report rate of 18%; schools with 50 to 74% minority enrollment had a report rate of 17%; and schools with 75% or more minority enrollment had a report rate of 23%. Id. In the category of other incidents, for schools with minority enrollment of less than 10%, the report rate was 47%; for schools with minority enrollment of 10 to 24%, the report rate was 55%; for schools with minority enrollment of 25 to 50%, the report rate was 56%; for schools with a minority enrollment of 50 to 74%, the report rate was 52%; and for schools with a minority enrollment of 75% or more, the report rate was 58%. Id. See DeVoe et al., supra note 234, at 84. See DeVoe et al., supra note 234, at 29. Some people are resisting the school-police connection. See Luscombe, supra note 256. In response to an incident in which a thirteen-year-old first generation immigrant was removed as president of the student council and had her membership in the honor society revoked for bringing a traditional Korean pencil sharpener to school (which includes a folding two-inch blade), one Texas state senator introduced legislation that would require school administrators to take a “student’s intent” into account before administering any disciplinary procedures. See id. In New York City, several public school teachers have clashed with school police over police actions the teachers thought crossed
strate that urban and minority students are more likely to be questioned about an incident the principal knows she is going to relate to the police as evidence than their urban fringe, town, rural, and non-minority counterparts.\textsuperscript{274} This disparity also highlights the need for the \textit{Ferguson} test because a uniform, predictable standard would help ensure that students are equally apprised of their constitutional rights, which is particularly necessary given that not all student confessions are equally likely to result in referral to the criminal justice system.\textsuperscript{275} Thus, in situations in which it is applicable, the \textit{Ferguson} test would protect and inform rural and urban as well as minority and non-minority students alike.\textsuperscript{276}

IV. The Realities and Practicalities of the \textit{Ferguson} Test In The School Interrogation Setting

A. Custodial Interrogation

Assuming a situation in which the \textit{Ferguson} test triggers constitutional warnings, traditionally, \textit{Miranda} warnings are only required when the recipient of the warnings is both (1) interrogated and (2) in custody.\textsuperscript{277} Interrogation is questioning initiated by law enforcement of a suspect, meaning that someone the police are focusing on as a potential defendant, not just as a witness.\textsuperscript{278} When a school official questions a student in a \textit{Ferguson}-triggering situation, the “interrogation” compo-
By requiring that the school official seek out evidence with the intent to turn that evidence to law enforcement, the Ferguson test ensures that the questioning is initiated by a school official and that the school official is focused on gathering evidence against a particular student. Furthermore, interrogation for Miranda purposes also covers conduct or questioning that law enforcement knows is reasonably likely to elicit an incriminating response from the suspect. This so-called “functional equivalent” of interrogation also includes consideration of any suspect’s particular susceptibilities or vulnerabilities that law enforcement is aware of to use in eliciting a statement from the suspect. In a Ferguson situation, the functional equivalent of interrogation is often easily met because of the special relationship between a school official and a student. A school official is not only likely to personally know the student she is interrogating and the student’s background (including any particular susceptibilities), but a school official also has access to the student’s entire educational file, which contains much more than just grades.

280 See Tinkham, 719 A.2d at 581, 583–84. The principal in Tinkham told the police she intended to question the defendant. Id. at 581. Furthermore, it was never disputed that there was an “interrogation,” only that Miranda was not required because the principal was neither a law enforcement officer nor acting as an agent of law enforcement. Id. at 583–84; see also In re Navajo County Juvenile Action No. JV91000058, 901 P.2d 1247 (Ariz. Ct. App. 1995) (noting that the only dispute was whether the principal “was required to give appellant such a [Miranda] warning before questioning him”); Commonwealth v. Snyder, 597 N.E.2d 1363, 1369 (Mass. 1992) (not questioning whether an interrogation had occurred, only that Miranda was not required); In re Brendan H., 372 N.Y.S.2d 473, 477 (Fam. Ct. 1975) (referring to a school questioning as an “interrogation,” but again found that Miranda was not required because school officials were not acting as agents of or in concert with police).
282 See id.
283 See id. Educational records are important enough to be protected by federal law. See 20 U.S.C. § 1232g (1974). The Federal Educational Records Protection Act defines education records as information directly related to a student, specifically, any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche and maintained by education agencies or institutions, or by parties acting for agencies or institutions, including special education schools and health or social service institutions. See id. The National Center for Education Statistics, which provides guidelines to many academic institutions about the Federal Educational Records Privacy Act lists educational records as including: family information, such as the name and address of the student and her parents or guardians, date and place of birth, and number of siblings; personal information such as identification and social security number, picture, and information to readily identify the student; grades, test scores, courses taken, academic specializations and activities, and official letters about a student’s status in school; test records, answer sheets, and individualized educational plans; special education records; disciplinary records established and maintained by school officials; medical and health records that the school collects and maintains; docu-
What constitutes custody is a more tricky analysis.\textsuperscript{284} A formal arrest can meet the custody requirement, but this would not be the case in a school-based Ferguson situation.\textsuperscript{285} However, “restraint on freedom of movement of the degree associated with a formal arrest” also meets the custody requirement.\textsuperscript{286} The latter definition of custody is evaluated with a reasonable person test: would a reasonable person in the suspect’s position, given the totality of the circumstances, have felt free to end the questioning and leave?\textsuperscript{287} The location of the interrogation is not determinative because even some interrogations that have taken place in police stations have been found to be non-custodial since the suspects went to the station voluntarily and were not prevented from leaving.\textsuperscript{288} On the other hand, the Supreme Court held that an interrogation in a suspect’s home was custodial because it took place in the middle of the night, with the suspect surrounded by police officers with guns drawn.\textsuperscript{289}

A student, of course, does not go to the principal’s office voluntarily, in any true meaning of the word.\textsuperscript{290} The student must go see the principal and, once in the office, is not free to “end the questioning and leave.”\textsuperscript{291} Although a student might be insolent and difficult by refusing to answer questions, this is not the same as feeling free to leave the principal’s office.\textsuperscript{292} In a Ferguson situation, a student would not be surrounded by police who can use force or the threat of force to prevent her from leaving the principal’s office, but the power dynamic between a student and her principal, who has the ability to threaten and impose school punishments, effectively functions as restraint on a student’s freedom of movement.\textsuperscript{293} After all, being summoned to the principal’s office certainly carries with it “inherently compelling presen-

\textsuperscript{285} See Quarles, 467 U.S. at 655; Beheler, 463 U.S. at 1125; Mathiason, 429 U.S. at 494–95.
\textsuperscript{286} See Quarles, 467 U.S. at 655; Beheler, 463 U.S. at 1125; Mathiason, 429 U.S. at 494–95.
\textsuperscript{288} See Beheler, 463 U.S. at 1122, 1123; Mathiason, 429 U.S. at 494.
\textsuperscript{290} See Beheler, 463 U.S. at 1122, 1123; Mathiason, 429 U.S. at 494.
\textsuperscript{291} See Thompson, 516 U.S. at 112.
\textsuperscript{292} See id.
\textsuperscript{293} See Orozco, 394 U.S. at 325.
sures which . . . compel [the student] to speak where he would not otherwise do so freely.”

Additionally, in some schools, a school security guard, who may or may not be a law enforcement officer, may retrieve a student from class and accompany that student to the principal’s office, further demonstrating that the student is not voluntarily going nor free to end the questioning, but rather is made to go by a show of authority and a potential use of force.

In at least one case, a court found a custodial setting in a principal’s office. In *In re Killitz*, the student-defendant was summoned to the principal’s office, waited outside for a few minutes, and then was brought into the office. In the principal’s office, a police officer questioned the student while the principal watched. The court found that the student was in custody during the questioning because the student was “obliged” to respond to a school administrator’s request to go to the principal’s office, and had not gone voluntarily. Further, the court found that the student was in school during regular school hours, such that school officials controlled this student’s (and all other students’) freedom of movement “a great deal.” Additionally, neither the police officer nor the principal did anything “to dispel the clear impression communicated to defendant that he was not free to leave.” The court concluded that the student was in custody, under a state standard very similar to the federal *Miranda* custody test.

*In re Killitz* is distinguishable from most school interrogation cases (and from the school interrogation cases addressed in this Note) because a law enforcement officer conducted the interrogation. However, the Colorado court’s analysis on the issue of custody is instructive and applicable to more routine school interrogation situations that do

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295 See *Orozco*, 394 U.S. at 327–28; *DeVoe et al.*, supra note 234, at 63.
297 See id.
298 See id. The student-defendant was summoned to the office because another student had implicated him in a burglary. *Id.* Note that this type of focused interrogation also meets the implicit focus as a suspect, not merely questioning as a witness, aspect of *Miranda* rights applicability. *Beckwith v. United States*, 425 U.S. 341, 347 (1976); *Miranda*, 384 U.S. at 444.
299 See *Killitz*, 651 P.2d at 1383–84.
300 See id. at 1384.
301 See id.
302 See id. at 1383–84. Oregon weighs the following in establishing custody: (1) whether the defendant could have left the scene of the interrogation voluntarily, (2) whether defendant was being questioned as a suspect or merely as a witness, and (3) whether defendant freely and voluntarily accompanied the officer to the place of questioning. *Id.*
303 See id. at 1383.
not involve law enforcement. The court affirmed that a student does not go to the principal’s office voluntarily and, once in the office, is not free to leave, two important factors in the custody analysis. Therefore, the custody element is often met when a student is questioned by school officials.

B. The Substance of the Ferguson Rule Warnings

Because the traditional Miranda requirements of custodial interrogation are met in a school interrogation by a school official, and because school officials often have an intent (frequently dictated by school policy or custom) to turn the results of an interrogation over to police, Miranda warnings should be given to students in these types of interrogation settings. Ferguson stated that the hospital employees should have warned patients of “their constitutional rights, as standards of knowing waiver require,” and similarly, school officials should warn their students in comparable situations. For ease of application, school officials can follow their respective state laws concerning minors and Miranda warnings.

Some states have special requirements when administering Miranda rights to minors, and in such a jurisdiction, school officials should also follow these rules. For example, some states require the presence of or an opportunity for the minor to discuss the Miranda warnings with an “interested adult,” while others require a simplified version of Miranda for minors. The Miranda court stated that an “accused must be adequately and effectively apprised of his rights” in order to permit a full opportunity for the accused to exercise his or her right against self in-

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304 See Killitz, 651 P.2d at 1383.
308 See Ferguson, 532 U.S. at 85; Miranda, 384 U.S. at 436, 444. The Miranda warnings include: the right to remain silent; the right to an attorney, either retained or appointed; and that any statement a suspect does make may be used as evidence against her. See Miranda, 384 U.S. at 444.
309 See Miranda, 384 U.S. at 444.
311 See Philip S., 594 N.E. 2d at 885; State v. Benoit, 490 A.2d 295, 304 (N.H. 1984) (requiring that warnings be in “language understandable to a child”); A Juvenile, 521 N.E.2d at 1371.
Therefore, in a school interrogation, an adequate warning of a student’s rights should require the school official to make it clear that any information obtained will be shared with law enforcement for potential criminal punishments, not just for in-school punishments, since this is the crux of why a school official would even be giving such warnings. Such specific warnings are not unheard of—New Hampshire specifically requires informing a minor that she may be sent into the adult system in its *Miranda* warnings for minors.

C. Feasibility

The *Ferguson* test will not require constitutional warnings in every school discipline situation because the factors of the test will not be met in every situation. The *Ferguson* test and its factors limit the applicability to situations in which school officials are seeking out evidence against a student with the intent to turn that evidence over to law enforcement. School functioning will not be impaired because of the *Ferguson* test or by requiring school officials to sometimes give *Miranda* warnings, as concerned the Superior Court of Pennsylvania in *Commonwealth v. Dingfelt*, which wrote:

School officials do stand in the position of loco parentis and as such are entitled to retain a degree of control over the school’s students and its environment. For these reasons they should not be limited to the degree that would result in making it necessary to warn students of their constitutional rights everytime [sic] a problem of discipline arose and especially when the problem of discipline occasions the knowledge of the commission of the crime. It would be utterly ridiculous for a teacher who confronted a student for throwing a rubber

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312 See *Miranda*, 384 U.S. at 467.
313 See *Ferguson*, 532 U.S. at 85.
314 See *Benoit*, 490 A.2d at 304.

New Hampshire’s recommended *Miranda* warning for minors is: “There is a possibility that you may not be brought to juvenile court but instead will be treated as an adult in criminal court. There you could go to county jail or the State prison. If you are treated as an adult you will have to go through the adult criminal system, just as if you were 18 years old. If that happens, you will not receive the protections of the juvenile justice system.”

*Id.* app. at 306–07.
315 See *Ferguson*, 532 U.S. at 85.
316 See *id.*
band across the classroom to be under a duty to give *Miranda* warnings before telling the student to empty his pockets.\(^{317}\)

The Supreme Court enunciated a similar concern when considering if school officials were required to get a warrant before searching a student in *New Jersey v. T.L.O.*\(^ {318}\) The Court wrote that a warrant requirement was “unsuited” to the school environment because it would interfere with school officials’ ability to swiftly implement disciplinary procedures needed in the school setting.\(^ {319}\) The *Ferguson* test and its factors, however, distinguish routine classroom discipline situations from interrogations by administrators who are intending to turn incriminating evidence over to law enforcement based on official or de facto school policies.\(^ {320}\) The *Ferguson* test would not require constitutional warnings in the former, only in the latter.\(^ {321}\)

As the Pennsylvania court worried, if every teacher in every disciplinary situation, had to give *Miranda* warnings, classroom discipline would halt, chaos would reign, and learning would cease.\(^ {322}\) But the line is much clearer than the Pennsylvania court admits; school officials would be required to give warnings when they intend to turn evidence over to police, based upon the nature of the incident and school policies.\(^ {323}\) A classroom teacher instructing her student to hand over the student’s cache of rubber bands, or even questioning the student about his rubber band “possession,” is a disciplinary situation that is very unlikely to reach law enforcement, and thus would not meet the *Ferguson* test.\(^ {324}\)

Similarly, most in-classroom discipline situations will not meet the *Ferguson* test.\(^ {325}\) Even those situations that begin in the classroom but eventually include sending a student to the administration for further action will usually not meet the *Ferguson* test because so many of these incidents are not of the sort that could or would be turned over to law enforcement.\(^ {326}\) For example, thirty percent of middle schools and twenty-nine percent of high schools report at least weekly incidents of


\(^{319}\) See id.

\(^{320}\) See *Ferguson*, 532 U.S. at 85.

\(^{321}\) See id.

\(^{322}\) See *Dingfelt*, 323 A.2d at 147.

\(^{323}\) See *Ferguson*, 532 U.S. at 85; *Dingfelt*, 323 A.2d at 147.

\(^{324}\) See *Ferguson*, 532 U.S. at 85; *Dingfelt*, 323 A.2d at 147.

\(^{325}\) See *Ferguson*, 532 U.S. at 85; *Dingfelt*, 323 A.2d at 147.

\(^{326}\) See *Ferguson*, 532 U.S. at 85.
“student acts of disrespect for teachers,” and these are likely handled and punished within the classroom by the classroom teacher.\textsuperscript{327} When students causing an act of disrespect are referred to a school administrator, such incidents are not the kind where a principal would interrogate a student with the intent to turn any information gathered over to police, even if the student “confessed” to dis-respecting her teacher in a written student-referral form.\textsuperscript{328}

On the other hand, a situation in which a principal is investigating a student suspected of having drugs on school property and questions that student with every intention of turning any evidence (such as a written confession) over to the police would meet the \textit{Ferguson} test.\textsuperscript{329} Already existing school policies also provide guidance as to when there is a \textit{Ferguson} situation, and thus school officials should give \textit{Miranda} warnings.\textsuperscript{330} For example, the Las Cruces policy mandates that school officials report and turn any evidence of a felony or drug-related crimes to local law enforcement.\textsuperscript{331} Likewise, the Hayward policy encourages school officials to report and share evidence of tobacco use and requires school officials to report and share evidence of alcohol use or possession with local law enforcement.\textsuperscript{332} Thus, in these districts, teachers and (most likely) principals know that if they are questioning a student about an alcohol or drug incident, they need to give warnings because they intend (and indeed, are required) to turn any evidence over to law enforcement.\textsuperscript{333} Thus, even though the number of incidents where school officials call, inform, or assist law enforcement is rising, the \textit{Ferguson} test will not have any impact on most individual, routine discipline situations.\textsuperscript{334}

\textbf{Conclusion}

In \textit{Miranda}, the Supreme Court wrote, “[This decision] was necessary . . . to insure that what was proclaimed in the Constitution had not become but a ‘form of words’ in the hands of government officials.”\textsuperscript{335}

\begin{itemize}
\item \textsuperscript{327} See DeVoe et al., \textit{supra} note 234, at 31.
\item \textsuperscript{328} See Ferguson, 532 U.S. at 85; State v. Tinkham, 719 A.2d 580, 581 (N.H. 1998).
\item \textsuperscript{329} See Ferguson, 532 U.S. at 85.
\item \textsuperscript{330} See id.; Hayward Policy, \textit{supra} note 235; Las Cruces Policy, \textit{supra} note 235.
\item \textsuperscript{331} See Las Cruces Policy, \textit{supra} note 235.
\item \textsuperscript{332} See Hayward Policy, \textit{supra} note 235.
\item \textsuperscript{333} See Ferguson, 532 U.S. at 85; Miranda v. Arizona, 384 U.S. 436, 444 (1966); Hayward Policy, \textit{supra} note 235; Las Cruces Policy, \textit{supra} note 235.
\item \textsuperscript{334} See Ferguson, 532 U.S. at 85; DeVoe et al., \textit{supra} note 234, at 26.
\item \textsuperscript{335} See Miranda, 384 U.S. at 444.
\end{itemize}
The *Ferguson* test would ensure that a student is informed of her constitutional rights before an interrogation if her principal is seeking out evidence with the intent to turn that evidence over to law enforcement. Applying the *Ferguson* test to school interrogations would ensure a process more appropriately protective of students’ Fifth Amendment rights than agency law, which is how school interrogation cases have usually been analyzed. The *Ferguson* test is the more appropriate analysis because, although *Ferguson* and other school search cases rely on similar analyses, *Ferguson* extends to other constitutional rights.

The *Ferguson* test, which would provide a uniform guideline for school officials conducting student interrogations, is particularly necessary for several reasons. First, there is an increasingly close connection between many school officials and law enforcement due to policies that require school officials to share evidence of certain potential criminal activity with law enforcement. Next, statistics show that students in urban schools and schools with high numbers of minority students report more crimes to police, suggesting that some students may be more vulnerable in school interrogation situations. Finally, because students do not expect their principals to seek out evidence the same way they would expect of law enforcement, they may give a statement that they believe will be used solely for school disciplinary purposes, though it turns out to be used for matters of criminal justice—a situation that, if known by the student, may have changed their decision to speak. Thus the *Ferguson* test is necessary because it would ensure that students’ Fifth Amendment rights do not become “but a form of words” in the hands of school officials.
I BEG YOUR PARDON: A CALL FOR RENEWAL OF EXECUTIVE CLEMENCY AND ACCOUNTABILITY IN MASSACHUSETTS

GAVRIEL B. WOLFE*

Abstract: The pardon power, often described as a safety valve on the criminal justice system, is in a state of atrophy. Against a backdrop of “tough-on-crime” rhetoric, a systemic devaluation of rehabilitation efforts, and significant racial disparities in punishment, the disuse of clemency means no possibility of exit for those who have transformed themselves while incarcerated. This Note examines the origins, history, and philosophical underpinnings of clemency in the United States, focusing on the delicate balance between executive discretion and accountability. It then considers the structural and political factors that have contributed to the almost total failure of the clemency process in Massachusetts in recent years. The Note argues for the revitalization of executive clemency as a means of achieving optimal justice in individual criminal cases and system-wide, and it suggests changes to the administration of the clemency process in Massachusetts to achieve that end.

Introduction

Arnold L. King entered the criminal justice system young.1 At seventeen, he dropped out of high school and became addicted to drugs.2 At eighteen, he was high and in pursuit of his next supply when he shot and killed a man on Newbury Street in Boston.3 In 1972, King, a black teenager, was convicted of first-degree murder and sentenced to life in prison without the possibility of parole.4

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4 Id.; Walker, supra note 1.
Arnie King is now a middle-aged man. He has spent decades in prison. However, he has not merely grown in years; he has also matured. During his time in prison, he has doggedly undertaken the project of his own education, earning a GED, an associate’s degree, a bachelor’s degree, and a master’s degree. Perhaps most importantly, King has reflected on his life’s path, his incarceration, and the mistakes he has made, and he has chosen to share his experiences and insights with others. He has written extensively for publications on the outside, primarily to educate the larger community about prison life and to counsel against the path he followed. King has taken responsibility for having taken the life of another human being, and has communicated in word and deed that he has atoned for that crime.

Nonetheless, despite the life changes he has effected—and despite having been behind bars for nearly three and a half decades, fully twice the length of his pre-incarceration life—King has not yet fulfilled the punishment that society, in the form of the jury, saw fit to impose on him for his offense. At age fifty-three, Arnie King is now beginning his thirty-fifth year of incarceration. Because he is ineligible for parole, he will spend the rest of his life in prison unless the Governor grants him clemency.

Clemency is a broad term used to describe an official act, such as pardon or commutation, which removes some or all of the punitive consequences of criminal conviction. Typically, clemency is granted after an individual has been charged, tried, and convicted of a crime, and functions to reduce the amount of punishment that the offender must suffer. A pardon eradicates all or part of a conviction. It allows the offender to walk away with a clean slate, as though he or she had

5 See Walker, supra note 1.
6 Id.
7 See id.
8 King, supra note 2, at 10.
10 See, e.g., King, supra note 9; King, supra note 2, at 10.
11 See King, supra note 9.
12 See Walker, supra note 1.
14 See Walker, supra note 1.
16 Id. at 5.
17 Id.
never been tried or convicted. Commutation, on the other hand, merely reduces the severity of punishment by substituting a lesser sentence for a greater one. In Arnie King’s case, commutation would mean permitting him to serve less than a life term.

King has petitioned for clemency five times, and five times he has been turned down. In 2004, the Massachusetts Advisory Board of Pardons recommended his most recent commutation petition favorably to the Governor, yet his prison sentence still was not commuted. Instead, Governor Mitt Romney effectively denied him clemency by failing to take the matter into consideration within the year after the recommendation was issued. By not acting, Governor Romney allowed the Board’s recommendation to expire. Arnie King will have to petition for clemency yet again and hope that next time his petition does not fall on deaf ears.

King’s personal story raises questions about the operation of the clemency process, especially when considered against the backdrop of contemporary trends within the American justice system. Arnie King is just one of more than two million people now living behind bars in the United States. That number reflects exponential growth in recent decades—roughly four times more people are incarcerated today than were incarcerated in 1970. A number of factors have led to this increase, including a shift in criminal justice policy toward longer sentences and determinate sentences without the possibility of early release.

Of course, raw numbers do not tell the whole story. Our nation’s overflowing prisons are mostly filled with poor, dispossessed, racial

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18 Id.
19 Id.
20 See Moore, supra note 15, at 5.
22 See In re Arnold L. King, supra note 21, at 2; Support the Release of Arnold King, supra note 13.
23 See 120 Mass. Code Regs. 902.12(2) (2006); In re Arnold L. King, supra note 21, at 2; Support the Release of Arnold L. King, supra note 13.
24 See 120 Mass. Code Regs. 902.12(2); In re Arnold L. King, supra note 21, at 2; Support the Release of Arnold L. King, supra note 13.
25 See 120 Mass. Code Regs. 902.12(2); In re Arnold L. King, supra note 21, at 2; Support the Release of Arnold L. King, supra note 13.
27 Id.
28 See id. at 55.
minorities. At least forty percent—maybe even more than fifty percent—of incarcerated individuals are African American. According to a Bureau of Justice Statistics report, one in three African American males can expect to be imprisoned during his lifetime. Today, sixty-two percent of the U.S. prison population is African American or Latino, as compared with only twenty-three percent in 1930; in contrast, seventy-seven percent of inmates in 1930 were white. Statistics are similarly disproportionate for youthful offenders. African American and Latino youth are far more likely than their white peers to be sentenced for both drug offenses and violent crimes, and they are likely to serve longer sentences.

There is considerable disagreement about the reasons for these racial disparities. However, it is indisputable that the disproportionate number of poor people of color in prison is not merely the result of disproportionate offending. Discretionary decisions made by law enforcement officials also contribute to the disparity. Former President Carter put it plainly and personally when he compared the way the system would treat his children compared with the children of his black neighbors: “All three of my boys smoked pot [growing up]. I knew it. But I also knew if one was caught he would never go to prison. But if any of my neighbors got caught . . . they would go to prison for 10, 12 years.” Statistics bear out Carter’s assertion. Though seventy-one percent of youth arrested throughout the United States in 1997 were...

30 Kennedy Comm’n Reports, supra note 29, at 48.
31 Id.
32 Id. at 49.
33 Id.
34 Id.
35 See Kennedy Comm’n Reports, supra note 29, at 49.
36 Id. at 51. Of course, some commentators do directly attribute the racial disparities in incarceration to racial disparities in criminal behavior, ignoring disparities in law enforcement and other factors. Id. This, in turn, leads to race-based solutions to crime. See Brian Faler, Bennett Under Fire for Remark on Crime and Black Abortions, Wash. Post, Sept. 30, 2005, at A5. In September 2005, former U.S. Secretary of Education William J. Bennett made the claim that “if you wanted to reduce crime, you could . . . abort every black baby in this country, and your crime rate would go down.” Id.
37 Kennedy Comm’n Reports, supra note 29, at 51.
38 Id. at 50 (quoting former President Jimmy Carter).
39 Id. at 49.
white, white youth represented only thirty-seven percent of detained or committed juveniles.\textsuperscript{40}

Clemency is frequently described as a safety valve on the criminal justice system that can correct inequitable flaws in the way that the system operates.\textsuperscript{41} Today, that safety valve appears to be shut tight.\textsuperscript{42} Executive clemency in the United States has atrophied, yet it is needed now more than ever.\textsuperscript{43} The combination of the current “tough-on-crime” climate, front-end discretion, and strict sentencing regimes necessitates a closer look at executive clemency as a remedy for inequity in criminal justice.\textsuperscript{44} Even if police and prosecutorial discretion could be eliminated, and bias removed from all criminal justice legislation, clemency would still be necessary because no set of legislative rules can work in all circumstances.\textsuperscript{45} In light of Arnie King’s frustrated commutation petitions and the knowledge that clemency is necessary to a working justice system, it is imperative to examine the clemency process and analyze the reasons for its failure.\textsuperscript{46}

Certainly, clemency is not appropriate in all cases, and the difficulty of regulating its operation raises many questions.\textsuperscript{47} Some questions are more theoretical and others relate to the way that the clemency power is exercised in practice. Why might a governor grant or deny someone clemency? What standards should apply? How do administrative structure and contemporary theories of punishment impact a jurisdiction’s clemency activity? What makes a clemency process “successful”? Does someone like Arnie King deserve to continue to be punished? Together, these questions form the basis of an inquiry that is both academic and practical.

This Note will consider the role of discretion within the criminal justice system and will argue that the contemporary political bias in favor of inflexible, harsh punishment requires the existence of discretion on the “back end” of the criminal justice system. It will examine declining grants of clemency in the past twenty-five years and analyze how the

\textsuperscript{40} Id.
\textsuperscript{41} See, e.g., id. at 73; Margaret Colgate Love, Of Pardons, Politics and Collar Buttons: Reflections on the President’s Duty to Be Merciful, 27 FORDHAM URB. L.J. 1483, 1483 (2000).
\textsuperscript{42} KENNEDY COMM’N REPORTS, supra note 29, at 71.
\textsuperscript{43} See Love, supra note 41, at 1484–85.
\textsuperscript{44} See KENNEDY COMM’N REPORTS, supra note 29, at 57–58; Whitman, supra note 26, at 49; Love, supra note 41, at 1495.
\textsuperscript{46} See Love, supra note 41, at 1484–85.
\textsuperscript{47} See Moore, supra note 15, at 7–8.
administrative process and the philosophical underpinnings of clemency support an anti-clemency bias. In particular, this Note focuses on executive clemency powers in Massachusetts, including the power of the Governor to commute sentences. Because the clemency process in Massachusetts is clearly defined, yet yields a negligible number of grants, Massachusetts serves as a useful context for exploring clemency’s nationwide failure. Finally, this Note will explore how to reactivate the clemency power, and how to balance the discretionary nature of clemency with guidelines to ensure that the power is neither hampered nor abused, in order to best enhance justice in individual cases and system-wide.

Part I provides a brief history of clemency in the United States, describes its current state of atrophy, and argues for its renewal. Part II examines the structure of the executive clemency process in Massachusetts, compares that structure with its counterparts in other U.S. jurisdictions, and identifies institutional disincentives for granting clemency in Massachusetts. Part III looks beyond the formal process to the underlying philosophical justifications for the clemency power and surveys academic scholarship in this area. Part IV traces recent changes in the Massachusetts Executive Clemency Guidelines as they relate to those justifications. Lastly, Part V synthesizes the central lessons from the foregoing study, and proposes modifications to the administration of executive clemency in Massachusetts and other jurisdictions in order to increase the exercise of the pardon power while maintaining accountability.

I. Clemency in the United States: Overview, History, Decline

A. Background: History and Decline

Oh, mercy mercy me
Oh, things ain’t what they used to be

The power of the executive to grant clemency for criminal offenses has been an indispensable element of federal and state systems of just-

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48 This Note will not specifically treat the subject of clemency in the context of capital punishment or commuting death sentences, so as to avoid the unique moral questions regarding the death penalty that have the potential to cloud a more general analysis.

49 See Margaret Colgate Love, Relief from the Collateral Consequences of a Criminal Conviction 105 tbl.3 (2006).

50 Marvin Gaye, Mercy Mercy Me (The Ecology), on What’s Going On (Motown Records 1971).
tice since the early days of the republic.\textsuperscript{51} Indeed, the founders of the nation considered this executive function so important that they enumerated it in the Constitution among the first of the president’s powers, alongside his role as Commander in Chief.\textsuperscript{52} The states followed suit; nearly every state constitution contains a provision granting the governor the power to issue pardons.\textsuperscript{53}

Although the power to grant clemency has a central, centuries-old place in the constitutional schema, that power has fallen into disuse in recent history.\textsuperscript{54} Clemency’s moon waxed and waned with the legal and political tides of the last two centuries.\textsuperscript{55} In the nineteenth century, because the American criminal justice system remained fairly primitive, the need for clemency was acute.\textsuperscript{56} Innovations such as parole and probation, which temper a criminal sentence, had not yet been established in most jurisdictions.\textsuperscript{57} The vast majority of today’s constitutional criminal procedure safeguards did not exist, and mitigating defenses, such as those based on mental illness, were not well developed.\textsuperscript{58} Further, no social safety net of federal benefits programs existed, so the consequences were dire for a family with a wage-earner in prison.\textsuperscript{59} As a result, the pardon power was exercised regularly, as a matter of course.\textsuperscript{60} Between 1860 and 1900, for example, approximately half of all presidential pardon requests were granted.\textsuperscript{61}

However, the twentieth century brought changes in legal standards, as well as a new approach to criminal justice grounded in the nascent behavioral sciences.\textsuperscript{62} The dawn of psychiatry offered new justi-
fication for criminal justice policy—the promise of treating and curing criminal behavior. Instead of merely punishing offenders, the system aimed to turn them into law-abiding citizens.

As a result, rehabilitation became a dominant goal in the dispensation of criminal justice in the United States. Policymakers, now thinking in terms of reform, devised new sentencing schemes to match this purpose; instead of a fixed term, a criminal offender might be sentenced to an indeterminate length of time in prison. The sentence would be satisfied only when the convicted person demonstrated that he was fully reformed.

In this schema, clemency became an atavistic concept. Presumably, “since sentences would be fitted to the rehabilitative needs of each individual, there would no longer be a need for the institution of pardon.” In theory, sentences would be so individually tailored that pardoning an offender before his therapeutic punishment was completed could only poorly serve the offender and society. If any further fine-tuning was necessary, parole provided a new, discretionary post-conviction option for individualizing the administration of justice.

Despite its seeming promise, rehabilitation came under attack from both ends of the political spectrum in the early 1970s. Conservatives decried its perceived potential for excessive leniency. Liberals, on the other hand, found that rehabilitation lost its shine when offenders ended up serving longer sentences because they were not deemed satisfactorily reformed. Moreover, because rehabilitation was built on individuation of punishment-treatment, inequities abounded. This, in turn, gave rise to the concern that cultural bias regarding race and class might influence the duration of a person’s incarceration and be toler-

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63 See id. at 57–58.
64 Id. at 57, 59.
65 See Moore, supra note 15, at 55–60.
66 Id. at 59.
67 Id.
68 See id. at 61.
69 Id. at 55.
70 See Moore, supra note 15, at 61.
71 Id. It is critical to note that parole is not a form of clemency. Id. at 6. Rather, parole is a manifestation of punishment. Id. It is a judicially administered mechanism used to regulate a criminal offender’s liberty. Id.
73 Id.
74 See Moore, supra note 15, at 70; Cullen & Gendreau, supra note 72, at 122.
75 Cullen & Gendreau, supra note 72, at 122.
ated in the name of science. Finally, empirical data did not appear to support the rehabilitation model. Assessment of results from hundreds of studies showed that rehabilitation efforts as a whole had no appreciable effect on recidivism.

The 1970s brought about a reevaluation and a systemic about-face. Policymakers responded to an increase in drug-related crime with a renewed emphasis on retributivism. Instead of rehabilitation, the principal aim of criminal justice policy became making sure that offenders were punished according to well-defined standards and got their just deserts. Over the last few decades, political rhetoric has emphasized getting tough on crime. In policy terms, this has translated into aggressive policing and prosecuting, strict determinate sentencing, mandatory minimum sentences, and “three strikes” rules.

Tough-on-crime politics have had an effect on clemency as well as on legislation and sentencing. Executives fear the “soft-on-crime” label that might come with letting offenders out of prison before their sentence is complete. Consequently, the use of the pardon power has

76 Id.
77 Moore, supra note 15, at 67.
78 Id. In fact, the data may have been considerably less conclusive than it was originally made out to be. Cullen & Gendreau, supra note 72, at 128–29. Studies of particular programs showed positive results, but those results were obscured by broad-brush surveys of the available literature. Id. More recent scholarship suggests that certain rehabilitation efforts did work, and distinctions can be drawn between successful and failed efforts, particularly with regard to the setting in which treatment is delivered, the type of offender receiving the treatment, and the integrity of the therapeutic treatment. Id. at 138.
79 Moore, supra note 15, at 66.
80 See Kennedy Comm’n Reports, supra note 29, at 68.
81 Moore, supra note 15, at 74–75.
82 See Kennedy Comm’n Reports, supra note 29, at 68. Since the 1970s, “tough-on-crime” jargon has become nearly universal in American political parlance. See id. However, it is instructive to note that being tough on crime is not a universal international value. See Whitman, supra note 26, at 76. Professor James Q. Whitman describes a recent episode in French politics where an exposé of harsh prison conditions led to a contest among politicians to demonstrate “who had the deeper commitment to making punishment more humane” and cared more about “the rights and dignity of convicts.” Id.
83 See Kennedy Comm’n Reports, supra note 29, at 57–58; Whitman, supra note 26, at 49, 56–57; Love, supra note 41, at 1495.
84 See Kennedy Comm’n Reports, supra note 29, at 69; Love, supra note 41, at 1496–97.
85 See Kennedy Comm’n Reports, supra note 29, at 69. There is perhaps no more fearsome cautionary tale than that of Governor Michael Dukakis and Willie Horton, particularly in Massachusetts politics. See id. When Governor Dukakis ran for president in 1988, he was skewered with the soft-on-crime label because Willie Horton, a convicted murderer in Massachusetts, was let out of prison in 1986 and subsequently committed another brutal murder. Id. Ironically, Horton was not the beneficiary of clemency, but rather was out of prison as part of a weekend furlough program over which Governor Dukakis exercised no direct control. Id.
steadily declined in the last few decades in jurisdictions nationwide.\textsuperscript{86} Today, the pardon power is exercised extremely rarely.\textsuperscript{87} Even when clemency is granted, it tends to take the form of a pardon granted after a punishment is fully served—granted either for symbolic value or to restore civil rights—and fails to confer a remission of punishment.\textsuperscript{88}

The pardon power’s infrequent application has tarnished its reputation.\textsuperscript{89} Grants of clemency have dwindled to such an extent that the practice is no longer perceived as a routine part of the criminal justice system.\textsuperscript{90} Instead, clemency’s rarity makes it appear to be an aberrant, and possibly outmoded, practice.\textsuperscript{91}

\section*{B. The Contemporary Need for Clemency}

Despite its decline in practice, the need for clemency remains acute.\textsuperscript{92} In fact, the very factors that have led to clemency’s decline necessitate its revival.\textsuperscript{93} The tough-on-crime movement has been tough on

\begin{itemize}
  \item \textsuperscript{86} See id. at 70.
  \item \textsuperscript{87} See id. at 70–71. On the federal level, for example, the number of pardons granted from 1980 to 1992 plummeted more than seventy-five percent from each of the preceding twelve-year periods, from more than 2000 to fewer than 500. \textit{Id.} at 70. President George W. Bush has continued this downward trend. \textit{Id.}.
  \item \textsuperscript{88} See Kobil, \textit{supra} note 45, at 602. Historically, erasing the collateral consequences of conviction has been an essential task of the clemency power. See Love, \textit{supra} note 41, at 1491. Nonetheless, to reduce clemency to this exclusive purpose is to disregard clemency’s multi-faceted utility and to incautiously dispose of commutation in a wholesale manner. See \textit{id.} at 1490.
  \item \textsuperscript{89} Love, \textit{supra} note 41, at 1484.
  \item \textsuperscript{90} See id.; \textit{Kennedy Comm’n Reports, supra} note 29, at 71. Fewer pardons also mean greater public scrutiny. Love, \textit{supra} note 41, at 1484. Since Watergate, the body politic has become more suspicious of government in general, and discretionary powers are particularly suspect. See Cullen & Gendreau, \textit{supra} note 72, at 122. President Gerald Ford’s highly controversial preemptive pardon of Richard Nixon contributed to a sharp mistrust of the clemency power and a perception that pardons are frequently politically motivated. See Moore, \textit{supra} note 15, at 7; Jason B. Grosky, \textit{Critics: Pardons Are Too Political}, \textit{Eagle-Trib.} (Lawrence, Mass.), Oct. 13, 2002 (online version on file with the Boston College Third World Law Journal).
  \item Other high profile pardons continue to fuel that perception. Consider, for example, President Clinton’s pardons of a group of Puerto Rican nationalists in his final days in office, which was believed to be an attempt to win support from Latino voters in advance of Hillary Clinton’s New York Senate race. Love, \textit{supra} note 41, at 1484. Or, for an example of a Massachusetts pardon appearing to be politically-motivated, one can turn to the 1993 pardon by then Governor William Weld of Anthony Galluccio, an ambitious Cambridge City Councilor, for prior drunk driving and petty theft convictions. Michael Jonas, \textit{On Galluccio, Shadow of a Doubt, Boston Globe}, Apr. 2, 2006, at 6.
  \item \textsuperscript{91} Love, \textit{supra} note 41, at 1483.
  \item \textsuperscript{92} \textit{Kennedy Comm’n Reports, supra} note 29, at 71.
  \item \textsuperscript{93} See Kobil, \textit{supra} note 45, at 574.
\end{itemize}
American society.\textsuperscript{94} With two million people in jail, the United States has by far the highest incarceration rate of any Westernized democracy, and incarceration incurs heavy costs, both financial and social.\textsuperscript{95} The contemporary insistence on combining harsh punishment and little mercy is not sustainable.\textsuperscript{96} Moreover, this formula for justice fails to reflect the concerns that originally enshrined the clemency power in the federal and state constitutions.\textsuperscript{97} Today, scholars with widely divergent views about criminal justice policy share a common belief that the pardon power should be exercised more actively.\textsuperscript{98}

In a dramatic address at the American Bar Association’s (ABA) annual meeting in San Francisco on August 9, 2003, Supreme Court Justice Anthony Kennedy challenged the assembled lawyers to look critically at the criminal justice system.\textsuperscript{99} He raised fundamental concerns about the fairness and success of the system, and called particular attention to the issue of clemency, decrying the fact that “the pardon process . . . seems to have been drained of its moral force.”\textsuperscript{100} He took the opportunity to advocate the vital importance of clemency in contemporary American criminal law.\textsuperscript{101} According to the ABA Commission established to study Justice Kennedy’s concerns, “[t]oday, in many determinate sentencing jurisdictions the pardon process is the only way that prisoners can have their claims of exigency considered. In such jurisdictions, pardon is necessary to the just and efficient functioning of the criminal justice system.”\textsuperscript{102}

Despite Justice Kennedy’s adjuration, grants of clemency remain strikingly rare.\textsuperscript{103} In order to gain insight into the situation, it is critical to first look at the relationship between the rate of clemency and the process by which the clemency power is administered.\textsuperscript{104}


\textsuperscript{95} See \textit{Whitman}, supra note 26, at 3; Rapaport, \textit{supra} note 94, at 1530.

\textsuperscript{96} See Rapaport, \textit{supra} note 94, at 1530.

\textsuperscript{97} See U.S. Const. art. II, § 2, cl. 1; Mass. Const. pt. 2, ch. II, § I, art. VIII.

\textsuperscript{98} See Kobil, \textit{supra} note 45, at 611; Love, \textit{supra} note 41, at 1512.

\textsuperscript{99} See Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), available at \url{http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html}.

\textsuperscript{100} Id.

\textsuperscript{101} Id.

\textsuperscript{102} \textit{Kennedy Comm’n Reports}, \textit{supra} note 29, at 72.

\textsuperscript{103} Id. at 71.

\textsuperscript{104} See id. at 74.
II. EXECUTIVE CLEMENCY AND ADMINISTRATIVE STRUCTURE

A. The Relationship Between Structure and Grant Activity

Clemency is universally an executive power, but it is administered differently by jurisdiction.\(^\text{105}\) In some states, the governor alone decides whether to pardon a petitioner.\(^\text{106}\) In others, the governor is aided by an independent board of appointed officials.\(^\text{107}\) In some cases, the governor merely consults the board, and in others the governor’s power is wholly dependent on the board’s consensus.\(^\text{108}\)

Several scholars in the past twenty years have conducted surveys of clemency procedure by jurisdiction in an attempt to catalogue and compare the various systems.\(^\text{109}\) The most recent, compiled by Margaret Colgate Love, contains both information about each jurisdiction’s procedure as well as its recent pardon activity.\(^\text{110}\) According to Love’s findings, few jurisdictions have a thriving pardon power.\(^\text{111}\) In fact, most states have not granted more than a token number of pardons each year since 1995.\(^\text{112}\) Only nine states issue a “substantial number of pardons” each year and grant a substantial percentage of the applications

\(^{105}\) Id. at 70.

\(^{106}\) Id.

\(^{107}\) KENNEDY COMM’N REPORTS, supra note 29, at 70.

\(^{108}\) See id.


\(^{110}\) Love, supra note 49, at 18. Though Love’s primary focus is on the effect that pardon can have in relieving the collateral consequences of criminal conviction, her work is a valuable mine of information about comparative pardon procedure more generally. See id. at ix, 20–21.

\(^{111}\) Id. at 18. The Kennedy Commission Report similarly concluded: “preliminary research indicates that even in those jurisdictions where the pardon process appears on the surface to be working efficiently, it rarely produces any grants.” KENNEDY COMM’N REPORTS, supra note 29, at 72.

\(^{112}\) Love, supra note 49, at 21. The federal clemency system is as withered as any of the state systems. See KENNEDY COMM’N REPORTS, supra note 29, at 72 n.17. It provides one of the starkest examples of the failure of the clemency process to yield results. See id. The Justice Department has twelve officials staffing its pardon office. Id. During the first three years of George W. Bush’s presidency, he granted a grand total of eleven pardons—not quite one pardon apiece for each of the staff. Id. During the same time period, he did not grant a single commutation. Id. Meanwhile, he denied 580 pardon appeals and 2400 petitions for commutation. Id.
filed. Other than in these states, she concludes, pardon does not seem to be “reasonably attainable.”

According to Love, the states with the most active pardon power share certain characteristics of administration. The most robust exercise of the pardon power tends to occur where it is more regulated and somewhat insulated from politics. In each of the most active states, the process is regulated by law and is reasonably transparent. All but two of the nine have a public application process and hold hearings at regular intervals. In most of these states, the recommending board or the grantor is required to publish the reasons for its recommendation. Additionally, in the most active states, the pardoning authority has a degree of protection from the political process, either because the pardon power is placed in an independent board or because the governor’s power cannot be exercised without a favorable board recommendation.

B. Massachusetts Administrative Structure and Grant Activity: A Closer Look

In light of Love’s findings, one would expect the clemency power in Massachusetts to result in a relatively large number of grants. The Commonwealth has a clear, well-regulated administrative process, and the Governor shares responsibility for making clemency decisions with an independent board. However, an analysis of the Massachusetts process proves that while the existence of these characteristics may correlate to more frequent exercise of executive clemency, they do not ensure it. In the past ten years, only 27 pardons have been granted, though about 100 petitions are filed annually. Even more
striking, Governor Romney did not grant a single pardon or commutation during his entire four years in office.\textsuperscript{125}

Given the infrequent grants of clemency in Massachusetts compared to what Love’s study would suggest, it is useful to look in detail at the procedure that governs executive clemency in Massachusetts to determine whether the process itself poses structural barriers to grants of clemency.

1. Massachusetts Clemency Administration in Detail

The Massachusetts Constitution vests the pardon power in the Governor and the Governor’s Council.\textsuperscript{126} The Governor’s Council (“the Council”), also called the Executive Council, is an eight-member elected body with the lieutenant governor serving ex-officio.\textsuperscript{127} Before a pardon application reaches the Council and the Governor’s desk, an administrative body, the Advisory Board of Pardons (“the Board”), conducts an initial review based on guidelines established by the Governor.\textsuperscript{128} The Board’s seven members are full-time, salaried employees, appointed by the Governor to five-year terms.\textsuperscript{129}

When the Board receives a pardon application from a prisoner, it must give notice to specified officials within the justice system to afford

\textsuperscript{125} Margaret Colgate Love’s survey, conducted in 2005, found that Governor Romney did not use his clemency powers during his first three years in office. \textit{Love, supra} note 49, at 105 tbl.3. That Governor Romney granted no pardons or commutations between then and the end of his term in office is evidenced by the fact that he submitted no pardon report to the legislature, and no act of clemency by Governor Romney was ever reported in the Boston Globe, Massachusetts’s newspaper of record. Yet Governor Romney’s preference not to exercise his clemency powers is no secret. In a recent interview, Governor Romney proudly stated: “People ask me to commute sentences or to pardon criminals. I haven’t done that. I get a lot of recommendations, I haven’t pardoned a one.” \textit{Keller @ Large: Romney Discusses Laguer Case} (WBZTV radio broadcast Oct. 22, 2006).

\textsuperscript{126} Mass. Const. pt. 2, ch. II, § I, art. VIII. “The power of pardoning offences, except . . . impeachment . . . , shall be in the governor, by and with the advice of council, provided, that if the offence is a felony the general court shall have power to prescribe the terms and conditions upon which a pardon may be granted . . . .” \textit{Id.}

\textsuperscript{127} Mass.Gov, Governor’s Council, http://www.mass.gov (follow “State Government” hyperlink; then follow “Governor’s Council” hyperlink) (last visited Apr. 12, 2007) [hereinafter Governor’s Council].


them the opportunity to comment on the petition.\textsuperscript{130} If the application is in compliance with minimal statutory and administrative requirements, the Board conducts a preliminary investigation and prepares a case summary regarding the petitioner’s criminal, social, and institutional histories, as well as any other factors relevant to the issue of pardon.\textsuperscript{131}

Having conducted a preliminary investigation, the Board may submit a recommendation to the Governor and the Council, together with any comments received, or it may hold a public hearing on the merits of the petition if it determines that a hearing is necessary to be able to give the petition adequate consideration.\textsuperscript{132} For a pardon petition, a hearing is required if the Board determines that a petition is eligible for further review; for commutation, a hearing is optional.\textsuperscript{133} When the Board issues its recommendations, it must submit specific reasons for them.\textsuperscript{134}

If the Board favorably recommends that the Governor grant a pardon, he or she may only do so with the advice and consent of the Council.\textsuperscript{135} If the petitioner was convicted of a felony, further procedure exists; the Council must hold a public hearing of its own.\textsuperscript{136} The Council must have a quorum to vote, its vote must be a recorded roll

\textsuperscript{130} Id. ch. 127, § 154. The statutorily named officials include the attorney general, the chief of police of the municipality in which the crime was committed, the district attorney or justice of the district court, and the commissioner of correction if the prisoner is incarcerated in a Massachusetts correctional institution. Id.

\textsuperscript{131} 120 Mass. Code Regs. 902.04 (2006); see also id. 901.04 (setting forth the same process for commutation petitions). The process for pardon and commutation is substantially the same. See id. 901.04; 902.04. Consistent with the use of “pardon” within the Massachusetts statutory schema, I have chosen to use the generic “pardon” to describe executive clemency generally. Mass. Gen. Laws ch. 127, § 152. However, I will note any significant procedural distinctions in the text.

It is important to note that the clemency process does not function as an appraisal of the original adjudication. See id. at § 154. To the contrary, the Board is prohibited from ever reviewing the proceedings of the trial court or considering any questions about their propriety. Id.

\textsuperscript{132} Mass. Gen. Laws ch. 127, § 154. Both the petitioner’s application and the Board’s written recommendation are public records. Id. at §§ 152, 154. However, if the facts stated in the report would cause undue hardship or injury to the petitioner or other individuals, they may be submitted separately from the recommendation itself, and may be maintained confidential. Id. at § 154.

\textsuperscript{133} 120 Mass. Code Regs. 901.05, 902.06.

\textsuperscript{134} Id. at 901.11, 902.10.

\textsuperscript{135} Mass. Gen. Laws ch. 127, § 152.

\textsuperscript{136} Id.
call, and the vote of a majority of the members present is required for the approval or disapproval of the petition. 137

Without the consent of the Council, the Governor may not pardon a single prisoner. 138 On the other hand, if the Council recommends that the petitioner be granted a pardon, the Governor has complete discretion regarding whether to approve or disapprove the petition, or whether to consider the petition at all. 139 If, within a year, he or she takes no action on a favorable recommendation of the Board, that recommendation is considered to have been denied and the petitioner must reapply. 140

Whether the Governor grants, affirmatively denies, or simply ignores a pardon petition, he or she is not required to provide an explanation. 141 In fact, the Governor’s only reporting requirement regarding his or her pardon decisions is that he or she must annually communicate to the state legislature a list of pardons granted and the action of the Board on those pardons. 142 In other words, the Governor is not required to give reasons for his or her conclusion in any given case. 143

2. Structural Explanations for Grant Inactivity

The very structure of the Massachusetts clemency process contains elements of discretion, bureaucracy, and a lack of accountability that set the stage for a low number of grants. 144 Analyzing the administration of clemency in Massachusetts helps explain the recent inactivity, and may yield lessons for other jurisdictions as well. 145

Massachusetts may be described as having an independent advisory board, because the Board is appointed, not elected. 146 However, that does not mean that the clemency process is necessarily insulated from politics. 147 First of all, the Governor appoints the Board members and chairperson to salaried jobs. 148 Therefore, the Board members have an incentive to make decisions that are consistent with the Gover-
nor’s politics. If the Governor’s preference is to consider few pardon candidates, board members have a vested interest in playing a strict gatekeeper role, so that they might be reappointed if the Governor is reelected. The Governor will rarely, if ever, consider pardon applications that have not been recommended positively by the Board, so a negative recommendation functionally denies a petition. In fact, the Board is the end of the line for most pardon petitions. Of about 100 applications filed each year, most are recommended negatively.

The Council—which receives petitions after the Board—is also vulnerable to political pressure, because it is elected, not appointed. Between the Council and the Governor, nine elected officials are ultimately responsible for making clemency decisions. That means nine individuals who are accountable to voters. In a political climate in which society rewards being tough on crime, this bevy of politicians has a strong incentive to deny clemency.

Apart from political pressures on the clemency process, the process may be hampered by its complicated structure with multiple participants and levels of review. Love’s study suggests that a governor’s clemency decision-making will be aided by an independent review board that can devote its full attention to the clemency process. However, the Massachusetts system incorporates two multi-member panels, and some clemency petitions require multiple proceedings.

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149 See id.
150 See id. According to a Boston Bar Association Task Force report, some members continue to sit and vote on parole and clemency petitions even after their terms have ended as a matter of law. BOSTON BAR ASS’N, TASK FORCE ON PAROLE AND CMTY. REINTEGRATION, PAROLE PRACTICES IN MASSACHUSETTS AND THEIR EFFECT ON COMMUNITY REINTEGRATION 35–36 (Aug. 2002), available at http://www.bostonbar.org/prs/reports/final-report081402.pdf [hereinafter PAROLE PRACTICES IN MASSACHUSETTS]. When this happens, they stay on at the governor’s sufferance unless and until they are reappointed, and such members are perceived as being beholden to the governor. Id. at 36.
151 See Romney Guidelines, supra note 128, at 8.
152 See LOVE, supra note 49, at 105 tbl.3.
153 Id.
155 See id. pt. 2, ch. II, § I, art. VIII; Governor’s Council, supra note 127.
156 See Mass. Const. pt. 2, ch. II, § I, art. VIII; id. pt. 2, ch. VI, § I, art. XI, amend. 16; Governor’s Council, supra note 127.
157 See KENNEDY COMM’N REPORTS, supra note 29, at 69; LOVE, supra note 41, at 1496–97.
158 See LOVE, supra note 49, at 105 tbl.3.
159 See id. at x–xi.
are three opportunities for a petition to be denied. As a statistical matter, the more entities that need to align to grant clemency, the greater the probability that such an alignment will not occur. Practically speaking, the process may be too bureaucratic to yield many positive grants.

Another administrative factor impacting the health of the executive clemency power is the fact that the Governor is not required to give reasons for his actions. Though the Board pens a report on each case, the Governor does not. It may be assumed that when the Governor acts in accordance with the Board’s recommendation, his reasoning follows the reasoning in the Board’s report. However, when the Governor acts at variance with the Board, as in the case of Arnie King, his reasoning remains unknown.

Moreover, the requirement that the Governor convey selective information to the legislature—about pardons granted, but not pardons denied—exacerbates the bias toward denying clemency. The statutory scheme does not require the Governor to report denied clemency petitions to any entity. The fact that the Governor can avoid scrutiny for virtually all denials, but cannot likewise escape scrutiny for grants of clemency, may itself facilitate denials. Plainly put, it is politically safe for a governor to deny or simply ignore the Board’s positive recommendations. If the Governor fails to act on a favorable recommendation from the Board, and there is no media attention on the case, it is

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162 See Love, supra note 49, at 105 tbl.3.
163 See Love, supra note 41, at 1502-03; Rapaport, supra note 94, at 1533.
166 See Romney Guidelines, supra note 128, at 2.
167 See id. The governor’s reasoning may reflect the Board’s reasons, but without an independent explanation by the governor observers must resort to speculation. See id. at 8–9. Researchers at SUNY Albany recently began to archive clemency petitions from death row inmates around the country. Very little is known about what makes a petition successful. By analyzing hundreds of petitions and making them available to the public, the researchers hope to begin to figure out what “works.” See Archive Collects Pleas from Death Row, CNN.com, March 1, 2006, http://www.economyinaction.org/dia/organizations/ncafps/news.jsp? key=2311&t=.  
169 See id.
170 See id.; Kennedy Comm’n Reports, supra note 29, at 69. There are arguments to be made for and against holding the governor accountable for clemency decisions in general. See Love, supra note 41, at 1512; Rapaport, supra note 94, at 1535. This section merely points out the potential negative impact of an uneven reporting requirement.
unlikely that the Governor would ever be called to account for his decision.\(^{172}\)

A final factor that may influence the frequency of clemency grants in Massachusetts is the simple composition of the Board, which does double duty as both the Advisory Board of Pardons and the Parole Board.\(^{173}\) A Boston Bar Association (BBA) Task Force on Parole and Community Reintegration, which convened in May of 2000, noted that, at the time, the Board was composed almost exclusively of people with backgrounds in law enforcement and other official criminal justice work.\(^{174}\) However, the statute that sets out membership criteria for the Board requires that Board members have five years of experience in one of a variety of fields, including: parole, probation, corrections, law, law enforcement, psychology, psychiatry, sociology, and social work.\(^{175}\) Though the statute does not affirmatively require diversification, the BBA report contends that “the clear intent of the statute was to include persons from diverse backgrounds as Board members.”\(^{176}\) The report demonstrates this intent with reference to legislative history, pointing out that changes made to the statutory requirements throughout the twentieth century consistently modified the makeup of the Board, adding language about gender diversity, diversity of political affiliation, and diversity of professional background.\(^{177}\) In addition, the Board itself adopted guidelines in 1990 that emphasize the need for “different and professional experiences and viewpoints” and “a range of perspectives” in reviewing prisoners’ cases.\(^{178}\) Nonetheless, the Board continues to be dominated by people with law enforcement or criminal justice backgrounds.\(^{179}\)

The BBA report asserts that a lack of diversity on the Board in recent years statistically correlates to a lack of prisoners released on parole.\(^{180}\) During the 1970s and 1980s, governors made appointments to the board that reflected the diverse backgrounds described in the stat-

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\(^{172}\) See Kennedy Comm’n Reports, supra note 29, at 69. The fact that the recommendations of the Board are not published contributes to the general lack of accountability. See Mass. Gen. Laws ch. 127, § 154. The recommendations are public documents, but they are available by request rather than published. See id.

\(^{173}\) See Parole Practices in Massachusetts, supra note 150, at 35.

\(^{174}\) Id. at 27.


\(^{176}\) Parole Practices in Massachusetts, supra note 150, at 33.

\(^{177}\) See id. at 32–33.

\(^{178}\) Id. at 34.

\(^{179}\) See id. at 27.

\(^{180}\) Id. at 34–35.
In 1990, seventy percent of inmates serving non-life sentences were released on parole. Since then, the majority of appointees have come from backgrounds in policing, prosecution, parole and probation. By 2000, only forty-one percent of inmates were granted parole. The clemency rate declined significantly during the 1990s as well. Because the same board makes decisions about parole and clemency, and grant rates for both declined when the board became more homogeneous, it is reasonable to impute the BBA report’s findings regarding parole board diversity and grants to the clemency context as well.

In sum, a variety of administrative factors create a structural bias against granting clemency in Massachusetts. These factors include the vulnerability of the Board and the Governor’s Council to political pressures; the involvement of multiple levels of bureaucratic decision-makers; the lack of accountability when the Governor’s decision is at variance with the Board’s recommendation; the uneven reporting requirements regarding grants and denials of clemency; and the Board’s lack of diversity. As a result, good reasons exist to modify the executive clemency administrative process in Massachusetts.

Still, the structural bias against clemency alone cannot explain the precipitous drop in clemency grants over the last twenty-five years, because the process has remained essentially unchanged throughout this period. The same procedure—flawed though it may be—once yielded greater results. Consequently, it is imperative to seek alternative explanations for the recent decline by turning from procedure to substance. The underlying rationales used to justify the existence of the clemency power have a powerful effect on its exercise and implementation; philosophical attitudes toward clemency color the process from

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181 Parole Practices in Massachusetts, supra note 150, at 33.
182 Id. at 35.
183 Id. at 34. The BBA report also considered the racial and ethnic diversity of the board, as well as its geographical representation. Id. More people of color were appointed to the board in the 1970s and 1980s, and more of the board members lived in urban communities to which potential parolees would likely return. Id. As of 2002, only one person of color served on the board, and other than one board member who lived in West Roxbury, none of the board members lived in an urban area. Id. at 35.
184 Id.
185 See Grosky, supra note 90.
186 See id.; Parole Practices in Massachusetts, supra note 150, at 35.
187 See supra Part I.B.
189 See Grosky, supra note 90.
beginning to end. As a result, any study of declining clemency rates must take into account the philosophical justifications that undergird the clemency power and evaluate whether they offer any insight into the decline.

III. Philosophical Approaches to Clemency and What They Say About Administrative Process

A. Philosophical Attitudes Matter

Philosophers and legal scholars have long argued about what principles should guide criminal punishment and punishment remission, and how those principles ought to play out in practice. Correspondingly, every criminal justice system reflects philosophical undercurrents and attitudes, either explicitly or embedded in its design and implementation. Considering the philosophical principles at play—and sometimes in conflict—within any clemency process can provide an essential framework for evaluating the process itself. In order to reflect on clemency’s sharp decline in Massachusetts, for example, it is necessary to consider competing theoretical justifications for the clemency power and assess how those perspectives are brought to bear in its administration.

In early American history, clemency was viewed as a gift that could be bestowed by the executive as a matter of grace. This notion of grace derived from the European tradition of the sovereign ruling by divine right and possessing the capacity for divine benevolence. Clemency was an act of intervention from on high in cases where the law would mete out a harsh punishment but principles of equity demanded a less severe penalty.

190 See infra Part III.
191 See infra Part III.
192 See generally Moore, supra note 15.
194 See infra Part IV.
195 See infra Part IV. Scholarly or philosophical treatises about clemency frequently use the words “clemency” and “pardon” interchangeably. Moore, supra note 15, at 15. Because various forms of clemency function similarly as instruments of tempering the criminal justice system, and differ only as to degree or procedure, they are typically considered within the same theoretical framework. See id.
196 Moore, supra note 15, at 50.
197 Id. at 51.
198 See, e.g., Regina v. Dudley and Stephens, 14 Q.B.D. 273, 288 (1884). In this famous case, three men in a boat lost thousands of miles from the Cape of Good Hope murdered
Then, in the early twentieth century, Justice Holmes described the concept of pardon in entirely different terms:

A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.199

According to this formulation, clemency exists not merely for the purpose of serving private justice, but also—or perhaps primarily—for the purpose of serving the public good.200

Today, these two different understandings of the clemency power—as a private instrument of grace and as a tool for the benefit of the public welfare—both inform the way that constitutional authority is implemented.201 State public policy, as expressed in legislative, executive and judicial writings, often draws upon one or both of these explanations to justify the existence of executive clemency and to guide its exercise.202 In addition, contemporary philosophical approaches to clemency reflect the tension between the two.203

B. Contemporary Theories of Clemency: Retributivism and Redemption

Scholars—both lawyers and philosophers—fiercely debate the theoretical justifications for clemency, and how these theories should best be applied in practice.204 They struggle to reconcile the history of clemency as a monarchic power with our constitutional scheme of checks and balances; to understand what role, if any, the notion of mercy may play in a modern, objective criminal justice system; to accommodate the perceived need for a safety valve on an imperfect, overtaxed criminal justice system; and to balance discretion against the liberal, democratic ideal of equity.205 Because clemency is fundamentally about remission of punishment, theorists tend to articulate their views

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199 Biddle v. Perovich, 274 U.S. 480, 486 (1927); Moore, supra note 15, at 64.
200 See Moore, supra note 15, at 65.
201 See Romney Guidelines, supra note 128, at 1, 6.
202 See id.
203 See Moore, supra note 15, at 65.
204 See generally Kobil, supra note 45; Rapaport, supra note 94.
205 See generally Kobil, supra note 45; Rapaport, supra note 94.
of the proper exercise of the clemency power in terms of the theory of punishment to which they subscribe.\textsuperscript{206}

1. Retributivism: Justice, Equity, Process, and Standards

Retributivist theorists argue that executive clemency must be made to operate in accordance with retributivist principles of punishment—that is, based on each offender getting his or her just deserts.\textsuperscript{207} According to this model, clemency is only justified as an extrajudicial corrective, compensating for any failure of the system that might be occasioned by the necessarily broad brush strokes of legislation.\textsuperscript{208} Retributivists view the history of executive clemency as marred by haphazard, arbitrary, or abusive discretion.\textsuperscript{209} In contrast, they believe the remission of punishment must be administered in a principled, consistent fashion.\textsuperscript{210} Strict adherence to this philosophy leaves no room for an executive to make discretionary clemency decisions based on utilitarian concerns about the public welfare or pangs of compassion.\textsuperscript{211}

Professor Kobil contributes to the retributivist critique of clemency by distinguishing between “justice-enhancing” and “justice-neutral” clemency decisions.\textsuperscript{212} He calls grants of clemency justice-enhancing when they serve the goal of fairness under the law, such that each person receives the punishment he or she deserves.\textsuperscript{213} Notwithstanding the difficulty of objectively establishing the particular punishment deserved by each offender for each offense, our system of criminal justice aspires to such an ideal.\textsuperscript{214} Within this schema, justice-enhancing clemency is a magnificent retributivist tool—an “ideal vehicle for remedying many of the problems inherent in an imperfect, overloaded, and increasingly rigid system of criminal justice.”\textsuperscript{215}

On the other hand, justice-neutral clemency is not retributivist, but utilitarian.\textsuperscript{216} It aims to further goals unrelated to a strict notion of jus-

\begin{footnotes}
\item[206] See generally Kobil, \textit{supra} note 45; Rapaport, \textit{supra} note 94.
\item[207] See Moore, \textit{supra} note 15, at 89; Kobil, \textit{supra} note 45, at 579.
\item[208] See Kobil, \textit{supra} note 45, at 592, 638.
\item[209] See id. at 572–73.
\item[210] Id. at 575.
\item[211] See id.; Dan Markel, \textit{Against Mercy}, 88 Minn. L. Rev. 1421, 1431 (2004).
\item[212] Kobil, \textit{supra} note 45, at 579.
\item[213] Id.
\item[214] Id. at 580.
\item[215] Id. at 613.
\item[216] See id. at 582–83, 592.
\end{footnotes}
tice in relation to the specific offense.\textsuperscript{217} Kobil does not disavow the use of justice-neutral clemency entirely.\textsuperscript{218} Utilitarian concerns, such as specific or general deterrence, may play a role in assigning or remitting punishment once a determination has been made as to just deserts.\textsuperscript{219}

However, these two distinct categories of clemency should be administered separately according to separate principles.\textsuperscript{220} According to retributivists, justice-enhancing clemency should be governed by consistent standards of punishment and administered according to a formal procedure.\textsuperscript{221} When the purpose of clemency is for justice to be served, the decision-making must be accountable to principles of due process rather than tainted by the political, discretionary concerns that inform utilitarian, justice-neutral clemency decisions.\textsuperscript{222} For justice-neutral decisions about remission of punishment, it may suffice for an executive to administer clemency on an ad hoc basis.\textsuperscript{223} However, retributivists decry that executives usually fail to distinguish between the two types of clemency and approach all clemency decisions with discretion.\textsuperscript{224} As a result, clemency decision-making is erratic, constrained only by the executives’ personal prejudices as to the meaning of fairness.\textsuperscript{225}

To avoid the unprincipled decision-making that retributivists condemn, the clemency power should be delegated by the executive to a professional, independent commission.\textsuperscript{226} The commission’s members—like the federal judiciary and in contrast to the Massachusetts Advisory Board—would be appointed by the executive with the advice and consent of the legislature and would serve without term limits during good behavior.\textsuperscript{227} In many respects, this new brand of clemency resem-

\begin{footnotesize}
\textsuperscript{217} See Kobil, supra note 45, at 581. For example, Alexander Hamilton envisioned the pardon power being used as a means to “restore the tranquility of the commonwealth” in the wake of national conflict, by formally absolving those who had transgressed against the State. The Federalist No. 74, at 417 (Alexander Hamilton) (Clinton Rossiter ed., 1999). The Civil War presents multiple instances of pardon being used in this manner. See Moore, supra note 15, at 51. During the war, President Lincoln pardoned deserters on condition that they return and fight for the Union. Id. Afterward, Presidents Johnson and Grant pardoned Confederate leaders in an effort to demonstrate publicly the resolution of the conflict. Id.

\textsuperscript{218} Kobil, supra note 45, at 580–81.

\textsuperscript{219} Id.

\textsuperscript{220} Id. at 622.

\textsuperscript{221} Id. at 575.

\textsuperscript{222} Id. at 633–34.

\textsuperscript{223} Kobil, supra note 45, at 604.

\textsuperscript{224} Id. at 602, 604.

\textsuperscript{225} Id.

\textsuperscript{226} Id. at 623–24.

\end{footnotesize}
bles an additional layer of appellate review, but Professor Kobil contends that it will yield a finer quality of justice than criminal adjudications themselves.\textsuperscript{228} Regardless of the particular administrative structure employed, it is fundamental to the retributivist approach to clemency that justice be evenhandedly administered according to consistent principles.\textsuperscript{229}

2. Compassionate Clemency: Redemption, Rehabilitation, Mercy, and Discretion

Other scholars argue that the retributivist camp turns its back on the most important characteristic of clemency—lenity driven by compassion.\textsuperscript{230} They contend that championing a narrow vision of “clemency-as-remedial-retributive-justice” misses the point of clemency entirely and disrespects the true historical tradition of the executive clemency power.\textsuperscript{231} In contrast to the retributivists, Professors Elizabeth Rapaport and Margaret Colgate Love extol the virtues of mercy—clemency granted not merely for the sake of right, but for its own sake.\textsuperscript{232}

Rapaport describes clemency as the discretionary power of the executive to exact less than the full measure of punishment from a wrongdoer, and she emphasizes its importance from a redemptive perspective.\textsuperscript{233} She criticizes the retributivist model for failing to consider a prisoner’s post-conviction achievements as potential grounds for clemency.\textsuperscript{234} According to a retributivist perspective, taking post-conviction achievements into account would interfere with the principle of fully punishing each wrongdoer according to his or her just deserts.\textsuperscript{235} “Redemptive clemency may be deserved in the sense that it is earned,” she explains, but retributivists believe it is not owed, because a person’s post-conviction actions can “create no retributively-justified entitlement.”\textsuperscript{236}

\textsuperscript{228} See Rapaport, \textit{supra} note 94, at 1532.
\textsuperscript{229} Kobil, \textit{supra} note 45, at 575.
\textsuperscript{230} See Rapaport, \textit{supra} note 94, at 1503.
\textsuperscript{231} See \textit{id}.
\textsuperscript{232} Id.; Love, \textit{supra} note 41, at 1485. Love’s scholarly perspective is informed by practical experience in the field. Love, \textit{supra} note 41, at 1483 n.1. From 1990 to 1997, she served as a Pardon Attorney in the Department of Justice. \textit{Id}.
\textsuperscript{233} Rapaport, \textit{supra} note 94, at 1503.
\textsuperscript{234} \textit{Id} at 1523.
\textsuperscript{235} \textit{Id}.
\textsuperscript{236} \textit{Id}.
The redemptive approach to criminal justice identifies two types of post-conviction achievement that should serve as the basis of clemency: rehabilitation or heroic service rendered while incarcerated.\textsuperscript{237} Opportunities to perform heroic service are few and far between, but rehabilitation is something all prisoners can strive for.\textsuperscript{238} The rehabilitation movement as a whole may not be in vogue and institutionally supported, but the clemency process should credit individual inmates who undergo positive personal transformations.\textsuperscript{239}

The redemptive perspective sees punishment in terms of its dynamic, transformative potential rather than strictly in terms of just deserts.\textsuperscript{240} It supplants a polarized vision of good (free) and bad (incarcerated) people with an understanding that all people have the capacity for both weakness and high moral achievement.\textsuperscript{241} Finally, redemptive criminal justice incorporates the value of hope into the justice system: clemency on the grounds of rehabilitation “would foster hope for release and reconciliation among those willing to take on the rigors of self-transformation.”\textsuperscript{242}

In keeping with redemptive clemency, Professor Rapaport strenuously defends clemency’s historical discretionary quality.\textsuperscript{243} She describes clemency as a last resort where institutionalized public power has failed to respond to the call of justice.\textsuperscript{244} In light of this critical last resort function, redemptive criminal justice resists the retributivist suggestion that clemency should operate as another level of criminal justice bureaucracy, with a “full-blown executive apparatus . . . that paral-

\textsuperscript{237} Id.
\textsuperscript{238} See Rapaport, supra note 94, at 1523.
\textsuperscript{239} Id. at 1524. By way of example, Rapaport offers the case of Precious Bedell. Id. Bedell was sentenced to twenty-five years to life for the second-degree murder of her toddler daughter. Id. The death occurred when Bedell, angry at her daughter for her behavior at a restaurant, took her into a restroom, propped her on the sink, and hit her. Id. Her daughter fell, broke her skull on the hard bathroom floor, and died. Id. at 1524–25. While in prison in New York, Bedell matured, participated in therapy programs, took responsibility for her action, educated herself, and helped develop programs to give women at risk of harming their children the tools to avoid violence and be good parents. Id. at 1525. She transformed herself into a different person than she was at the time of her crime and became a model prisoner. Id. Nonetheless, she was twice denied clemency. Id. Rapaport decries the fact that, from a retributivist perspective, Bedell’s progress is irrelevant to the issue of clemency. Id. at 1526.
\textsuperscript{240} Id. at 1528.
\textsuperscript{241} Id. at 1529.
\textsuperscript{242} Id. at 1530.
\textsuperscript{243} Rapaport, supra note 94, at 1533.
\textsuperscript{244} Id.
lems the judicial system.” Such a system is not merely inefficient; it sacrifices the essential discretionary quality of clemency that functions as a check on the judicial system. Indeed, Rapaport praises clemency for its very anti-bureaucratic nature and for its ability to function in opposition to the normative views of the citizenry.

Professor Margaret Colgate Love also argues passionately for the preservation of discretion. In addition, she advances the theory that an executive has not only the power to grant clemency, but also a duty to do so. The power to pardon, in her opinion, is a constitutional obligation of office, not a personal privilege.

As part of that obligation, Love suggests that executive clemency should be exercised not only for the fulfillment of justice, but also for the sake of mercy and for the good of the community. Love encourages executives to utilize the pardon power as a tool to communicate the value of mercy. Granting clemency has symbolic expressive value, because the President or the Governor heads an entire branch of government and is looked to for leadership by members of his administration and by ordinary citizens. As a result, the pardon power can be a vehicle for encouraging compassion in criminal justice policy, leading lower administrators by example, championing positive self-transformation, and sharing a moral vision with the general public.

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245 Love, supra note 41, at 1502.
246 See id. at 1502–03. The retributivist ideal of standards-driven equity is hampered by the reality of a criminal justice system with built-in biases. See Kennedy Comm’n Reports, supra note 29, at 49. Legislation does not always treat all offenders equally, and police and prosecutors exercise discretion in furtherance of their professional bias toward exacting punishment. See id.; Whitman, supra note 26, at 56–57. Discretion in granting clemency is necessary for balance. Rapaport, supra note 94, at 1535. According to Rapaport, “[w]hen we seek to banish discretion, we impoverish justice and consort with comforting fictions.” Id.
247 See Rapaport, supra note 94, at 1534. Clemency has played a trailblazing function in history as a result of its discretionary nature, crediting emergent claims for mitigation before they became integrated into the criminal law. Id.; Moore, supra note 15, at 53. According to Rapaport, discretion allows for innovation, whereas bureaucratization impedes it. Rapaport, supra note 94, at 1534.
248 See Love, supra note 41, at 1483.
249 Id. at 1485.
250 See id.
251 Id. at 1505.
252 Id. at 1485, 1512.
IV. Tightening Chains: Analyzing Twenty-Five Years of Changes in Massachusetts Clemency Guidelines

Philosophical approaches to clemency inform the way in which clemency is carried out in practice. In the end, the most important factor for the health of executive clemency in the Commonwealth is the attitude of the Governor. Even though governors are rarely scholars and their attitudes toward clemency may not reflect explicit philosophical perspectives, philosophical trends can be seen in the language that governors use to explain their approach to clemency decisions. In Massachusetts, the Governor’s perspective on clemency is most clearly reflected in guidelines he issues to the Advisory Board of Pardons. Each governor may establish his or her own set of guidelines regarding executive clemency, upon which the Board is obliged to base its judgments.

Over the last twenty-five years, Massachusetts governors have issued increasingly stringent guidelines. This comes as little surprise, given both the general trend toward harshness in criminal justice policy and the fact that Massachusetts has shifted from electing liberal Democrats to electing increasingly conservative Republican governors. Nonetheless, it is instructive to track changes in successive governors’ clemency guidelines to understand how politics, philosophy, and the clemency process itself formed the recipe for today’s grant rate of zero. The textual changes describe a radical shift in the Commonwealth’s philosophical approach to executive clemency and shed a clearer light on the decline in grants. Furthermore, because tough-on-crime policies

he acted, at least in part, to set an example of justice and fairness. Governor George Ryan, Speech at Northwestern University College of Law (Jan. 11, 2003), http://www.stopcapitalpunishment.org/ryans_speech.html.

255 See generally Moore, supra note 15.
256 See Kobil, supra note 45, at 601.
257 See Romney Guidelines, supra note 128, at 1.
259 See Romney Guidelines, supra note 128, at 2.
260 See discussion infra Parts IV.A–B.
261 See Grosky, supra note 90.
262 See discussion infra Parts IV.A–B.
263 See Grosky, supra note 90. Compare Dukakis Commutation Guidelines, supra note 258, at 1 (describing commutation as integrally related to the rehabilitative purposes of
and politics describe a national trend, the changes in Massachusetts likely contain lessons for the nation as a whole.264

A. The Shift Away from Rehabilitation in Commutation Decisions

Governor Dukakis issued a set of guidelines for commutation and pardon in 1983 and modified the commutation guidelines in 1988,265 Moderate Republican Governor Weld made further changes in the early 1990s.266 Then Governor Romney modified the guidelines again in 2003.267 One of the most striking changes from one governor to another is the change in language about rehabilitation as a ground for commutation.268

In 1983, Governor Dukakis’s Commutation Guidelines placed a heavy emphasis on rehabilitation, framing the clemency process in those terms.269 Dukakis used strongly enthusiastic—almost inspirational—language to encourage people in prison to strive for self-improvement.270 He wrote that “[t]he real possibility of future commutation relief is intended to serve as a strong motivation for confined persons to utilize available resources for self-development and improvement efforts and as an incentive for them to become law-abiding citizens.”271

In addition, Governor Dukakis made clear that rehabilitation was to be measured in an individualized manner.272 He described the com-
mutation process as “[t]he process of ascertaining whether or not re-
habilitative ends of confinement . . . have been met in individual
cases.” 273 In order to be eligible for commutation based on rehabilita-
tion, a petitioner was required to demonstrate that he or she had,
“within his or her capacity, made exceptional strides in self-develop-
ment and improvement.” 274 Self-development and self-improve-
ment were measured solely in relation to the petitioner’s initial levels of per-
sonal actualization. 275 Governor Weld added an additional, objective
criterion: the petitioner had to show that he or she was not only a bet-
ter person than at the beginning of his or her sentence, but also that
her or she “would be a law-abiding citizen.” 276 Finally, Governor Rom-
ney did away with the most individualized language in the guidelines,
removing the reference to the petitioner’s personal capacity. 277 Con-
sequently, a petitioner today must show that he or she “has made excep-
tional strides in self-development and self-improvement and would be a
law-abiding citizen.” 278 Instead of framing rehabilitation in strictly per-
sonal terms, the new standard focuses on the seemingly objective stan-
dard of whether the person would be law-abiding, but leaves that de-
termination to the personal prejudices of Board members. 279

B. Clemency Is a Privilege, Not a Right

In addition to the shift away from rehabilitation, the textual
changes in successive governors’ guidelines clearly reflect another im-
portant trend. From Governors Dukakis to Romney, the attitude toward
clemency changes from one of urgency to one of indulgence; from a
sense that clemency is a matter of executive obligation to a sense that it
is unworthy of significant attention. 280 The 1983 Commutation Guide-

273 Id.
274 Dukakis Commutation Guidelines, supra note 258, at 1. Rehabilitation is one of a
few rationales for commutation presented in Massachusetts’s clemency guidelines. See
Romney Guidelines, supra note 128, at 6. Other rationales for commutation in Massachu-
setts have been based on a concern about gross inequities in the judicial process or a con-
cern for the physical well-being of prisoners suffering from terminal illness or chronic
disability. See id. This Note focuses on rehabilitation because it is the most democratic
means of achieving commutation; it is the least subject to the petitioner’s unique circum-
stances.
275 See Dukakis Commutation Guidelines, supra note 258, at 1.
276 See Weld Commutation Guidelines, supra note 258, at 1.
277 See Romney Guidelines, supra note 128, at 6.
278 Id.
279 See id.
280 See id. at 1; Dukakis Commutation Guidelines, supra note 258, at 1, 2. As a practical
manifestation of his commitment to the clemency process, Governor Dukakis promised to
lines reflect a conviction that the Governor’s constitutional authority to grant clemency carries an implicit duty to treat such matters seriously.\textsuperscript{281} According to Dukakis, commutation is “an integral part of the correctional process.”\textsuperscript{282} Furthermore, Dukakis’s 1983 Pardon Guidelines assert that “persons who exhibit a substantial period of good citizenship subsequent to criminal conviction and who have a specific compelling need to clear their record deserve consideration for Pardon relief.”\textsuperscript{283}

Governors Weld and Romney did away with this language.\textsuperscript{284} The Weld Guidelines make no mention of petitioners deserving consideration as a matter of right.\textsuperscript{285} In addition, they back away from Dukakis’s description of commutation as essential by introducing commutation first as “an extraordinary remedy.”\textsuperscript{286} In the introduction to the most recent set of guidelines, Governor Romney takes his disavowal even further, excising the statement that commutation is integral to the correctional process.\textsuperscript{287} By contrast, he makes every rhetorical effort to marginalize the clemency power and assure the reader that he will exercise his authority parsimoniously: “The Governor views the granting of executive clemency as an act of grace and not merely a remedy, which should be only awarded under the most rare and extraordinary circumstances.”\textsuperscript{288}

Viewing clemency as “an act of grace,” Governor Romney rejects any suggestion of constitutional obligation and reverts to a conception of clemency as handed down from on high.\textsuperscript{289} Certainly, the idea of mercy assumes relations of status hierarchy.\textsuperscript{290} “Mercy comes de haut en bas: superiors accord it to inferiors. In this, mercy is akin to degrada-
tion: when we show a person mercy, we confirm his inferior status.”

However, mercy correspondingly suggests magnanimity, individualization of justice, and a willingness to find reasons why the petitioner deserves milder punishment. Governor Romney’s tightfisted approach to clemency neglects this side of the equation.

C. Philosophy Abused at the Hands of Politics; Clemency Suffers

All of these changes over time spell bad news for Arnie King. King has spent twenty-five years executing a personal ethical transformation, and Massachusetts governors have spent twenty-five years tipping the scales, devaluing such a transformation and disallowing the individualized consideration that would permit such a transformation to be acknowledged and considered significant by the Advisory Board. Governor Romney’s Guidelines reflect a dramatic shift away from rehabilitation and toward retributivism, yet they retain an emphasis on discretion that allows the Governor to refuse to grant clemency at will.

Of course, politicians are not philosophical purists. Any governor’s guidelines will reflect a variety of philosophical and political principles rather than a coherent penological philosophy. As a practical matter, mixing and matching is not necessarily a problem. Criminal justice policy in the United States has long reflected a variety of social and moral concerns, including retribution, deterrence, prevention, incapacitation, and behavioral correction. Neither retributivist nor re-

291 Id.
292 See Love, supra note 41, at 1485; Rapaport, supra note 94, at 1524–25.
293 See Romney Guidelines, supra note 128, at 1.
294 See Walker, supra note 1.
295 See id.; discussion supra Parts IV.A–B.
296 See Romney Guidelines, supra note 128, at 1.
297 See id. Likewise, neither philosophy lends itself to facile political categorization. The retributivist emphasis on just deserts appears to be in line with conservative tough-on-crime rhetoric, yet the associated insistence on equity is likely to find favor with liberals who are concerned that punishment not be meted out unevenly along lines of race or class. See Moore, supra note 15, at 93; Cullen & Gendreau, supra note 72, at 122. On the other hand, liberals might be moved by the redemptive perspective’s language about compassion and human potential, yet find themselves uneasy with the notion of unfettered executive discretion, which could undermine the principle of equal justice under law or, worse still, be used inequitably to benefit a privileged elite. See Cullen & Gendreau, supra note 72, at 122.
298 See Kobil, supra note 45, at 580–81.
299 See Kadish et al., supra note 193, at 101.
demptive philosophy alone is sufficient to serve the variety of goals of criminal justice in America.\textsuperscript{300}

However, contemporary tough-on-crime politics have taken advantage of competing conceptions of clemency to achieve a severe result.\textsuperscript{301} Retributivism compels action in certain circumstances and prescribes action in other circumstances.\textsuperscript{302} When clemency is governed by principles of just deserts and formal standards, the executive is under no obligation to act magnanimously and play the role of the merciful sovereign.\textsuperscript{303} On the other hand, redemptive clemency offers compassion, but it is discretionary; compassion can always be withheld.\textsuperscript{304} If clemency is an act of grace, then the executive does not have to heed the recommendations of a review board or be compelled to grant clemency, even when a retributivist would expect clemency as a matter of right.\textsuperscript{305}

In today’s tough-on-crime climate, rhetoric from both philosophical perspectives may be combined to nearly preclude clemency altogether.\textsuperscript{306} The net result is a systemic failure, an outcome that is anathema to both philosophies.\textsuperscript{307} It is universally dismaying that the important tool of clemency simply is not being used.\textsuperscript{308}

V. Recommendations to Renew and Improve Executive Clemency in Massachusetts

In order to renew the exercise of the clemency power in Massachusetts and throughout the United States, policymakers must begin with a foundational belief that clemency is vital to the American constitutional criminal justice system.\textsuperscript{309} This belief is grounded in the knowledge that the criminal justice system is imperfect and will never be without flaws or inequities.\textsuperscript{310} To begin, bias is entrenched in the system, such that it metes out disproportionate punishment for poor peo-

\textsuperscript{300} See id.
\textsuperscript{301} See Romney Guidelines, supra note 128, at 1; Moore, supra note 15, at 8–9, 226; Rapaport, supra note 94, at 1517.
\textsuperscript{302} See Moore, supra note 15, at 95–96; Rapaport, supra note 94, at 1517.
\textsuperscript{303} See Moore, supra note 15, at 226.
\textsuperscript{304} See Rapaport, supra note 94, at 1504.
\textsuperscript{305} See Moore, supra note 15, at 8–9.
\textsuperscript{306} See Romney Guidelines, supra note 128, at 1.
\textsuperscript{307} See Rapaport, supra note 94, at 1506.
\textsuperscript{308} See id.
\textsuperscript{309} See Kennedy Comm’n Reports, supra note 29, at 66, 71.
\textsuperscript{310} See id. at 71–72.
ple of color—an intolerable result.\textsuperscript{311} Even ignoring bias, however, it is simply impossible to foresee all mitigating circumstances at sentencing.\textsuperscript{312} Clemency is a tool to adjust the output of the criminal justice machine; its raison d’être is to compensate for failures of justice and foresight.\textsuperscript{313}

Clemency can be renewed in Massachusetts by a combination of means. First, the clemency process must be buffered as much as possible from political winds.\textsuperscript{314} Second, the Governor needs to be more accountable for his or her decisions, particularly for clemency petitions denied.\textsuperscript{315} Finally, there must be a renewed emphasis on rehabilitation as a legitimate ground for clemency.\textsuperscript{316}

\textbf{A. Diminishing the Role of Politics}

Policymakers should consider a number of means to prevent clemency from being held hostage to politics. One way to protect clemency from politics is to remove the Governor’s own political concerns from the executive clemency guidelines.\textsuperscript{317} The Governor should not write his or her own clemency guidelines.\textsuperscript{318} If the Governor writes the guidelines he or she will follow, as is the case in Massachusetts today, petitioners are entirely subject to the vicissitudes of the Governor’s personal preferences, anxieties and ambitions.\textsuperscript{319} Consequently, the clemency power is exercised inconsistently and inequitably from governor to governor.\textsuperscript{320} Instead, guidelines for the Board and the Governor should be promulgated by a state administrative agency or the legislature. No governmental entity is immune from political pressures, but the effect of political pressure may be diminished by ensuring that a single entity is not responsible for both defining the criteria by which clemency should be granted and making the final determination regarding individual clemency petitions.\textsuperscript{321}

\begin{footnotes}
\item[311] See id. at 51.
\item[312] See id. at 71–72.
\item[313] See id.
\item[314] Love, supra note 49, at 20–21; see Kobil, supra note 45, at 613.
\item[315] Kobil, supra note 45, at 637.
\item[316] See Rapaport, supra note 94, at 1524–26.
\item[317] See Love, supra note 49, at 20–21.
\item[318] See Grosky, supra note 90.
\item[319] See id.
\item[320] See id.
\item[321] See id.
\end{footnotes}
A second means of taking politics out of clemency decision-making in Massachusetts is to remove the Council from the process.\textsuperscript{322} Currently, too many elected officials are responsible for clemency decisions, leading to self-servingly cautious and bureaucratic determinations.\textsuperscript{323} Denying clemency will always be a safer political course than granting it.\textsuperscript{324} However, by eliminating the role of the Council in the process, and thereby reducing the number of actors who have political interests on the line, the bias against granting clemency will be diminished.\textsuperscript{325}

Diversifying the Board will also take some of the political pressure off the clemency process.\textsuperscript{326} Existing law suggests that the Board should be made up of members with wide-ranging expertise, and the Board’s own guidelines likewise call for Board members to be drawn from a variety of professional fields.\textsuperscript{327} What is now simply a recommendation should be made a requirement.\textsuperscript{328} Ensuring that the decision-making body evaluating clemency petitions reflects multiple professional perspectives will guard against the built-in prejudice towards clemency that exists when that body is exclusively composed of law enforcement officials.\textsuperscript{329}

\section*{B. Increasing Accountability for Denials}

The Governor must also be held accountable for his or her clemency decisions.\textsuperscript{330} Particular attention should be paid to denials.\textsuperscript{331} Today, denials are silent, and that silence enables governors to deny clemency without calling any critical attention to those decisions.\textsuperscript{332} Three simple structural changes will draw more attention to denied clemency petitions. First, lawmakers should require the Governor to annually report denials, not just grants, to the General Court.\textsuperscript{333} Such a require-

\begin{footnotesize}
\item[322] See discussion supra Part II.B.2. Because the Massachusetts Constitution endows the Council with the power of advice and consent with respect to clemency decisions, removing the Council from the process would require a constitutional amendment. See Mass. Const. pt. 2, ch. II, § I, art. VIII.
\item[323] See discussion supra Part II.B.2.
\item[324] See Kennedy Comm’n Reports, supra note 29, at 69.
\item[325] See discussion supra Part II.B.2.
\item[326] See Parole Practices in Massachusetts, supra note 150, at 29.
\item[327] See id. at 34; Mass. Gen. Laws ch. 27, § 4.
\item[328] See Parole Practices in Massachusetts, supra note 150, at 29, 36.
\item[329] See id.
\item[330] See Kobil, supra note 45, at 637.
\item[331] See Kennedy Comm’n Reports, supra note 29, at 71; Grosky, supra note 90.
\item[333] See Love, supra note 49, at 105 tbl.3.
\end{footnotesize}
ment would ensure that denials of clemency are publicized, at least within the limited forum of the legislature; denials of clemency ought not to be issued entirely under the radar.334

Second, when a petition is recommended favorably by the Board, there should be a presumption in favor of clemency.335 The Code of Massachusetts Regulations should be amended so that any clemency petition that receives a favorable recommendation from the Board be considered granted, not denied, if the Governor does not act within a year.336 No petition that has received a favorable report from the Board should be allowed to perish as a result of the Governor’s inaction.337

Lastly, a new accountability mechanism should be established for cases in which the Governor denies petitions that the Board recommended favorably.338 In such cases, the Governor should be required to issue an opinion explaining his or her reasons for the denial.339 The Governor would retain the ultimate authority with regard to clemency decisions, but would not retain the unchecked privilege of exercising that authority without any accountability.340 These three measures, in combination, would ensure that the Governor pays closer attention to denials of clemency, and that negative decisions receive external attention as well.

C. Reviving Rehabilitation as a Ground for Clemency

A final way of encouraging a renewal of clemency, both in Massachusetts and in other jurisdictions, is to revive an emphasis on rehabilitation as a basis for clemency.341 In Massachusetts, rehabilitation remains a ground for granting clemency in theory, but successive governors have deemphasized it within the text of their clemency guidelines.342 Language in the guidelines indicating that prisoners’ self-development would be credited and rewarded in clemency decisions has

334 See id.
335 See Dukakis Commutation Guidelines, supra note 258, at 1; Dukakis Pardon Guidelines 1983, supra note 265, at 1.
337 See id.; In re Arnold L. King, supra note 21, at 2; Support the Release of Arnold L. King, supra note 13.
338 See 120 Mass. Code Regs. 902.12(2); In re Arnold L. King, supra note 21, at 2; Support the Release of Arnold L. King, supra note 13.
339 See Rapaport, supra note 94, at 1535.
340 See id.
341 See id. at 1524–26.
342 See discussion supra Part IV.A.
faded away in recent decades. With this policy shift away from rehabilitation, grants of clemency correspondingly vanished.

It is time to refocus the debate on the ways in which clemency can be earned. In light of the sharp decline in clemency that accompanied a policy shift away from rehabilitation, it would appear that the clemency process would yield more grants again if and when it explicitly recognizes petitioners’ potential for personal transformation and rewards their individual achievements. In order to re-activate the clemency power, the guidelines for the use of that power should be re-drafted to vigorously promote clemency based on rehabilitation.

**Conclusion**

Executive clemency is a vital part of the criminal justice system. It serves as a safety valve on the system, a particularly critical function in light of the system’s disproportionate impact on poor people of color. The near-universal decline in grants of clemency in recent years is part and parcel of a trend toward harsher, unremitting justice, yet that very trend creates a need for more clemency, not less.

Massachusetts represents an instructive example of the decline in clemency, demonstrating both that the administrative process is structured with internal biases against clemency and also that the number of grants is heavily dependent on the attitude of the executive. Nonetheless, this examination of clemency in Massachusetts offers inspiration for ways to renew the clemency power. The system can be reformed by eliminating political pressures on the process, holding the executive accountable for denials of clemency as well as grants, and promoting rehabilitation as a legitimate rationale for granting clemency.

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343 See discussion supra Parts IV.A–B.
344 See Romney Guidelines, supra note 128, at 6; Dukakis Commutation Guidelines, supra note 258, at 1; Grosky, supra note 90.
345 See Rapaport, supra note 94, at 1523.
346 See Romney Guidelines, supra note 128, at 6; Dukakis Commutation Guidelines, supra note 258, at 1; Grosky, supra note 90; Rapaport, supra note 94, at 1523.
347 See Rapaport, supra note 94, at 1523; Romney Guidelines, supra note 128, at 6; Dukakis Commutation Guidelines, supra note 258, at 1; Grosky, supra note 90. As noted earlier, rehabilitation is a hallmark of the redemptive perspective on clemency. However, rehabilitation can be celebrated by retributivists too. For a retributivist defense of granting clemency based on ethical transformations, see B. Douglas Robbins, *Resurrection from a Death Sentence: Why Capital Sentences Should Be Commuted upon the Occasion of an Authentic Ethical Transformation*, U. Pa. L. Rev. 1115, 1116, 1124–25 (2001) (describing character retributivism as “the notion that wrongdoers should be punished in proportion to their own inner wickedness”).
A renewal of the executive clemency power in the United States is overdue. Though the subject deserves additional scholarly attention, it is not merely academic. Arnie King and the thousands of clemency petitioners around the country deserve a system that works.
LESSON LEARNED: WHY FEDERAL STEM CELL POLICY MUST BE INFORMED BY MINORITY DISADVANTAGE IN ORGAN ALLOCATION

Margaret Bichler*


Abstract: Ever since advancements in medical technology made organ transplantation possible, the demand for organs has been far greater than the supply, thus creating an organ shortage. The medical necessity of genetic matching between donor and donee has disadvantaged minorities in their pursuit of healthy organs because most organ donors are Caucasian and are therefore not a genetic “match” for minorities. Minority disadvantage in organ allocation must inform federal stem cell policy lest the same genetic incompatibility hinder minority access to potentially life-saving stem cell therapies. The federal government must take affirmative and timely steps in order to ensure equitable access to stem cell therapies in the future. This book review outlines those steps, arguing that Congress should: (1) fund stem cell research in order to secure march-in rights under the Bayh-Dole Act; and (2) condition the receipt of funds on the use of diverse stem cell lines in order to promote the creation of therapies genetically accessible to a diverse citizenship.

Introduction

As members of societies that have a history of ethnic discrimination, we have an obligation to reduce ethnic disparities in life expectancy and other indicators of health. Insofar as these disparities are understood as present injustices, at the very least, public policy should not be formulated in ways that make them worse.

—Ruth R. Faden¹

¹ Ruth R. Faden, Public Stem Cell Banks: Considerations of Justice in Stem Cell Research and Therapy, 33 Hastings Center Rep. 13, 22 (2003). Faden is professor of Biomedical Ethics and Executive Director of The Berman Institute of Bioethics at the Johns Hopkins Univer-
In recent years, as organ transplantation has progressed and become a safer practice, the demand for organs has increased while the supply has remained the same.\(^2\) Unfortunately, in the resulting organ shortage, minority and impoverished populations have been both disadvantaged in their pursuit of organs and exploited by the organ trade that exists in foreign countries.\(^3\) This situation has left many pondering what social justice requires given such a shortage.\(^4\) Further scientific advancement has made the medical community newly hopeful that stem cells—unspecialized, raw biological materials capable of developing into numerous more specialized cells, such as muscle, heart, nerve, and blood—will one day render the organ shortage a crisis of the past.\(^5\) As research efforts progress, and social debate continues, one thing seems certain: insofar as stem cell research promises to bridge the gap between organ supply and demand, sound federal policy must be implemented now in order to guide the research efforts and to ensure equitable distribution of its fruits in the future.\(^6\)

Cécile Fabre, author of *Whose Body Is It Anyway? Justice and the Integrity of the Person*, explores the organ shortage within a broader discussion of social justice.\(^7\) She defines a just society as one in which: (1) every citizen has the resources necessary to lead a minimally flourishing life, and (2) once everybody has such a life, individuals are allowed to “enjoy the fruits of their labor in pursuit of their conception of the

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\(^5\) See Faden, supra note 1, at 13.

\(^6\) See id.

\(^7\) See Fabre, supra note 4, at 5.
good.” To achieve the first prong, Fabre proposes that just as individuals in a just society have equal rights to the material resources necessary to lead a minimally flourishing life, they have equal rights to personal resources—namely, body parts and personal services (e.g., acts of good samaritanism, prostitution, surrogacy). Based on this understanding, she seeks to show that, insofar as the government has access to one’s material resources via taxation for the purpose of redistributing those resources to the poor, the government should also have access to personal resources, namely healthy and able bodies and body parts, for the purpose of redistributing organs to the sick or for imposing a duty to act on a third person who witnesses another’s peril. In order for the second prong to be satisfied, that is, in order for individuals to be freely able to pursue their conception of the good, Fabre suggests that individuals should be legally permitted to sell their organs and to lease their bodies for child-bearing or sexual services. Here Fabre explains that organ sales, surrogacy contracts, and prostitution, should be legal for different reasons: though they are not necessities required by all in order to lead a minimally flourishing life, they are desired by some in their pursuit of an ideal existence, which is equally important in a just society.

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8 Id. at 4. Fabre defines a minimally flourishing life as one in which an individual is capable of “framing, revising, and implementing a conception of the good” with which she identifies. Id. at 32. Obtaining such a life requires that one has a “range of opportunities to choose from, and access—time and resources—to some of those opportunities.” Id. Fabre then explains that the principle of sufficiency requires steps to be taken (redistributive steps) to provide individuals with the means necessary to lead a minimally flourishing life, namely that poor people are given basic necessities, that individuals are given access to financial services and to markets, and that social services are provided. Id. at 33. Achieving sufficiency requires that the autonomy of some is compromised as distributive policies deprive them of some resources for the betterment of others. Id.

9 Id. at 7–8. Fabre asserts that organ confiscation from both dead and live bodies should be legalized. Id. at 5. Essentially, the viable organs from every dead body would be harvested and donated. Id. at 73–74. Citizens would also be commissioned to donate organs such as kidneys, corneas, and liver lobes while living if and when they were determined to be a match for someone in need. See id. at 100.

10 Id. at 2–3. Fabre argues for a “highly qualified right to personal integrity” and, in so doing, suggests that personal autonomy and broader access to others’ bodies can and should co-exist. Id. at 2. The author proposes that “being committed to coercive taxation for the purpose of distributive justice does entail that we cannot be committed to a full right to personal integrity . . . rejecting the view that individuals have such a right does not entail sacrificing one of liberalism’s core values . . . to wit, autonomy.” Id. at 3. For Fabre, body parts, though not commodities, are resources that are needed by some, for example those who suffer renal failure, to lead a minimally flourishing life. See id. at 5. Similarly, other citizens who find themselves in peril have an equal right to the personal services of an able-bodied bystander capable of helping without accepting an unreasonable risk or compromising their own ability to achieve a minimally flourishing life. Id. at 4.

11 Id. at 8–9.
society. Anticipating criticism that the legalization of organ sales would ultimately exploit the poor, Fabre situates her argument within “ideal theory”—a theory of distributive justice that assumes every citizen’s need for material resources is met, or, in other words, that there is no poverty.

While Fabre’s arguments are interesting, their utility, at least in the United States, is limited by both the tremendous value consistently placed on personal autonomy by the American legal system and the reality of poverty. The value and preservation of personal autonomy informs so much of the American legal landscape that it is difficult, if not impossible, to imagine a government willing and able to confiscate organs from its citizens. Moreover, poverty plagues the United States and other capitalistic societies, and the legalization of organ sales would inevitably result in the exploitation of poor populations. In fact, in countries where organ sales are currently legal, impoverished citizens sell organs for minimal compensation to their more economically stable counterparts. Despite the limitations that the value of autonomy and poverty place on Fabre’s arguments, the author is simply seeking to outline a solution to a very real problem that has come to haunt both national and international medical fields within recent years: the organ shortage.

Given the value of personal autonomy and the pervasiveness of poverty, this Book Review provides a more realistic examination of the

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12 Fabre, supra note 4, at 8–9.
13 Id. at 8. Fabre realizes that examining organ sales in ideal theory is odd because standard objections to the legalization of organ sales are based on the fact that there is poverty and, as a result, poor people might have no choice but to sell an organ in order to meet their financial and material needs. Id. She goes on to explain that, even if there is reason to believe that organ sales would be less prevalent in a just society, the question of their legitimacy would not be completely moot because individuals, she argues, should still have the right regardless of whether or not they exercise it. Id.
14 See, e.g., Thor v. Superior Court, 855 P.2d 375, 380 (Cal. 1993); In re Gardner, 534 A.2d 947, 950 (Me. 1987) (explaining that “American courts and commentators have long emphasized the importance of personal autonomy”); U.S. Census Bureau, Poverty: 2005 Highlights, http://www.census.gov/hhes/www/poverty/poverty05/pov05hi.html (last visited Mar. 22, 2007) [hereinafter Poverty Highlights]. The official poverty rate in 2005 was 12.6%. Id. The poverty rate was 24.9% among Blacks and 21.8% among Hispanics. Id.
15 See Thor, 855 P.2d at 380; Gardner, 534 A.2d at 950.
16 Poverty Highlights, supra note 14.
17 See Poor Villagers, supra note 3; Patel, supra note 3.
18 See Report Brief, supra note 4, at 1 (explaining that “as organ transplantation has grown increasingly safe and effective, the demand for transplants has grown far faster than the supply of available organs”). The number of people on the U.S. waiting lists has increased from 16,000 in 1988 to a current total of more than 90,000; approximately 40,000 individuals are added to the transplant waiting list every year. Id.
shortage and assesses the need for federal stem cell policy that recognizes the ways in which both minority and poor populations are disadvantaged in their pursuit of healthy organs. It will evaluate the need for federal safeguards against the disadvantage of these populations if and when stem cell research bridges the gap between the supply and demand of organs. The federal government has already created a niche within the scheme of federally funded research via the Bayh-Dole Act of 1980, which creates the right of private research entities to patent federally funded research, but reserves a right for the government to “march-in” if the results of that research are not used for the good of the general public.¹⁹

Part I will outline the ways in which the organ shortage adversely affects minority and poor populations both domestically and abroad.²⁰ Part II will discuss stem cell research and the probability that, if left unregulated, its fruits will benefit primarily wealthy Caucasian populations.²¹ Because of these risks, it is imperative that the federal government does what it can to direct stem cell research.²² Part III will introduce the Bayh-Dole Act as a means by which the federal government could provide meaningful guidance to stem cell research efforts to ensure that, if those efforts one day minimize the gap between organ supply and demand, the benefits of such scientific advancements will be enjoyed equitably.²³ Part III will outline the necessary steps to ensure equal access to future stem cell therapies: (1) Congress must pass legislation allocating federal funds to stem cell research, (2) the National Institutes of Health (NIH), or comparable federal entities, must establish stem cell banks comprised of diverse stem cell lines, and (3) Congress must condition the provision of federal funds on the use of diverse stem cell lines in research.²⁴

¹⁹ Bayh-Dole Act of 1980, 35 U.S.C. § 203(a) (2001). The Act stipulates that when the federal government funds research conducted by a nonprofit organization or a small business firm, the contractor has a right to patent the results. Id. § 202. With respect to any resulting invention, the funding agency shall have the right to require the patent holder to grant a license to the government or the government’s designee. Id. § 203.

²⁰ See, e.g., Galen, supra note 2 at 363; Patel, supra note 3; Poor Villagers, supra note 3.

²¹ See Faden, supra note 1, at 14.

²² See id.

²³ See 35 U.S.C. § 203(a); Faden, supra note 1, at 14.

²⁴ Steve Mitchell, United Press Int’l, U.S. Stem Cell Firms Moving Overseas, Aug. 8, 2006, available at http://www.spacedaily.com/reports/US_Stem_Cell_Firms_Moving_Overseas_999.html (explaining that President Bush’s recent veto of federal legislation that would have funded stem cell research on frozen embryos has influenced stem cell research firms to relocate overseas to more favorable research forums); Press Release, Johns Hopkins Medicine, Panel: Clinical Use of Embryonic Stem Cells Jeopardized by Policy on Federal Funding (Nov.
I. MINORITY AND POOR DISADVANTAGE IN THE ORGAN SHORTAGE

The organ shortage is a frustrating and heartbreaking reality for all involved, but it is most costly for members of poor and minority populations.\(^{25}\) There are at least three ways in which the organ shortage harms minorities and the poor: (1) allocation protocol coupled with biological issues of genetic matching in the United States leaves minorities waiting for organs longer and in greater numbers, (2) the cost of organ transplantation prevents the poor from obtaining organ transplants, and (3) impoverished populations abroad are exploited by wealthy organ donees who buy their organs for minimal compensation.\(^ {26}\) In the United States, African Americans and other minorities are on organ waiting lists in greater percentages and for longer periods of time than their white counterparts.\(^ {27}\) Inasmuch as the following reasons for minority disadvantage center on biological issues and the failure of African Americans to donate organs in high numbers, the federal government is in no position to remedy the disadvantage.\(^ {28}\) However, the federal government currently stands in the ideal position from which to direct stem cell research so that these issues will not result in minority disadvantage in the future allocation of stem cell therapies.

There are numerous reasons for minority disadvantage in organ allocation in the United States.\(^ {29}\) First, minority populations and Cau-
Caucasians are genetically dissimilar in immune system antigens and blood types, which translates into immune system incompatibilities that prevent minorities from passing the initial screening by which genetic “matches” are paired according to allocation protocol. Second, fewer African Americans than Caucasians elect to become organ donors, which results in Caucasians having a greater likelihood of being successfully matched to a donor sooner. Third, even with governmental guidelines in place to secure equitable distribution of organs, all organ allocations are subject to “medical judgments” concerning the suitability of donees for the transplant. Minority populations are, therefore, left unprotected against discriminatory judgment calls that they are unlikely to lead a life conducive to caring for a healthy organ.

The tremendous cost of an organ transplant disadvantages another marginalized population in their pursuit of healthy organs: the poor. It is estimated that, in the United States, an organ transplant procedure and the necessary post-operation medical care costs as much as twelve percent of the United States population, and thirty-two percent of the kidney waiting list. Biologic differences, like the dissimilarities in immune system antigens and blood types existing between African Americans and Caucasians, between a donor and a donee, can trigger immune responses from the donee’s body after transplantation causing transplant failure or death. Specifically, blood types O and B are more common among African Americans than whites, and since whites are more frequently organ donors, this results in African Americans on the waiting list failing the initial Match System screening when organs from white donors are allocated.

Gaston explains that because immunosuppression technology (used to suppress immune rejection of organs that are of a different genetic type than the donee’s) has become more advanced, the importance of genetic matching to successful transplant outcomes has been greatly reduced. Gaston, supra note 27, at 2. The impact of HLA-based allocation, the process by which human leukocyte antigens are matched between donor and donee in order to increase the likelihood of successful transplantation, is to offer rapid transplantation to those with common antigens and reduce access for minorities with uncommon antigens. A recent study suggests that reducing reliance on ABO blood-type identity and HLA matching might increase minority access to transplantation by as much as fifteen percent.

Gaston discusses a scenario in which a doctor might make a judgment call between a healthy, wealthy white male and an alcoholic woman when determining who should get a liver. Galen speculates that the doctor might ultimately decide that the healthy, wealthy white male, promising to make a large donation to the hospital, will get the liver because the woman’s alcoholism makes her less medically suitable given that her lifestyle induced the failure of her own liver. The same discretionary judgments can be made to disfavor African Americans and other minority populations whom, the doctor may assume, also lead unacceptable lifestyles.

Transplants; “African Americans comprise approximately twelve percent of the United States population, and thirty-two percent of the kidney waiting list.” Id.

See id. at 363–64. Biologic differences, like the dissimilarities in immune system antigens and blood types existing between African Americans and Caucasians, between a donor and a donee, can trigger immune responses from the donee’s body after transplantation causing transplant failure or death. Id. Specifically, blood types O and B are more common among African Americans than whites, and since whites are more frequently organ donors, this results in African Americans on the waiting list failing the initial Match System screening when organs from white donors are allocated. Id. at 364.

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See Galen, supra note 2, at 375–77. Galen discusses a scenario in which a doctor might make a judgment call between a healthy, wealthy white male and an alcoholic woman when determining who should get a liver. Id. Galen speculates that the doctor might ultimately decide that the healthy, wealthy white male, promising to make a large donation to the hospital, will get the liver because the woman’s alcoholism makes her less medically suitable given that her lifestyle induced the failure of her own liver. The same discretionary judgments can be made to disfavor African Americans and other minority populations whom, the doctor may assume, also lead unacceptable lifestyles. See id.

See id.

Id. at 368.
as $394,000 per patient. While most states have Medicaid programs that cover the majority of transplant procedures, many individuals are not poor enough to qualify for Medicaid, cannot afford private health insurance, and cannot conceivably produce nearly $400,000 for a life-saving organ transplant—their precarious financial situation will probably leave them on the waiting list indefinitely. Moreover, wealthy Americans can remove themselves from organ transplant waiting lists by flying overseas and securing an organ transplant for a mere $130,000 to $160,000. The poor cannot because Medicaid and other insurance providers will not cover an organ transplant in a foreign black market; as a result, the availability of an organ market abroad provides the wealthy with another advantage and leaves the poor waiting longer for organs.

The organ shortage does not just harm people of color in need of transplants; it also leads to the exploitation of minority organ “donors” in foreign markets. This unsettling reality must also inform federal stem cell policy so that the economic incentive to purchase organs abroad will cease once stem cell therapies are developed. In countries where organ sales are legal or where they are illegal but proliferate via the black market, the situation of the poor within the organ shortage is exacerbated as they are exploited by wealthy counterparts seeking healthy organs. The following account of Amjad Ali, a poor villager from eastern Pakistan who was promised a job and money in exchange...
for one of his kidneys, is a striking example of the exploitative black market.\footnote{Poor Villagers, supra note 3.} Ten months after the procedure, Ali was still jobless, one kidney short, and in constant pain and discomfort.\footnote{Id.} He describes his experience as follows: “They promised me a job and took me to Rawalpindi. They drugged me, made me unconscious for days and cut out my kidney.”\footnote{Id.} In order to support Ali’s pursuit of compensation or legal remedy, his father has taken loans, sold his goats, crockery, and bricks.\footnote{Id.} All three people arrested for the incident were released after they produced documents showing that Ali had been paid USD $1250 for his kidney.\footnote{Id.} Ali is one of many who have fallen prey to this scenario, and the social consequences of selling a kidney or other organ can be as permanent as the loss of the organ itself.\footnote{Id.} Men have returned to their communities only to find that they are no longer marriageable because they are not considered “whole,” and they are discriminated against by their employers because of beliefs that once one loses a kidney they never regain full strength.\footnote{Id.} These social consequences often place the individual in an even more dire financial situation.\footnote{Id.} A 2002 study on the long-term effects of organ sales in India revealed that, of three-hundred and fifty people who had sold their kidneys for an average price of $1000, seventy-five percent were still in debt six years after the sale, and the number of individuals living in poverty within the

\footnote{See id. Anthropologists Nancy Scheper-Hughes and Lawrence Cohen are members of a task force of social scientists and anthropologists dedicated to investigating and exposing the organ trade and the ways in which it exploits the poor in foreign countries. Kathleen Scalise, Extreme Research: Nancy Scheper-Hughes and Lawrence Cohen, BERKELEY MAG., Summer 1999, available at http://www.berkeley.edu/news/magazine/summer_99/feature_darkness_scheper.html. In India, poor women have sold their kidneys to pay back money borrowed to feed their families. Id. In South Africa, cadavers of poor, mostly minority, victims of violence have been "looted" for usable eyes and heart valves. Id. In Brazil, the government declares everyone a universal organ donor at birth, and people in poverty are terrified of falling prey to the organ trade. Id.}{\footnote{See Jeffrey P. Kahn, Studying Organ Sales: Short Term Profits, Long Term Suffering, CNN.com, Oct. 10, 2002, http://archives.cnn.com/2002/HEALTH/10/01/ethics.matters.selling.organs.}}
study group had actually increased from fifty-four to seventy-one percent.\textsuperscript{50}

\section*{II. The Promise of Stem Cell Research and the Perpetuation of Minority Disadvantage}

The organ shortage and, more specifically, its effects on minority populations are daunting realities that should weigh on and inform both the legislature and the executive as stem cell policy is developed.\textsuperscript{51} Within recent years the promise of stem cell research has grown as research efforts have shifted from basic science to the development of cures for numerous diseases and disorders.\textsuperscript{52} Because all stem cell therapies, from cures for Alzheimer’s and diabetes to transplanted organs, will be genetically specific and will thus require “matching,” the same genetic issues that define minority disadvantage in the organ shortage will define their access to all stem cell therapies unless preventative measures are taken.\textsuperscript{53}

To date, the dominant moral concern in the stem cell debate has had little or nothing to do with securing equitable access to stem cell therapies, but has focused instead on whether it is acceptable practice to extract stem cells from live embryos.\textsuperscript{54} In 2001, President Bush took a determined moral stance on the issue when he announced that federally funded stem cell research could proceed but would be re-

\textsuperscript{50} Id. The study also found that “[m]ore than 85 percent reported that their health declined after the donation, and almost 80 percent said they would not recommend selling a kidney.” Id.

\textsuperscript{51} See Faden, supra note 1, at 17.

\textsuperscript{52} See, e.g., id. at 13. Because of their unique capability to develop into numerous specialized cells, stem cells will potentially cure Alzheimer’s, Parkinson’s, and diabetes, as well as generate organs. See id.

\textsuperscript{53} See id.

\textsuperscript{54} See Geoffrey Winn, The Stem Cell Debate, L. Spot, Sept. 2001, http://www.law4u.com.au/lil/ls_stem.html. Pope John Paul II has stated: “Human embryos obtained in vitro are human beings and are subjects with rights; their dignity and right to life must be respected from the first moment of their existence. It is immoral to produce human embryos destined to be exploited as disposable biological material.” See id. The Catholic Church’s opinion, as stated by the late Pope John Paul II, is representative of many groups and centers on the conviction that an embryo is a human life, and thus that the destruction of an embryo is a moral and legal wrong. Id. Winn also points to writer Ronald Bailey as a scholar who has convincingly opposed the stance taken by the Catholic Church and many others. Id. Bailey urges that while a one-week-old embryo is undeniably alive on a cellular level, molecular biology has recently established that the capacity for life is contained not only within an embryo, but also within adult cells, and thus, the potential for life is no longer a sufficient argument to legally protect human embryos from being “exploited” for the use of their stem cells. Id.
stricted to cell lines then in existence.\textsuperscript{55} As research continues to reveal more suitable means of harvesting stem cells, the efforts to utilize them for therapeutic purposes will ultimately forge on, and most of the contention regarding right to life issues will most likely dissipate.\textsuperscript{56}

Unfortunately, the ethical dilemmas do not stop at the use of live embryos for obtaining stem cells; the debate has overlooked the reality that, unless proactive measures are implemented, minority and impoverished populations stand to be seriously disadvantaged yet again once stem cell research yields cures and therapies for diseases and disorders.\textsuperscript{57} This threat is two-fold: (1) the same genetic issues that currently diminish the chances of minorities finding healthy organs that are a “match” will also prevent them from obtaining stem cell therapies that are a “match,” and (2) the race to patent the results of stem cell research will inevitably lead to the commercialization and more expensive therapies, out of the reach of impoverished populations.\textsuperscript{58} In order to avoid these threats, Congress must develop proactive legislation regarding stem cell research and related therapies.

\textbf{A. Immune Rejection and Biological Access}

It is well understood that biological factors coupled with the “match” system of organ allocation has disadvantaged minority populations in need of organ transplants.\textsuperscript{59} The government must now unde-

\textsuperscript{55} See \textit{id.}
\textsuperscript{56} See Nicholas Wade, \textit{Stem Cell News Could Intensify Political Debate}, N.Y. TIMES, Aug. 24, 2006, at A1. On August 23, 2006, researchers at Advanced Technology, Inc. announced that they had discovered a new means by which stem cells could be extracted from an embryo while allowing for the embryo to be implanted in the uterus and to develop into a fetus. \textit{See id.} This approach, if proven successful in other laboratories, could potentially provide an answer to the stem cell debate insofar as it would quash ethical concerns regarding the destruction of potential life. \textit{Id.} The new technique would be performed on a two-day-old embryo consisting of only eight cells and would involve one of those cells being removed while the embryo, now consisting of seven cells, could be implanted into the uterus to develop. \textit{Id.} This process has been utilized for over ten years now in order to diagnose Down syndrome in embryos and, throughout that period, has yielded healthy babies. \textit{Id.} Until this breakthrough, stem cells have been harvested from blastocysts, which are 150-cell embryos at a later stage of development; harvesting stem cells from blastocysts kills the embryo and gives rise to the ethical dilemma now fueling the stem cell research debate. \textit{Id.}

\textsuperscript{57} See Faden, \textit{supra} note 1, at 17.
\textsuperscript{59} Organ Donation Allocation Before the Senate Labor and Human Resources Committee and the House Committee on Commerce, 105th Cong. (1998) (testimony of Hon. Donna E. Shalala, Sec-
stand and guard against the likelihood that the same issues will disad-
vantage minorities when stem cells are successfully developed into
transplantable tissue.\textsuperscript{60} For, although stem cells are unspecialized in a
very significant sense, they still have biological properties that make
them suitable for some populations but not others.\textsuperscript{61} Ruth Faden, in
her article \textit{Public Stem Cell Banks: Considerations of Justice in Stem Cell Re-
search and Therapy}, calls the discriminatory result of such properties the
problem of “biological access”—the situation in which “the biological
properties of cells make them less accessible to some potential recipi-
ents than to others.”\textsuperscript{62} Immune rejection is a large part of the reason
that minorities have been disadvantaged in their pursuit of healthy or-
gans to date, and it stands to limit minority access to stem cell therapies
in the same way.\textsuperscript{63}

A person’s genetic makeup includes a set of genes which code for
a type of protein, called human leukocyte antigens (HLA), found on
the surface of every cell in the body, including stem cells.\textsuperscript{64} HLA pro-
teins play a major role in immune recognition and rejection.\textsuperscript{65} Multiple
genes code for HLA, and every person has two copies of these genes,
one gene inherited from each parent.\textsuperscript{66} These HLA-coding genes occur
in variant forms, each of which is called an allele, and the array of al-
leles that each person possesses is called her haplotype.\textsuperscript{67} Those with
more common haplotypes are more likely to find a donor while those
with less common haplotypes are less so.\textsuperscript{68} While mismatched trans-
plants can be and are performed between donors and recipients with
different haplotypes, a greater number of mismatched alleles between
the donor and the recipient results in a greater chance of organ failure
or rejection.\textsuperscript{69}

\begin{footnotes}
\item[60] See Faden, supra note 1, at 17.
\item[61] Id.
\item[62] Id. at 14.
\item[63] Id. at 17. There are three main strategies currently implemented to remedy the prob-
lem of immune rejection: immunosuppressive drugs, clinically induced tolerance, and HLA
matching. \textit{Id.} at 16.
\item[64] Id. at 14.
\item[65] Faden, supra note 1, at 14.
\item[66] Id.
\item[67] Id.
\item[68] Id. at 15.
\item[69] Id. Faden explains that rejection is a major research area in the transplantation
realm as researchers continue to seek a way to allow patients, regardless of their haplo-
types, to receive a transplant that will work for them. \textit{Id.} If this research is successful, the
Interestingly, “HLA has been demonstrated to track with geographical ancestry,” and persons of sub-Saharan African ancestry have the greatest variety of HLA types relative to any other geographical or ethnic group.\textsuperscript{70} The issue of HLA-matching thus poses a real problem for ethnic and minority communities in the United States because their HLA types are more varied than the HLA types of other social sectors, and so they are more rarely occurring in the United States population.\textsuperscript{71} Minorities will therefore be less likely to find a match, more likely to have a significant number of mismatches, and more likely to suffer failure or rejection.\textsuperscript{72} Faden points out that this unfortunate genetic circumstance will extend from organ and bone marrow transplantation to stem cell transplants because stem cells bear the haplotype of the individual from whom the cell line was derived.\textsuperscript{73} Thus, “disparities currently present in the field of transplantation are likely to be replicated in the emerging practice of stem cell transplantation, unless specifically guarded against.”\textsuperscript{74} The federal government, in developing stem cell research policy, should prevent future disparity in access to stem cell therapies by requiring the use of diverse stem cell lines in federally funded research.\textsuperscript{75}

\textsuperscript{70} Faden, \textit{supra} note 1, at 15.
\textsuperscript{71} \textit{Id}.
\textsuperscript{72} \textit{See id}.
\textsuperscript{73} \textit{Id} at 17. The author further explains that HLA-matching will undoubtedly be more crucial to some stem-cell-derived therapies than to others depending on the tissue that is transplanted, but “matching will be critical to clinical success in at least some important therapeutic applications.” \textit{Id}.
\textsuperscript{74} \textit{Id}.
\textsuperscript{75} \textit{See Faden, \textit{supra} note 1, at 17.}
B. The Patent Problem

The issue of biological access is not the only obstacle that stands to inhibit minority access to stem cell therapies. Currently, one patent holder dominates the realm of stem cell research and could quite possibly monopolize the stem cell therapy market in the future. The race to discover, patent, and commercialize new stem cell therapies, if left unregulated, will probably result in those therapies being too expensive for minority and impoverished populations. Here, the Bayh-Dole Act, which states the preservation of public availability of inventions as one of its objectives, speaks to the government’s awareness of the ways in which patents can result in the inequitable use of scientific discovery—now they must translate that awareness into federal policy that will prevent that result in the future of stem cell research.

Both common law and statutory law have established that, in order for a patent to create an exclusive right to investigate particular scientific phenomena and theories, it must: (1) claim a specific device and not a general effect, and (2) not limit the use of a technological device that has no substitute and is necessary for the exploration of a certain scientific question. In the race to patent the results of stem cell research, it is unclear whether the patents that have been issued to date are in keeping with these criteria. What is clear, however, is that if pat-

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76 See Lee, supra note 58, at 89–90 (explaining that currently stem cell research patents are held primarily by one entity, thus patent monopoly is a potential problem).
77 Id.
80 Lee, supra note 58, at 83–84. The author explains that the prohibition against patenting natural laws and phenomena is largely the result of common law. Id. at 93. The Supreme Court, in 1842, stated that “the end to be accomplished is not the subject of a patent,” but the new and useful means for obtaining that end are within the proper scope of patent law. Carver v. Hyde, 41 U.S. 513, 519 (1842). The Court has thus generally distinguished between a nonpatentable means and a patentable end. See Lee, supra note 58, at 93.
81 Id. at 80–81. Lee argues that the patents currently limiting stem cell research are not in keeping with these criteria. See id. Lee distinguishes between upstream and downstream research assets and argues that such a distinction is at the heart of the patent system and is an effective embodiment of common law patent doctrine as well as sound public policy meant to encourage scientific innovation while protecting access to basic scientific knowledge. Id. at 81–82. In order for researchers and innovators to be able to freely explore and implement their ideas, basic research tools and tools without substitutes (upstream knowledge) must remain widely available. See id. At the same time, in order for researchers and innovators to have incentive to pursue their ideas, they are given exclusive rights (downstream privatization) to their final and unique invention. See id.
ent-monopolizing private companies commercialize the results of their stem cell research, access to stem cell therapies will be severely limited by the high price that will inevitably result from monopoly over a specific therapy.\textsuperscript{82}

James Thomson was the first researcher to isolate human embryonic stem cells (HESCs).\textsuperscript{83} He subsequently secured three incredibly broad patents related to his discovery, which were eventually assigned to Geron Corporation, a private biotechnology firm.\textsuperscript{84} Thomson’s patents involve numerous claims stipulating what will be in violation of the patents; one of these claims alone encompasses, in effect, virtually all HESCs of significant research value.\textsuperscript{85} Arguably, these patents violate the common law patent qualification factors outlined above because isolated HESCs are a research tool with no adequate substitute and their patenting limits many other researchers from exploring the scientific questions surrounding stem cells.\textsuperscript{86} The limitations placed on stem cell research by Thomson’s patents are substantial; because of the breadth of Thomson’s patents, all researchers must negotiate with the patent holder before using HESCs, even if they have isolated new HESCs or use a new method to do so.\textsuperscript{87}

\textsuperscript{82} Mueller, supra note 78, at 509; see Lee, supra note 58, at 102–03. Insofar as HESCs are a research tool lying anterior to knowledge and theory, patents on HESCs have the practical effect of creating monopolies over the knowledge that such a tool will ultimately generate. Lee, supra note 58, at 102–03. Lee therefore urges that common law doctrine and public policy require a narrowing of the patentability of HESCs. See id. at 104.

\textsuperscript{83} See Lee, supra note 58, at 89.

\textsuperscript{84} Id. Lee argues that a patent on HESCs is a patent on an upstream research tool creating an incredibly “wide zone of exclusivity,” since the many discoveries and innovations that may arise from stem cell research are still largely theoretical and will be pursued well into the future. Id. at 92. Because HESCs are critical to achieving fundamental new insights into biology and are the means that will be used to explore numerous potential therapies, granting individual property rights over them seems contrary to the policy objective in keeping basic scientific knowledge available to the public at large and to the scientific community intent on pursuing innovation. Id.

\textsuperscript{85} Id. at 90.

\textsuperscript{86} Id. For Lee, stem cells are prime examples of upstream research tools, with no adequate substitution, that should not be patentable in keeping with the common law. Id. at 82.

\textsuperscript{87} Christopher Hazuka, Supporting the Work of Lesser Geniuses: An Argument for Removing Obstructions to Human Embryonic Stem Cell Research, 57 U. MIAMI L. REV. 157, 178–79 (2002) (explaining that the breadth of Thomson’s patents empowers him to control future stem cell research); see Lee, supra note 58, at 90. Thomson assigned his patents to the Wisconsin Alumni Research Foundation (WARF) which continues to hold the rights. Lee, supra note 58, at 90. Even though Thomson’s inventive step merely involved discovering the method by which HESCs could be isolated and cultured (a process that might very well have an adequate substitute), his patents actually cover both the process and the stem cells themselves; the patents’ claims cover all HESCs instead of covering only those cell lines isolated
By severely limiting the stem cell research tools available to others, the Thomson patents have laid the foundation for a future monopoly over stem cell therapies. The threat of patent infringement lawsuits has even discouraged foreign biotechnology companies and research institutions from marketing their stem cell advances within the United States. If their stem cells match the claims contained in the Thomson patents, a license must be secured from the patent holder so as to avoid patent litigation. While an agreement between the patent holder and the NIH has eased some concerns over the access to stem cell research tools, the agreement maintains the patent holder’s broad legal rights over HESCs, and does nothing to alleviate concerns that a future monopoly over stem cell research therapies derived from HESCs will drastically increase prices, thereby making the therapies available only to the wealthy social sector.

by Thomson. Id. The patent on the method for isolating and culturing stem cells also stands to hinder future research; even if another researcher successfully derived useful stem cells without infringing a patent claim, it would still be likely to infringe the patent on the only known method for maintaining the cells’ viability held by WARF. Id.

In July 2006, the Foundation for Taxpayer and Consumer Rights, a California consumer group, and the Public Patent Foundation, a New York organization advocating patent reform, petitioned the U.S. Patent and Trademark Office for review of the Thomson patents, and in October 2006 their request was granted. Andrew Pollack, Agency Agrees to Review Human Stem Cell Patents, N.Y. Times, Oct. 4, 2006, at C3. The review could lead to a rescission or narrowing of the three Thomson patents. Id. The groups who filed for the review argue that the patents should not have been granted to Thomson because, at the time of his application, three scientific papers by other researchers and one previous patent had already established the process by which embryonic stem cells could be isolated in mice, pigs, and sheep. Id. The patents, which only apply in the United States, have brought many research groups to move abroad, a clear indicator of the drastic ways in which the patents have impeded research efforts within the United States. Id. Even if the review relieves this impediment, it could take years for the review to be completed. Id.

88 See Lee, supra note 58, at 89–90; Hazuka, supra note 87, 175–76.
90 Lee, supra note 58, at 90.
91 See id. at 90–91. In October of 1999, WARF established WiCell Research Institute, Inc., a non-profit organization designated to hold the licenses to WARF stem cells. Id. at 90. WiCell executed a Memorandum of Understanding (MOU) which established that WiCell would offer WARF cells to scientists at NIH laboratories at the cost of preparation. Id. WiCell also agreed to allow federally funded non-profit researchers access to the stem cell lines upon negotiating similar arrangements. Id. Though this agreement provides more access to the patented stem cells, it includes strict “reach-through” provisions for commercial applications. Id. at 90–91. The agreement allows researchers using WARF HESCs to patent any discoveries made in their research but prohibits the commercialization of such discoveries unless a license with WARF is negotiated. Id. This stipulation alone should make it abundantly clear that WARF has no intention of loosening its grip on the future market in stem-cell-derived therapies. See id. Moreover, the MOU is a voluntary
III. Ensuring Equitable Access to Stem Cell Therapies Via Sound Federal Policy

Issues of biological access and the potential of future monopolization of stem cell therapies by patent holders are pressing concerns because they will impinge equal access to stem cell therapies unless federal policy regarding stem cell research addresses these foreseeable problems. Faden points out that the public policy responses to the issues faced by minorities in their pursuit of healthy organs have largely focused on appealing to the African American community for donation and to strategies to increase overall donation. In the case of stem cell research, however, the availability and diversity of HLA types represented in the efforts need not be constrained by the vagaries of organ donation. Though technology currently cannot create organs for transplantation, it can create stem cell lines to be used for research and eventually therapies. Thus, “it is within our power to construct a bank of stem cell lines that includes a wide spectrum of HLA types, specifically selected to satisfy considerations of justice.” Because of the Bayh-Dole Act, the government has an opportunity to ensure now that patented stem cell therapies will be both biologically and financially available to all in the future—that they will be used for the public good in general.

President Bush’s 2001 decision that stem cell research could only continue on then-existing stem cell lines (twenty-one total), and his more recent veto of federal legislation that would have provided federal funding to stem cell research efforts, demonstrate not only that his policy is ill-informed, but that it is short-sighted. In issuing his veto, the President said nothing of patent concerns or biological realities, nor did he recognize that research firms were willing and able to move

agreement that allows WiCell to “exclude any party from using HESCs, charge whatever license fee it desires for their use, or pursue infringement suits against those who use the HESCs without its permission.” Lee points out that the MOU is particularly advantageous to WiCell, which retains all rights to commercialize any discoveries arising from federally funded, basic research. Thus, “WiCell’s apparent generosity in allowing at-cost access to its patented cells may ultimately prove quite self-rewarding.”

92 See Lee, supra note 58, at 103; Faden, supra note 1, at 17.
93 See Faden, supra note 1, at 17
94 See id.
95 See id.
96 See id.
overseas to continue their efforts.99 Shortly after the veto, the Geron Corporation, sole assignee of the Thomson patents, announced that it was relocating to the U.K. and noted funding support as one of its reasons.100 In other words, stem cell research will progress with or without federal approval.101 There is a limited window of opportunity in which domestic research can be guided to achieve future equality in access to stem cell therapies, and that window is open now.102

In order for the policy goal of equal access to be achieved, the federal government must (1) fund stem cell research, (2) guide research efforts to involve diverse stem cell lines, and (3) prevent patent monopolies that will drive up the price of future therapies.103 If effective and remedial federal policy is implemented now, Americans will not only have access to affordable, biologically suitable therapies, but will have no reason to partake in the exploitation of impoverished minority populations abroad.104

A. Stem Cell Banks

Because the same biological factors that prevent minorities from having sufficient access to transplantable organs currently will limit their access to stem cell therapies in the future, Congress should pass legislation requiring the collection of diverse stem cell lines.105 Congressional legislation providing federal funds to stem cell research can then condition receipt of federal funds by research institutions on the use of diverse cell lines.106 Faden and her colleagues describe the stem cell lines currently available to researchers in the United States as “woefully inadequate” because a mere twenty-one stem cell lines have been approved for federally funded research, and these stem cells were derived from embryos created by in vitro fertilization for reproductive use.107 Because individuals engaged in the process of in vitro fertiliza-

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99 See id.; Mitchell, supra note 24.
100 See Mitchell, supra note 24.
101 See id.
102 See id.
103 See cases cited supra note 26; Mueller, supra note 78, at 509.
104 See Faden, supra note 1, at 17 (explaining that the establishment of a diverse stem cell bank will render stem cell therapies available to minority populations); supra notes 41–48 and accompanying text (describing the exploitation of the poor in foreign organ markets).
105 Faden, supra note 1, at 17.
106 See cases cited supra note 26.
107 Faden, supra note 1, at 17.
tion are generally not minorities, such details lead to the logical conclusion that the diversity of HLA types currently being studied in the United States is incredibly limited. In order to remedy the current dearth of HLA-type diversity in stem cell lines available for research, stem cell banks, like those proposed by Faden, should be created.

B. Establishing March-in Rights Under the Bayh-Dole Act

Providing federal funds for stem cell research will not only allow the federal government to direct the researchers to use diverse stem cell lines, but will also establish their march-in rights under the Bayh-Dole Act. March-in rights give the federal government (1) a nonexclusive license to whatever patented technology is derived from federally funded research, and (2) the right to, in some cases, grant third parties licenses to the invention against the patent-holder’s wishes. These rights will be key to guarding against monopolization and exorbitant prices of stem cell therapies. Congress passed the Bayh-Dole Act in 1980 in order to encourage the commercialization of technologies developed using federal funds by giving researchers the right to patent federally funded inventions. The Act simultaneously created

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108 B. J. Bankowski et al., Racial Disparities Amidst In Vitro Fertilization (IVF) Insurance Mandates in the United States, 84 Fertility & Sterility S242–43 (Supp. 2005). Minorities generally have less access to infertility treatments because of geographic and economic factors. Id. at S242. Moreover, state legislation requiring insurance companies to cover the procedures has been ineffective in increasing minority access to infertility care. Id. at S243.

109 See Faden, supra note 1, at 17.

110 Id. at 23. Faden proposes the creation of two stem cell banks. Id. The research bank would disburse cell lines for research and should thus be designed to fit research needs; it should consist primarily of homozygous (having identical alleles for a single trait) stem cell lines for the most widely occurring haplotypes in America. See id. Still, this bank should include several homozygous stem cell lines common to minorities so that diseases that occur primarily in minority populations are not left without a therapy in the future. See id. The therapeutic bank would disburse stem cells to clinicians to create a therapy for a specific individual. See id. at 18. Ideally, this bank would be sufficiently diverse so that every potential recipient could receive a match, but the funding required to establish and maintain such a bank renders this option currently unfeasible. See id. Given financial constraints, the most common haplotypes from each of the major minority populations in the United States should be included so that an equal percentage of individuals from each group will have access to stem cell therapies. Id. at 19, 21–23.


112 Id. §§ 202(c)(4), 203.

113 Id. § 202(c); see supra notes 57, 58, and 78 and accompanying text.

114 35 U.S.C. § 200. Prior to 1980, there was a “free market technology-transfer policy in the United States” based on the notion that, if public funds created the technology, title to the invention should remain with the government and the public. Peter S. Arno & Mi-
an obligation of the patent holder to ensure that her technology would be available to the public on reasonable terms.\textsuperscript{115} Thus, Bayh-Dole patent-holders are subject to march-in rights, or the right of the government to require the patent holder to assign a license to a party of their designation, which the government may exercise if the patentee fails to take reasonable steps toward practical application of the invention or if the action is necessary to satisfy health or safety needs.\textsuperscript{116}

In order for the government to exercise march-in rights, an aggrieved party (usually one who desires access to the patented technology) must file a petition with the NIH requesting that it initiate march-in proceedings.\textsuperscript{117} The NIH then reviews the petition and the evidence and issues a decision appealable in federal court.\textsuperscript{118} Because march-in rights have only been petitioned for three times since 1980 and none of the petitions has been successful, there is significant disagreement over what warrants the exercise of march-in rights.\textsuperscript{119} In rejecting the three petitions, the NIH stated that it was uncomfortable using march-in rights to control the prices of pharmaceutical drugs.\textsuperscript{120} Still, there is reason to believe that the statute’s requirements of “practical application” and availability on “reasonable terms” do authorize the government to exercise march-in rights when prices of therapies are exorbitant.\textsuperscript{121} Scholars who support this interpretation look to numerous court decisions in which the phrase “reasonable terms” has been inter-

\begin{flushleft}
\textsuperscript{117} 35 U.S.C. § 203.
\textsuperscript{118} Id.
\textsuperscript{119} Compare Arno & Davis, \emph{supra} note 114, at 649 (arguing that the language of Bayh-Dole could be interpreted to allow the exercise of march-in rights for the purpose of price control), with John H. Raubitschek & Norman J. Latker, \textit{Reasonable Pricing—A New Twist for March-In Rights Under the Bayh-Dole Act}, 22 SANTA CLARA COMPUTER & HIGH TECH L.J. 149, 162 (2005) (asserting that the legislative history of Bayh-Dole does not support an interpretation allowing the exercise of march-in rights to control prices).
\textsuperscript{120} Raubitschek & Latker, \emph{supra} note 119, at 157–59.
\textsuperscript{121} Arno & Davis, \emph{supra} note 114, at 651.
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interpreted to include prices. The government can also exercise march-in rights if required for the public health; a broad interpretation of this provision might also support price control. Finally, there is a difference between stem cell therapies that promise to cure disease and remedy organ failure and prescription medications meant to treat, but not cure, diseases—it seems far more unjust for economics to deny some individuals access to therapies that will cure them.

To date, the NIH has not had to consider whether the effective denial of life-saving therapies to impoverished populations would warrant the exercise of march-in rights, but the federal government should take the steps described herein to ensure that if and when that question arises in the future, it is not a hypothetical one. For if stem cell research efforts continue to be denied federal funding, those efforts will likely render therapies untouchable to the federal government and to many impoverished individuals and minority groups. Therefore, in order to secure government access and the possibility of price control in the future, federal funds must be provided before stem cell research progresses without them.

**Conclusion**

While Fabre and other scholars continue to grapple with the question of what social justice requires in addressing the organ shortage, the government is charged with the difficult task of actually achieving that justice. Unfortunately, minority disadvantage in the organ shortage is largely out of the government’s control insofar as their disadvantage is primarily due to biological factors and failure to donate organs in higher numbers. The government is also in a precariously helpless situation from which to assist those who are not poor enough to qualify for Medicaid and not financially able to purchase health insurance, and thus unable to secure an organ transplant. But, in developing stem cell policy, the federal government has an unprecedented opportunity to create equal access to life-saving therapies in the future. Sound stem cell policy requires federal funding conditioned on the use of diverse cell lines by researchers. Such funding, under the Bayh-Dole Act, will simultaneously ensure that the government will have the power to di-

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122 Id.
123 Raubitschek & Latker, supra note 119, at 167.
124 Id. at 157–59 (explaining that the petitions for the exercise of march-in rights have involved medications used to treat cancer and AIDS).
125 See id. at 167 (explaining that the government might control therapy prices via the other provisions of Bayh-Dole or by eminent domain).
rect stem cell research and to potentially engage in price control of the resulting therapies. Denying federal funds to stem cell research will not only impinge research efforts, but, more importantly, it will impinge the achievement of social justice.
FULFILLING THE PROMISE?:
WHEN HUMANITARIAN OBLIGATIONS
AND FOREIGN POLICY GOALS CONFLICT
IN THE UNITED STATES

ELEANOR E. DOWNES*

SEEKING REFUGE: CENTRAL AMERICAN MIGRATION TO MEXICO,
THE UNITED STATES, AND CANADA. By María Cristina García. Berkeley:

Abstract: In Seeking Refuge: Central American Migration to Mexico, the United
States, and Canada, María Cristina García evaluates the United States’ response to political
and military upheavals in Central America in the 1980s. García explains that both
international and domestic law demanded that the United States provide refugee status to
individuals with a “well-founded fear of persecution.” She suggests that, because it played
a significant role in creating these refugees, the United States had an even greater
responsibility to provide for their refuge. This Book Review evaluates the failure of U.S. law
and policy to realize even the minimal standards established under international agreements
with regard to the protection of refugees. In examining the situations in Central America in
the 1980s and Iraq now, it concludes that the United States must fulfill its obligations
under international law without regard to whether the United States contributed to the
refugee-creating crisis.

Introduction

The 1951 United Nations Convention Relating to the Status of
Refugees (1951 Convention), the fundamental international agreement regarding refugees,
defines a refugee as a person who “owing to well-founded fear of being persecuted for
reasons of race, religion, nationality, membership of a particular social group or political
opinion, is outside the country of his nationality and is unable or, owing to such fear, is
unwilling to avail himself of the protection of that country.”¹ Be-

¹ U.N. Convention Relating to the Status of Refugees, art.1, opened for signature July 28,
aa10. pdf [hereinafter 1951 Convention]. The 1951 Convention “provides the most com-
between 1974 and 1996 millions of Central Americans were driven from their homes by military forces that used violence to terrorize and incite fear among civilians. Similarly, since the U.S.-led invasion of Iraq in 2003, hundreds of thousands of Iraqis have sought refuge throughout the world in an effort to save themselves from violence and persecution. In both situations, U.S. foreign policy contributed to the violent persecution of innocent civilians that in turn drove thousands from their homes. Whether these migrants have been recognized as refugees has depended upon the formal and informal immigration, refugee, and foreign policies of the country where they sought safety.

In her book, Seeking Refuge: Central American Migration to Mexico, the United States, and Canada, María Cristina García explores the causes and effects of mass migration from Nicaragua, El Salvador, and Guatemala to North America during the 1980s and, in doing so, asserts that the United States failed to fulfill its obligation to respond to the needs of millions. García begins by providing a brief history of the political upheavals and wars in these three Central American countries. She details the economic and political sources of struggle and identifies the role the United States played in exacerbating each of these crises. By comprehensive codification of the rights of refugees yet attempted on the international level.”


2 María Cristina García, Seeking Refuge: Central American Migration to Mexico, the United States, and Canada 31–32 (2006).


4 See García, supra note 2, at 1, 13; Tavernise, supra note 3. The president of the non-governmental group, the U.S. Committee for Refugees and Immigrants, Lavinia Limon, has stated that the nearly 900,000 Iraqis who left Iraq between 2003 and 2005 are “the biggest new flow of refugees in the world.” See Tavernise, supra note 3.

5 García, supra note 2, at 32–33.

6 Id. at 1–2.

7 Id. at 14–43.

8 See id. From 1934 until 1977, the United States provided financial and military support to the ruling Somoza family in Nicaragua; this aid secured the loyalty of Nicaragua against Communist forces during the early Cold War. See id. at 13–14. In the early 1970s, the United States supported the Somoza’s containment of the Sandinista National Liberation Front (FSLN) that advocated revolutionary political and socioeconomic changes. Id. at 14, 15. The FSLN increasingly took control away from the Somoza dictatorship. Id. at 15. Their revolu-
ignoring human rights abuses and providing aid to military regimes known to be committing human rights abuses, the United States attempted to secure the loyalty of changing regimes and to contain the spread of Communism.\(^9\) The results of war and upheaval in Nicaragua, El Salvador, and Guatemala were immense.\(^10\) Between 1974 and 1996, approximately 250,000 people were killed, 1,000,000 were displaced within their home countries, and 2,000,000 fled Central America to

\(^9\) See García, supra note 2, at 13–29.

\(^10\) See id. at 1.
find refuge. Most of these migrants sought refuge in Mexico, Canada and the United States; however, the policies of these North American countries generally reflected a prioritization of state interests over humanitarian obligations. In contrast with its neighbors that were not involved in the military conflicts of Central America, the United States, which was intricately involved in supporting at least one side of each country’s war, was “reluctant to admit that its policies caused displacement and generated refugees.”

The hesitance of the United States to take responsibility for its role in creating Central American refugees was accompanied by a reluctance to fully address the needs of those seeking refuge. García introduces her book by arguing that although “foreign policy decisions often cause the displacement of populations, migration should not be used as an instrument for undermining or bolstering a specific regime.” Later, she echoes the argument of many U.S. citizens and the United Nations High Commissioner for Refugees (UNHCR) that the United States had

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11 Id.
12 See id. While García fully explores the policies of Mexico and Canada, this Book Review focuses on her analysis of the U.S. handling of Central American migration. Canadian and Mexican refugee and immigration policies, while far from flawless in the 1980s, were more generous than that of the United States. See id. at 77, 119. Both Canada and Mexico approached the conflicts in Central America as domestic issues with which they intentionally avoided interference. Id. at 125. As such, their immigration and refugee policies bore little connection to their foreign policies of non-involvement; both nations adopted more generous and adaptive approaches to Central American migrants than did the United States. See id. at 77, 119, 125. Furthermore, Mexico was not a signatory to the 1951 Convention or the 1967 Protocol until 2000, and was therefore in no way legally obligated to accept refugees during the period García discusses. See id. at 46; UNHCR, States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol, 3, available at http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf (last visited Mar. 28, 2007) [hereinafter UNHCR, Parties to Convention]. Canada signed the 1951 Convention and the 1967 Protocol in 1969. UNHCR, Parties to Convention, supra, at 2.
13 See García, supra note 2, at 18, 24, 26. In the span of three years, the United States provided substantial support to three opposing groups within Nicaragua. See id. at 17–19.
14 See id. at 33. García quotes a Salvadoran immigrant explaining the reluctance of the United States to accept Central Americans as refugees despite their need for humanitarian relief:

“The Reagan Administration doesn’t want to accept us as refugees because it would be admitting that the military aid it sends to El Salvador does not help, rather destroys and creates refugees. I didn’t come here because I wanted to. I had no economic need to come. I left my country because I had to.”

Id. at 84.
15 See id. at 86. In 1981, the UNHCR accused the United States of failing to fulfill its obligations towards refugees when it routinely forced Salvadoran refugees to return to their country. Id. at 89.
16 Id. at 8.
a responsibility, beyond that codified in the 1951 Convention, towards Central American migrants because of its role in instigating the conditions that led them to flee their home countries. According to this perspective, the United States should have liberally granted refugee assistance in order to account for its foreign policy decisions.

This Book Review argues that while the responsibility of the United States to provide humanitarian relief and refugee status is clear under international and domestic law, inferring additional responsibilities based on foreign policy unnecessarily creates the risk that humanitarian relief will become a tool of foreign policy and as such will fail to serve the human need it is intended to address. Part I provides an analysis of international refugee standards and explores how U.S. policies towards Central American migrants from 1974 to 1996 failed to meet the obligations imposed by those standards. Part II analogizes the political upheaval, war, and migration from Central America in the 1980s to the current political, military, and migration crises in Iraq. Part III argues that the United States should fulfill its current international obligations by addressing the humanitarian needs of Iraqi refugees without allowing those needs to be politicized.

I. MAKING AND BENDING REFUGEE STANDARDS

A. Well-Founded International Standards for Refugees

Following the Second World War, the newly formed United Nations adopted standards for the protection of refugees based on an underlying assumption that “human beings shall enjoy fundamental rights and freedoms without discrimination,” and that these rights could not be adequately protected “without international co-operation.” While the 1951 Convention continues to be the foundational international statement on refugees, the UNHCR has refined the evolving concept of refugees and their rights through formally adopted protocols and administrative handbooks.

17 Id. at 92.
18 Garcia, supra note 2, at 86, 92.
19 1951 Convention, supra note 1, pmbl. The 1951 Convention was not the first international effort to codify refugee policies. See id. art. 1. Article I notes five pre-WWII attempts to define refugees and their rights. See id.
The 1951 Convention defines the qualifications for refugee status, the duties of States that ratify the agreement, and the rights to which refugees are entitled. The 1951 Convention definition of a refugee includes a person with a well-founded fear of persecution based on personal identity traits or membership in particular groups based on events prior to January 1, 1951. It excludes any person for whom there are reasonable grounds for believing may have “committed a crime against peace, a war crime, or a crime against humanity,” “committed a serious non-political crime outside the country of refuge,” or “been guilty of acts contrary to the purposes and principles of the United Nations.” Under the 1951 Convention, refugees’ rights regarding freedom of religion, freedom of association, ownership of real and intellectual property, and access to courts are protected. Refugees are assured of the right to wage-earning employment, rations when the host State’s population is entitled to them, access to housing on par with other non-citizens, public education, and public relief. Furthermore, States agree to allow refugees to choose a place of residence and

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21 1951 Convention, supra note 1. The 1951 Convention should be distinguished from other foundational documents of the United Nations that did not bind States to specific obligations. See, e.g., Eleanor Roosevelt, Chairperson of the United Nations Comm’n on Human Rights, Adoption of the Declaration of Human Rights (1948), available at http://www.udhr.org/history/ergeas48.htm. For example, by supporting the Universal Declaration of Human Rights in 1948, countries pledged themselves to a “common standard of achievement” but did not become parties to an international agreement or accept any legal obligation. See id. In contrast, the 1951 Convention is an international agreement under which States accept specific obligations. See 1951 Convention, supra note 1, pmbl.

22 1951 Convention, supra note 1, art. 1. The “well-founded fear of persecution” is a key phrase of the definition. UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, supra note 20, at ¶ 37. The particular context of WWII, in which horrifying numbers of people were persecuted, murdered, and driven from their homes because of their race, religion, nationality, membership in particular social groups, and political opinion, shaped the post-war understanding of refugees and thus the 1951 Convention’s definition. See Matthew E. Price, Persecution Complex: Justifying Asylum Law’s Preference for Persecuted People, 47 HARV. INT’L L.J. 413, 419 (2006). As a result of this historic focus on persecution of specific groups, “people caught in the crossfire of civil war or generalized violence, starving people, people without the economic resources to subsist, people forced to flee their countries due to environmental catastrophe, people forcibly recruited by a rebel militia, and battered women unable to obtain protection from the police” have often been excluded from the benefits of refugee status. See id. at 417.

23 1951 Convention, supra note 1, art. 1.

24 Id. arts. 4, 13–16.

25 Id. arts. 17, 20–23.
to move freely within their territories. The 1951 Convention prohibits States from expelling or returning a refugee “to the frontiers of territories where his life or freedom would be threatened.” While each ratifying State retains the right to make reservations as to the terms of the agreement, the fundamental provisions concerning the definition of a refugee and the principle that no refugee will be returned to a territory where he or she fears persecution cannot be reserved. In 1967, the United Nations expanded the scope of protection to include individuals who became refugees after 1951 by passing the Protocol Relating to the Status of Refugees (1967 Protocol). Currently, one hundred and forty-three States have ratified each of the agreements. Although the United States was not a signatory to the 1951 Convention, it eventually accepted its basic tenets when it signed the 1967 Protocol.

For a nation made up almost entirely of immigrants, the United States has struggled throughout its legislative history to define consistent, fair immigration policies. In 1965, Congress passed a new Immigration Act that allowed widespread immigration by people from around the world which altered the composition and size of the immigrant population. Three years after the passage of that Act, the United States signed the 1967 Protocol and, in doing so, accepted responsibility for refugees under the newly broadened definition. Nations, like the United States, that had not ratified the 1951 Convention but signed the 1967 Protocol, accepted de facto the basic principles of the 1951 Convention. By signing the 1967 Protocol, the United States assumed responsibility for coordinating with other nations in the protection of refugees throughout the world. Congress essentially codified the internationally accepted definition of a refugee when it passed

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26 Id. art. 26.
27 Id. art. 33.
28 1951 Convention, supra note 1, art. 42.
29 1967 Protocol, supra note 20, art. 1.
30 UNCHR, Parties to Convention, supra note 12, at 1.
31 Id.; see 1967 Protocol, supra note 20, art. 1.
33 García, supra note 2, at 85.
34 UNCHR, Parties to Convention, supra note 12, at 4.
35 See 1967 Protocol, supra note 20, art. 1. Given that the 1967 Protocol incorporated the basic principles of the 1951 Convention, from this point forward all references to the 1967 Protocol are intended to be inclusive of the common principles between the agreements. Alternate usages will be noted as such.
36 Id.
the Refugee Act of 1980. The Act, as subsequently interpreted, changed the U.S. standard for accepting refugees from a “clear probability” of persecution to a “well-founded fear” of persecution in accordance with the language of the 1967 Protocol.

These expanded allowances for immigrants and refugees were followed by the election of President Reagan and economic recession. During the 1980s and 1990s, new immigration statutes and policies were implemented that reflected these political and economic shifts. Unequal implementation of refugee policies quietly eroded opportunities for the most vulnerable. As a result of these politically motivated policies, the United States failed to fully implement the provisions of the 1967 Protocol and the 1980 Refugee Act and, therefore, did not meet its obligations under international or domestic law.

B. U.S. Response to Central American Migrants

While facially neutral, U.S. refugee policy during the 1980s gave preference to applicants from Communist countries while denying protection to those fleeing regimes the United States was supporting. For example, by 1987, nearly one million migrants from Guatemala, Nicaragua, and El Salvador had arrived in the United States in need of a safe

39 García, supra note 2, at 85–86.
40 Id. at 86. For example, the Immigration Reform and Control Act of 1986 attempted to control illegal immigration by punishing employers who gave work to illegal immigrants. Gabor & Rosenquest, supra note 38, at 279.
41 See García, supra note 2, at 89. The State Department has discretionary authority to grant a special, temporary status (Extended Voluntary Departure) to citizens of another country whose lives might be jeopardized by returning to their country of origin; this status was not assigned to Central Americans during the 1980s. See id. See generally Lynda J. Oswald, Extended Voluntary Departure Limiting the Attorney General’s Discretion in Immigration Matters, 85 Mich. L. Rev. 152 (1986) (examining the denial of Extended Voluntary Departure to Salvadorans). Extended Voluntary Departure has been granted to citizens of at least fourteen nations including Cubans, Vietnamese, Iranians, Ethiopians, Afghans, Ugandans, and Poles. García, supra note 2, at 89. However, it was not assigned to Central Americans during the 1980s because the Reagan administration argued that the violence was not substantial enough, that there were sufficient avenues for refugees to seek protection, that the massive numbers of potential petitioners made it administratively impossible, and that providing a blanket protection would encourage additional unwanted migration. See id. at 89–90.
42 García, supra note 2, at 87, 99.
43 See id. at 88, 89.
haven from direct persecution and on-going violence in their home countries.\textsuperscript{44} A very small percentage of these migrants were granted immigration visas or refugee status.\textsuperscript{45} Generally, the United States viewed these and other migrants from Central America “as yet another drain” on a “fragile economy” and therefore treated them as unwelcome intruders.\textsuperscript{46} Furthermore, the Reagan administration argued that containment of Communism in Central America required the establishment of economic stability and that discouraging migration from Central America, especially into the United States, would create stability and foster democracy.\textsuperscript{47}

U.S. foreign and humanitarian policies towards Central America were compromised by the primary objective of containing Communism and establishing democracy in the region.\textsuperscript{48} Although the Refugee Act of 1980 formally adopted the 1967 Protocol’s definition of a refugee and attempted to standardize the process of applying for refugee status, the majority of those receiving refugee status throughout the 1980s continued to come from Communist countries.\textsuperscript{49} The United States’

\textsuperscript{44} See id. at 85.

\textsuperscript{45} See id. This Book Review focuses primarily on those individuals with refugee status. However, there is a statutory distinction between those seeking an immigration visa and those seeking refugee status. See 8 U.S.C. § 1101(a) (2000 & Supp. IV 2004). When an individual applies for an immigrant visa, he seeks permission to enter the United States with the intention of applying for permanent residence status. See id. § 1151(a). There are twenty categories of aliens who do not seek permanent resident status and are not defined as immigrants; they include representatives of other nations, those traveling temporarily for business or pleasure, and students. Id. § 1101(a). All other aliens are considered immigrants. See id. In contrast, the definition of a refugee is based on the individual’s physical location and reason for being outside of their country. See id. A refugee becomes eligible to apply for permanent residence after being physically present in the United States for one year. Id. § 1159(a)(1).

\textsuperscript{46} See García, supra note 2, at 85–86.

\textsuperscript{47} See id. at 86. In addition to denying refuge, the United States sought to discourage migration of any kind out of Central America by providing substantial development aid and funds to assist people in the region. See id. Between 1984 and 1989 the United States provided over $5 billion in development aid to the Central American countries of Guatemala, El Salvador, Costa Rica, Belize, and Honduras. See id. In addition, the United States contributed over $100 million to the UNHCR and the International Committee of the Red Cross for their work with displaced Central Americans. Id. at 86–87. The political purpose of these seemingly generous aid programs is clear in U.S. Coordinator for Refugee Affairs Jonathan Moore’s description of the purpose of the expenditures: “to support the return of economic stability to the region, to establish the foundation for broad-based sustained growth, and to encourage the growth of democracy and democratic institutions.” Jonathan Moore, Developing Solutions for Central American Refugee Problems, 89 Dep’t St. Bull., Aug. 1989, at 87.

\textsuperscript{48} See García, supra note 2, at 1–2, 9.

\textsuperscript{49} Id. at 87–88. By 1990, more than ninety percent of individuals granted refugee status were from Communist or Communist-dominated countries. Id. at 88.
political agenda led the country to condemn Communist countries known to persecute their citizens while failing to acknowledge that many of the regimes it supported were also persecuting their citizens.\(^{50}\) The inconsistency of this policy was noted by activist William Sloane Coffin:

> Were the U.S. government today forcibly returning Soviet Jews to the Soviet Union, or Poles to Poland, neither the Congress nor the American people would stand for it. . . . Why do they tolerate the forceful repatriation of Guatemalans to a government widely viewed as the most brutal in the entire Western hemisphere?\(^{51}\)

Article III of the 1951 Convention requires that States not consider national origin in the granting of refugee status.\(^{52}\) The United States voluntarily accepted an obligation to uphold this Article by agreeing to the 1967 Protocol and adopting the Refugee Act of 1980.\(^{53}\) Yet, to the detriment of thousands of Central Americans, the country disregarded its commitment under international law and regularly considered national origin in determining which persecuted people to protect.\(^{54}\) In 1985, eighty religious and refugee assistance groups challenged this unwritten policy in a class action lawsuit that aimed to secure asylum for Guatemalans and Salvadorans.\(^{55}\) Six years later, a settlement agreement with the federal government prohibited those making refugee decisions from considering a petitioner’s country of origin or whether the United States supported or had a favorable relationship with that country in deciding whether the petitioner had a well-founded fear of per-

\(^{50}\) See id. at 10. U.S. relations with Nicaragua in the mid-1980s provide a good example of simultaneous shifts in refugee and foreign policy. See id. at 114. In 1985, the United States increased support for the Contras’ efforts against the Sandinista government as it began responding to the refugee needs of Nicaraguans. Id. As President Reagan asked Congress for more money for the Contras, the Director of the Immigration and Naturalization Service in southern Florida announced that he would no longer reject Nicaraguans’ asylum claims: “It is agonizing to have to reject their applications because their asylum claims under present regulations are very hard to prove. Nicaraguans are fleeing Communism.” Id.

\(^{51}\) See id. at 96 (quoting William Sloane Coffin, The Task Ahead, in Sanctuary: A Resource Guide for Understanding and Participating in the Central American Refugee’s Struggle 177, 177 (Gary MacEoin ed., 1985)).

\(^{52}\) 1951 Convention, supra note 1, art. 3.


\(^{54}\) See GARCÍA, supra note 2, at 162.

\(^{55}\) See Am. Baptist Churches v. Thornburgh, 760 F. Supp. 796, 799 (N.D. Cal. 1991); GARCÍA, supra note 2, at 111.
secution. The specificity with which the settlement articulated this rule suggests that the court found the government’s unwritten policy exceptionally problematic:

WHEREAS, under the new asylum regulations as well as the old: foreign policy and border enforcement considerations are not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution; the fact that an individual is from a country whose government the United States supports or with which it has favorable relations is not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution; whether or not the United States Government agrees with the political or ideological beliefs of the individual is not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution; the same standard for determining whether or not an applicant has a well-founded fear of persecution applies to Salvadorans and Guatemalans as applies to all other nationalities . . . .

As a result of this settlement, more than 150,000 Salvadorans and Guatemalans who were in the United States had the opportunity to reapply for refugee status. Unfortunately, this decision could not protect the thousands of Salvadorans and Guatemalans who had been denied refugee status and were deported back to their country of origin.

That the United States did not provide refuge for these Central Americans was a humanitarian failure driven by foreign policy concerns. The costs of these policies were borne by the overwhelming majority of refugees who sought and were not given safe haven. Despite pledging in the 1967 Protocol to protect those seeking refuge from well-founded fears of persecution, the United States instead

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56 Am. Baptist Churches, 760 F. Supp. at 799. In February 2005, the U.S. Commission on Religious Freedom reported that the probability of receiving asylum still depended heavily on the claimant’s country of origin. See García, supra note 2, at 162. For example, at that time a person seeking asylum from El Salvador had a six percent chance of being granted asylum while a Cuban had an eighty percent chance. Id.


58 See García, supra note 2, at 112.

59 Am. Baptist Churches, 760 F. Supp. at 799. A mere 2.6% of Salvadoran and 1.8% of Guatemalan applications for asylum were accepted between 1983 and 1990. García, supra note 2, at 113. In a telling contrast, 76.7% of those seeking asylum from the Soviet Union were accepted. See id.

60 See García, supra note 2, at 10, 88–89.

61 See id. at 90.
placed the burden of its foreign policy priorities directly upon the most vulnerable.\textsuperscript{62}

II. Taking the Same Path in the Middle East?

The American invasion and the lack of a coherent strategy to ensure the safety of Iraqi citizens and rebuild post-invasion Iraq are the root cause of Iraqi suffering. The United States is, therefore, to blame, and as Iraqis are obviously fleeing from political persecution, the honorable thing to do is for President Bush to grant these Iraqis asylum in the United States!\textsuperscript{63}

The failure of U.S. policy towards Central America in the 1980s should serve as a warning of the risks of imposing democracy, supporting alternating regimes, and failing to provide adequate responses to humanitarian need.\textsuperscript{64} Instead, the United States has taken a very similar path in Iraq and risks many of the same humanitarian failures.\textsuperscript{65} As it did with Central America, the United States initially supported a regime that it later worked to dismantle.\textsuperscript{66} The invasion of Iraq; the cap-

\textsuperscript{62} See id.; 1951 Convention, supra note 1, art. 1; 1967 Protocol, supra note 20, art. 1.

\textsuperscript{63} Brant Thomas, Letter to the Editor, Asylum for Iraqis, N.Y. TIMES, May 22, 2006, at A20.

\textsuperscript{64} See García, supra note 2, at 8, 14–15.


\textsuperscript{66} See Buzzanco, supra note 65. As early as 1955, the United States made strategic alliances with Iraq and other Middle Eastern countries in an effort to contain Communism through an agreement called the “Baghdad Pact,” which set terms for coordinating regional affairs. Id. In 1958, a nationalist coup forced pro-American King Faisal out of power leading to the dissolution of the Baghdad Pact and a takeover over by Gen. Abdel Karim Kassim. Id. Repression of Saddam Hussein and other leaders of the Iraqi Left under Kassim ended when Kassim was assassinated in a coup led by the Ba’ath Party in 1963. Id. The Ba’ath party received intelligence support from the United States during the following five years, leading eventually to the Ba’aths, including member Saddam Hussein, taking power. Id. The United States brokered an agreement to harden the border between Iraq and Turkey in 1975 which lead to the mass murder of Kurdish rebels in the northern region of
ture, trial, and execution of Saddam Hussein; and the attempts to establish interim democratic governments have all been accompanied by massive civilian death and displacement. The primary justifications for the U.S.-led invasion of Iraq have been the pursuit of terrorists, the need for preventative warfare, and the belief that “democracy is a necessary and lacking institution in the Middle East that will keep the West safe from terrorism.” The argument that forcing the establishment of democracy will create stability and stave off a contrary force, whether it be Communism or terrorism, is not new and has not been proven to be correct. Between the March 2003 U.S.-led invasion and September 2006, as many as 600,000 Iraqi civilians were killed and nearly 900,000

Iraq. Id. During the 1980s, the United States and Iraq jointly opposed the Islamic Revolution in Iran. Id. In that decade, the United States provided Saddam Hussein’s government with over $40 billion in weapons and technology intended for use in fighting Iran, in addition to significant economic aid. Id. In August 1990, Iraq invaded its neighboring country of Kuwait in an effort to control oil exports in the region. See id. Following a warning to retreat by the United States and Great Britain, U.S. troops initiated air and ground attacks and forced the retreat of the Iraqi military from Kuwait. Id. During the 1990s, the United States and United Nations placed sanctions on Iraq in order to instigate regime change which, according to some human rights groups, led to disastrous health conditions and close to one million deaths. Id. As it had done in Nicaragua, the United States then began supporting groups that opposed the leader it had previously helped to install. See News-Hour: Opposing Saddam (PBS television broadcast Aug. 8, 2002), available at http://www.pbs.org/newshour/bb/middle_east/july-dec02/opposition_8-8.html#. Following the attacks of September 11, 2001, the Bush administration began planning an invasion of Iraq as a key facet of the “War on Terror.” See Seymour M. Hersh, The Slopepipe; How Conflicts Between the Bush Administration and the Intelligence Community Marred the Reporting on Iraq’s Weapons, New Yorker, Oct. 27, 2003, at 77. In March 2003, U.S.-led forces invaded Iraq under the pretext of Iraq’s refusal to provide information about its presumptive development of weapons of mass destruction. See Kevin J. Fandl, Recalibrating the War on Terror by Enhancing Development Practices in the Middle East, 16 DUKE J. COMP. & INT’L L. 299, 300 (2006); President George W. Bush, President Bush Addresses the Nation (March 19, 2003), available at http://www.whitehouse.gov/news/releases/2003/03/20030319-17.html. In May 2003, President Bush declared that, “[i]n the battle of Iraq, the United States and our allies have prevailed. . . . [T]he tyrant has fallen, and Iraq is free.” President George W. Bush, President Bush Announces Major Combat Operations in Iraq Have Ended (May 1, 2003), available at http://www.whitehouse.gov/news/releases/2003/05/20030501-15.html.

67 See Gilbert Burnham et al., Mortality After the 2003 Invasion of Iraq: A Cross-Sectional Cluster Sample Survey, 368 THE LANCET 1421, 1421 (2006), available at http://www.thelancet.com/webfiles/images/journals/lancet/s0140673606694919.pdf. The controversial Lancet study estimates that over 650,000 people may have died between March 2003 and September 2006 as a result of the war. Id. That figure includes approximately 100,000 people who died between March 2003 and September 2004. Id. As such, it is possible that as many as 550,000 people died between September 2004 and September 2006. Id.

68 See Fandl, supra note 66, at 310, 324.

69 See id. at 317–18.
sought refuge outside of Iraq. The Iraq Study Group, a bi-partisan initiative to reassess the situation in Iraq, noted the risk of not addressing the refugee crisis: “The number of refugees and internally displaced persons within Iraq is increasing dramatically. If this situation is not addressed, Iraq and the region could be further destabilized, and the humanitarian suffering could be severe.”

These refugees have primarily sought safety in the neighboring countries of Syria and Jordan. Substantial numbers of Iraqi refugees have also gone to Australia, Denmark, Germany, Iran, the Netherlands, Norway, Sweden, the United Kingdom, and the United States. All of these counties, save Norway, exceeded the United States in their acceptance of Iraqi refugees. While geography and the ease of travel play a role in where persecuted peoples seek refuge, the relatively low number of Iraqi refugees in the United States can partially be attributed to an overall drop in the number of refugees accepted into the United States following the attacks of September 11, 2001.

70 See Burnham, supra note 67, at 1421; Tavernise, supra note 3. Estimates of the number of Iraqis who have sought refuge outside of Iraq vary widely. See Burnham, supra note 67, at 1421; Tavernise, supra note 3; UNHCR, Global Refugee Trends, supra note 3, at tbl.2. Even conservative estimates, such as that of the UNHCR, suggest that by the end of 2005 there were approximately 260,000 Iraqi refugees. See UNHCR, Global Refugee Trends, supra note 3, at tbl.2. The disparity likely derives from the methods used to assess the number of refugees and the definition of refugee being applied. See Tavernise, supra note 3.


72 See Tavernise, supra note 3. The U.S. Committee for Refugees and Immigrants estimated that there were 644,500 Iraqi refugees in Syria and Jordan at the end of 2005. Id. Syria has the most open border policies, granting Iraqis fleeing their home country permission to remain legally in Syria as a temporary resident for up to six months. See Refugees Int’l, Iraqi Refugees in Syria, supra note 65.

73 See UNHCR, Global Refugee Trends, supra note 3, at tbl.5.

74 Id. According to the UNHCR, the Iraqi refugee population in the United States as of June 2, 2006 was 9150, compared to 93,173 in Iran, 68,071 in Germany, 27,622 in the Netherlands, 22,763 in the United Kingdom, 22,028 in Sweden, 11,500 in Denmark, 11,471 in Australia, and 8265 in Norway. Id.

75 Donald Kerwin, The Use and Misuse of “National Security” Rationale in Crafting U.S. Refugee and Immigration Policies, 17 INT’L J. REFUGEE L. 749, 756 (2005). Between 1999 and 2001 the United States admitted an average of just over 75,000 refugees per year; in contrast, the average during the following three years was approximately 36,000. See id. One post-September 11th reduction of refugee allowances occurred when the Bush administration immediately suspended refugee resettlement programs, leaving thousands of refugees in refugee camps. See Marisa Silenzi Cianciarulo, The W Visa: A Legislative Proposal for Female and Child Refugees Trapped in a Post-September 11 World, 17 YALE J.L. & FEMINISM 459, 478 (2005). Historically, the United States has accepted more refugees for permanent resettlement than other countries. Id. at 471. This impetuous policy change is particularly alarming in light of the fact that no terrorist in U.S. history, including the September 11th terrorists, entered the country under the refugee resettlement program. See Marisa Silenzi
Congress made seeking refuge significantly more difficult by passing the REAL ID Act of 2005.\(^6\) This Act made major changes in the proof an individual requesting refugee status must provide and the qualifications for refugee status.\(^7\) The Act imposes a new burden of proof on an individual to demonstrate that “race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.”\(^8\) Instead of requiring that an applicant prove a well-founded fear of persecution, the Act now places an exceptionally high burden on refugee applicants to prove the actual reason for their persecution.\(^9\) In effect, the Act changes the definition of a refugee from someone who can prove that they have a legitimate fear of persecution to someone who can prove the motives of their persecutors.\(^10\) Changing the definition of a refugee or the statutory criteria for obtaining refugee status may be an alteration of an unreservable provision of the 1951 Convention.\(^11\) As such, the change stands in direct conflict with the United States’ commitment under the 1967 Protocol.\(^12\)

In addition, the Act prohibits those who know or should have known that their actions afforded material support to a terrorist or-


\(^{7}\) See 8 U.S.C.A § 1158(b)(1)(B)(i). Cianciarulo has argued that interpretation of the REAL ID Act should preserve the Supreme Court’s declaration in Immigration & Naturalization Service v. Elias-Zaccarias that eligibility for asylum should not depend on “direct proof of [the] persecutors’ motives.” See 502 U.S. 478, 483 (1992); Cianciarulo, Terrorism and Asylum Seekers, supra note 75, at 120.

\(^{8}\) See Letter from American Bar Association Governmental Affairs Office to Congressional Representatives, (Feb. 9, 2005) available at http://www.abanet.org/poladv/letters/109th/immigration020905.pdf [hereinafter ABA Letter]. In opposing this provision of the Act, the ABA argued that it would “present nearly insurmountable obstacles for genuine refugees,” because “[p]lacing the additional burden on asylum seekers of not only having to establish why another person took certain actions, but the degree to which that person was motivated by a particular reason to the exclusion of others, is an extreme and unattainable standard of proof.” Id.


\(^{10}\) See 1951 Convention, supra note 1, art. 42; UNHCR, Intro. to Convention & Protocol, supra note 1, at 5.

\(^{11}\) See 1951 Convention, supra note 1, art. 42; UNHCR, Intro. to Convention & Protocol, supra note 1, at 5.
ganization or its members from applying for refuge.\textsuperscript{83} This requirement denies protection to those in the greatest need, particularly those people “who have taken up arms in resistance, in self-defense against such violent forces, as well as for those who have provided financial support, food, or clothing to others engaged in resistance.”\textsuperscript{84} Supporters of the Act justify its hurdles by citing national security concerns; a justification that many have argued is invalid.\textsuperscript{85} Even some organizations that generally support the REAL ID Act have objected strongly to this provision.\textsuperscript{86} Gary Bauer, the president of the conservative public policy group American Values, described the enforcement of the REAL ID Act as having lapsed “into ludicrously,” as he explained that “[t]he concept of material support is being distorted and even the definition of the term ‘terrorism’ is being turned on its ear.”\textsuperscript{87}

\textsuperscript{83} See 8 U.S.C.A. §§ 1158(b) (2)(A)(v), 1182(a) (3)(B) (West 2005). Much has been written about the implications of these exclusions on refugee seekers who have been forced by terrorist groups to participate in or support terrorist activities and, therefore, to commit crimes against peace or humanity. See generally, e.g., Michele L. Lombardo et al., Terrorism, Material Support, the Inherent Right to Self-Defense, and the U.S. Obligation to Protect Legitimate Asylum Seekers in a Post-9/11, Post-PATRIOT Act, Post-REAL ID Act World, 4 REGENT J. INT’L L. 237 (2006). The Antiterrorism and Effective Death Penalty Act of 1996 was the first U.S. act to explicitly bar “providing material support or resources” to “foreign terrorist organizations.” See 18 U.S.C. § 2339A (1994 & Supp. II 1996); Lombardo et al., supra, at 239. This prohibition has been widely criticized for failing to provide an exception for refugees who have been forced to make payments to or provide shelter to terrorist groups. See Amnesty Int’l, USA: Amnesty International Briefing to the Human Rights Committee on the Implementation of the International Covenant on Civil and Political Rights, at 60, AI Index AMR 51/111/2006, July 2006, available at http://web.amnesty.org/library/pdf/AMR511112006ENGLISH/$File/AMR5111106.pdf [hereinafter Amnesty Int’l, Civil and Political Rights]. An example of the implementation of this provision is found in the unpublished decision in Arias v. Gonzales, 143 F. App’x 464, 468 (3d Cir. 2005). The Third Circuit Court of Appeals found that a Colombian man who fearfully made payments on his boss’s behalf to a violent paramilitary group had provided material support to a terrorist organization and was therefore inadmissible. See id.

\textsuperscript{84} See Lombardo et al., supra note 83, at 238.

\textsuperscript{85} See Cianciarulo, Terrorism and Asylum Seekers, supra note 75, at 101–02. While arguing for the passage of the REAL ID Act, Rep. James Sensenbrenner (R-Wis.), its author, referred to four non-citizen terrorists and stated that “[e]very one of these non-9/11 terrorists who tried to kill or did kill honest, law-abiding Americans was an asylum applicant.” See id. In fact, all four of the men he referred to were denied asylum under a more permissive asylum policy. See id. at 105. Furthermore, the Act does not specifically target possible terrorists, but instead affects all refugee applicants. See id. at 103; see also Kerwin, supra note 75, at 757–58 (describing how post-9/11 legislation intended to increase national security has undermined refugee protections).


\textsuperscript{87} Id.
III. SUGGESTIONS FOR FULFILLING INTERNATIONAL REFUGEE OBLIGATIONS

In the 1980s, activists opposed to U.S. involvement in Central America and to the unequal application of statutory protections for refugees argued that humanitarian policy needed to align more closely to foreign policy to ensure the safety of millions of persecuted migrants. They identified an inconsistency in contributing to violence and upheaval that drove millions from their homes without providing sufficient refuge for dislocated victims of persecution. The same argument has been made regarding the U.S. involvement in Iraq, perhaps with even greater force due to the fact that the United States has invaded and occupied Iraq. Sen. Edward Kennedy (D-Mass.) expressed this sense of responsibility: “The refugees are witnesses to the cruelty that stains our age, and they cannot be overlooked. America bears heavy responsibility for their plight. We have a clear obligation to stop ignoring it and help chart a sensible course to ease the refugee crisis. Time is not on our side.”

However, the United States’ obligation to provide humanitarian relief for Iraqis should not and does not depend upon its role in the war. Under the 1967 Protocol, the United States agreed to work with other States to provide refuge for persons with a “well-founded fear of
persecution.”95 Article III of the 1967 Protocol requires that States inform the United Nations of the “laws and regulations they may adopt to ensure the application” of the agreement.96 The Refugee Act of 1980 should have ensured the application of the 1967 Protocol; instead, it was implemented in a discriminatory manner when distinctions based on national origin affected the acceptance of refugee applications.97 As a result, the United States failed to meet the standards established by the 1967 Protocol.98

While the federal courts addressed and attempted to remedy this situation in the 1980s, the passage of the REAL ID Act of 2005 codified the United States’ defiance of its obligations under the 1967 Protocol.99 The United States should acknowledge and act upon its voluntarily accepted obligation by immediately amending the portions of the REAL ID Act that distort the definition of a refugee.100 Congress should repeal the new burden of proof placed on a refugee applicant to prove the reason for his or her persecution.101 In addition, the material support provision of the REAL ID Act should be amended to clarify that the bar only applies to those individuals who pose a danger to the United States and that having provided support under duress or oppression is a defense against this bar.102

In order to fulfill its commitment under the 1967 Protocol, the United States must not only reform the REAL ID Act, but also must adopt policies that conform to international law and provide resources to respond to the urgent needs of persecuted Iraqis.103 Although the

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95 See 1951 Convention, supra note 1, art. 1; 1967 Protocol, supra note 20, art.1.
96 See 1951 Convention, supra note 1, art. 1; 1967 Protocol, supra note 20, art.1.
97 See GARCÍA, supra note 2, at 11–12.
98 See 1951 Convention, supra note 1, art. 1; 1967 Protocol, supra note 20, art.1.
100 See Cianciarulo, Terrorism and Asylum Seekers, supra note 75, at 120; ABA Letter, supra note 79.
101 See Cianciarulo, Terrorism and Asylum Seekers, supra note 75, at 120; ABA Letter, supra note 79.
103 See 1951 Convention, supra note 1, art. 1; 1967 Protocol, supra note 20, art.1.
number of Iraqi refugees in the United States may remain relatively low, the country has an obligation to work with other States to protect refugees.\textsuperscript{104} The preamble to the 1951 Convention explained that “the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem [with an] international scope and nature cannot therefore be achieved without international co-operation.”\textsuperscript{105} As such, the United States should continue to increase contributions to refugee organizations such as the UNHCR and the International Committee of the Red Cross to provide for the basic health, shelter, and education needs of Iraqi refugees throughout the world.\textsuperscript{106} In 2006, the United States contributed approximately $8 million to the UNHCR’s efforts in Iraq, which constituted more than half of the total contributions worldwide.\textsuperscript{107} The UNHCR has stated that it will need almost $60 million to help Iraqi refugees in 2007.\textsuperscript{108} In February 2007, the United States agreed to provide $18 million of the needed $60 million.\textsuperscript{109} While this is a significant increase in actual funds, it does not represent an increase that is proportional to the expected need.\textsuperscript{110}

Additional steps the United States could take include using diplomatic force to influence the actions of other countries in augmenting

\begin{itemize}
\item \textsuperscript{104} See 1951 Convention, supra note 1, art. 1; 1967 Protocol, supra note 20, art.1.; UNHCR, \textit{Global Refugee Trends}, supra note 3, at tbl.5. In February 2007, the Bush administration announced that it will allow 7000 Iraqi refugees to resettle in the United States. Nora Boustany & Joshua Partlow, \textit{U.S. Agrees to Resettle Refugees from Iraq}, Wash. Post, Feb. 15, 2007, at A22. This will be a fourteen-fold increase over the number of Iraqi refugees currently resettled in the United States. See id.
\item \textsuperscript{105} See 1951 Convention, supra note 1, pmbl.
\item \textsuperscript{107} UNHCR, \textit{Supplementary Appeal Iraq Situation Response 12} (Jan. 2007), http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=SUBSITES&idd=45a4a2472. The total cost of UNHCR expenses in 2006 totaled approximately $30 million, about $9 million of this was covered by funds carried over from 2005. \textit{Id.}
\item \textsuperscript{108} \textit{Id.} at 11.
\item \textsuperscript{109} Boustany & Partlow, supra note 104.
\item \textsuperscript{110} See \textit{id.}; UNHCR, \textit{Supplementary Appeal Iraq Situation Response}, supra note 107, at 12.
\end{itemize}
the protected statuses available to Iraqis.\textsuperscript{111} The United States should use its diplomatic power to condemn countries that force Iraqi refugees to return to Iraq before “sufficient guarantees are in place to ensure that their return is safe and dignified.”\textsuperscript{112} By doing so, the United States will uphold the 1951 Convention’s prohibition against the return of refugees if their lives or freedom will be threatened.\textsuperscript{113} Looking beyond the basic requirements of the 1967 Protocol, the United States might follow the lead of many European countries by creating alternative protections for Iraqis who have not qualified for refugee status.\textsuperscript{114} For example, Norway, Sweden, Switzerland, and Belgium have all granted subsidiary forms of protection or indefinitely extended deportation deadlines for Iraqis whose refugee applications have been denied.\textsuperscript{115}

**Conclusion**

In *Seeking Refuge: Central American Migration to Mexico, the United States, and Canada*, María Cristina García articulates the 1980s activist argument that the United States had a moral and legal obligation to provide refuge for Central American refugees.\textsuperscript{116} The country’s legal obligation originated in its joining the 1967 Protocol and was codified in domestic law through the passage and interpretation of the Refugee Act of 1980.\textsuperscript{117} Without addressing the moral issue of whether involvement in the upheaval that led to mass migration from Central America created an additional moral obligation, this Book Review argues that the international legal obligation alone demanded consistent, fair application of refugee policy. Through their protest, civil disobedience, lobbying, and legal efforts, activists drew attention to the fact that unof-


\textsuperscript{113} 1951 Convention, supra note 1, art. 33.

\textsuperscript{114} European Council on Refugees and Exiles, supra note 111, at 463. The legal means for providing such protections exist in Extended Voluntary Departure as discussed earlier. See supra note 41.

\textsuperscript{115} Id. President Bush could exercise his authority under existing law to expand refugee protections in the case of “an unforeseen emergency refugee situation” that is “justified by grave humanitarian concerns.” 8 U.S.C.A. § 1157(b) (West 2005).

\textsuperscript{116} García, supra note 2, at 92.

\textsuperscript{117} Am. Baptist Churches v. Thornburgh, 760 F. Supp. 796, 799 (N.D. Cal. 1991); 1967 Protocol, supra note 20, art. 1; García, supra note 2, at 87.
ficial U.S. policy failed to comply with international and domestic law.118

The U.S.-led war in Iraq has created hundreds of thousands of refugees.119 As it was in the 1980s, the United States is now faced with responding to a refugee crisis that it had a hand in creating. In the 1980s the country discriminatorily implemented laws that complied with international law; the United States has now gone beyond its past abrogation by passing the REAL ID Act of 2005, which substantially negates the essential principle that a person with a “well-founded fear of persecution” will be protected as a refugee.120 In order to fulfill its legal duty under the 1967 Protocol, the United States must amend the portions of the REAL ID Act that contradict its international obligations and act definitively to provide the resources and support that Iraqi refugees require.

118 García, supra note 2, at 86.
119 See Tavernise, supra note 3.
“’TIL DEATH DO THEM PART?”: ASSESSING THE PERMANENCE OF GOODRIDGE

Michael T. Mullaly*


Abstract: In America’s Struggle for Same-Sex Marriage, Daniel Pinello explores the social and political underpinnings of the controversy surrounding so-called “gay” marriage. Pinello’s analysis is directed toward using the struggle for marriage equality as an empirical basis for achieving a better understanding of how public policy derives from the interactions of citizens, interest groups, and government entities. This Book Review argues the importance to policy formation of a force Pinello tends to underemphasize: the counter-majoritarian influence of constitutional law and judicial review. The significance of this factor is considered primarily in relation to state constitutional amendments that purport to “define” marriage as being strictly between one man and one woman. This Book Review concludes that such amendments, by their nature, violate the Federal Equal Protection Clause. Separate consideration is given to the particular illegitimacy and vulnerability of such an amendment in Massachusetts, where state constitutional jurisprudence requires equal marriage rights for same-sex couples.

Introduction

Amid the sea of “Let the People Vote!” placards, with strains of Amazing Grace, This Little Light of Mine, and Battle Hymn of the Republic ringing through the air, one might have guessed that a vigorous suffrage battle was underway.¹ Yet this otherwise reasonable conclusion would have done nothing to explain the accompanying “No Special Rights for Sodomites” poster, to say nothing of the giant red “Jesus Is Lord” balloon flying forty feet above Boston Common—at least until the threat of lightning brought it down.² Then there was the opposition: less probable agents of disenfranchisement could scarcely be imagined.³ Stand-

¹ See Blogging the ConCon, Bay Windows, July 12, 2006, http://tinyurl.com/y5gw4m [hereinafter Blogging the ConCon].
² See id.
³ See id.
ing across Beacon Street from the “Let the People Vote!” contingent, they sang spirituals and hymns and carried signs reading “What If We Had Voted on Loving v. Virginia?” and “No Discrimination in the Constitution.”

For all its apparent incongruity, this bizarre set of circumstances actually makes complete sense—but not until the illusoriness of the voting-rights dispute is exposed.

Stripped of all such pretense, this was a demonstration about the civil rights of gays and lesbians and the role of the courts in defending them. The controversy was fueled, in particular, by the recognition of equal marriage rights for same-sex couples by the Massachusetts Supreme Judicial Court (SJC). Indeed, unfolding that day before the eyes of anyone who cared to see was a textbook demonstration of the practice, more rampant now than ever, of mobilizing the rhetoric of democracy to disguise unprincipled attacks on the independent judiciary.

Whatever their intention, those assembled under the supposed banner of voting rights had gathered, in fact, to inveigh against a much-embattled function of the courts—that of enabling minorities to exercise their constitutional rights.

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4 *Id.* In *Loving v. Virginia*, the Supreme Court found statutes banning interracial marriage “subversive of the principle of equality at the heart of the Fourteenth Amendment” and, thus, unconstitutional. 388 U.S. 1, 12 (1967). It is not difficult to imagine what the outcome of a popular vote on the issue would have been: at the time *Loving* was decided, seventy-two percent of Americans were opposed to interracial marriages and forty-eight percent went so far as to assert that such marriages should be criminally punishable. Daniel R. Pinello, *America’s Struggle for Same-Sex Marriage* 169 (2006).

5 See *Blogging the ConCon*, *supra* note 1. The ostensible “disenfranchisement” derived not from restrictions upon who may vote, but rather from adherence to long-established constitutional restrictions on which issues are appropriately made the subject of a popular vote. *See id.* For instance, a sign on the “Let the People Vote!” side proclaimed: “Say ‘No’ to Judicial Tyranny! Say ‘Yes’ to the Democratic Process!!” *Id.* Another read: “No to Gay Marriage: It’s Not About Civil Rights, It’s About Right and Wrong.” *Id.*

6 *See id.*

7 *See supra* note 5; *see also* Opinions of the Justices to the Senate, 802 N.E.2d 565, 572 (Mass. 2004); Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 968, 969 (Mass. 2003).

8 See Alexis de Tocqueville, *Democracy in America* 269 (J.P. Mayer ed., George Lawrence trans., HarperCollins 2000) (1850) (“I am aware of a hidden tendency in the United States leading the people to diminish judicial power . . . . [S]ooner or later these innovations will have dire results and . . . it will be seen that by diminishing the magistrates’ independence, not judicial power only but the democratic republic itself has been attacked.”); Sandra Day O’Connor, Editorial, *The Threat to Judicial Independence*, WALL ST. J., Sept. 27, 2006, at A18 (documenting an increase in populist animosity toward the judicial branch and in threats to its independence, and cautioning that both run counter to fundamental theories underlying American governance); *see also supra* note 5.

The day of these events, July 12, 2006, the Massachusetts General Court (the state legislature) was scheduled to hold a constitutional convention. Among the constitutional amendments slated for consideration was one from the Massachusetts Family Institute (MFI) seeking statewide implementation of its narrow and exclusionary “definition” of civil marriage. If successful, this proposed amendment (“the initiative”) would require that Massachusetts prospectively “define marriage only as the union of one man and one woman.”

An amendment of this kind to a state constitution would hardly be unique. Already twenty-seven states have included language in their constitutions intended to exclude same-sex couples from civil marriage, beginning with Alaska in 1998. Yet there is no precedent for the adop-

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10 Scott Helman, A Legislative Vote Hangs in the Balance, BOSTON GLOBE, July 12, 2006, at B1; see also MASS. CONST. pt. II, ch. I, § I, art. I. In Massachusetts, a constitutional convention consists of the Senate and House of Representatives meeting in joint session to determine whether proposed amendments to the constitution merit eventual placement on the ballot. MASS. CONST. amend. art. XLVIII, Init., pt. IV, §§ 4, 5.


12 Initiative Petition for a Constitutional Amendment to Define Marriage, Massachusetts Initiative Petition 05-02 (2005), available at http://www.ago.state.ma.us/filelibrary/petition05-02.rtf [hereinafter Initiative Petition 05-02] (“When recognizing marriages entered into after the adoption of this amendment by the people, the Commonwealth and its political subdivisions shall define marriage only as the union of one man and one woman.”).

13 See, e.g., OHIO CONST. art. XV, § 11.

Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.

Id. Ohio’s amendment is of a particularly pernicious sort; in addition to barring same-sex marriages from legal recognition, it also attempts to foreclose the possibility of statutorily enacted provisions for civil unions or domestic partnerships. Id.

tion of a constitutional amendment to prohibit same-sex marriage in a state whose highest court has found the denial of marriage equality to be unconstitutional. The potential for this situation to arise currently exists only in Massachusetts—the single American state to acknowledge same-sex couples’ constitutional entitlement to equal marriage rights.

See Andrea Estes & Scott Helman, Legislature Again Blocks Bid to Ban Gay Marriage: Lawmakers Recess Without Voting on Constitutional Amendment, BOSTON GLOBE, Nov. 10, 2006, at A1 (noting that the Massachusetts Legislature appeared to have killed a proposed constitutional amendment to limit marriage to opposite-sex couples); see also Opinions of the Justices to the Senate, 802 N.E.2d 565, 572 (Mass. 2004); Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 968, 969 (Mass. 2003). A constitutional amendment adopted in Hawaii in 1998 very nearly establishes such a precedent, however. Compare Haw. Const. art. I, § 23 (“The legislature shall have the power to reserve marriage to opposite-sex couples.”), and Haw. Rev. Stat. § 572-1 (2005) (“[T]he marriage contract . . . shall be only between a man and a woman . . . .”), with Baehr v. Lewin, 852 P.2d 44, 68 (Haw. 1993) (Levinson, J., plurality opinion) (“On remand, in accordance with the ‘strict scrutiny’ standard, the burden will rest on [the State] to overcome the presumption that [a statutory ban on same-sex marriage] is unconstitutional . . . .”). In 1993, a plurality of the Supreme Court of Hawaii held that a statutory ban on same-sex marriage “regulates access to the marital status and its concomitant rights and benefits on the basis of the applicants’ sex” and, therefore, “establishes a sex-based classification” which must survive strict-scrutiny review in order to be ruled constitutional. Baehr, 852 P.2d at 64, 68. On remand, the trial court found that the State had failed to rebut the statute’s presumptive unconstitutionality—a conclusion the Hawaii Supreme Court affirmed. Baehr v. Miike, No. 91–1394, 1996 WL 694235, at *22 (Haw. Cir. Ct. 1996), aff’d 950 P.2d 1234, 1234 (Haw. 1997). In response, the Hawaii Legislature proposed a constitutional amendment intended to restore its authority to ban same-sex marriage. Haw. Const. art. I, § 23; Pinello, supra note 4, at 27. This proposed amendment appeared on the November 1998 ballot, where it received the approval of sixty-nine percent of voters. Pinello, supra note 4, at 27.

16 Opinions of the Justices, 802 N.E.2d at 572; Goodridge, 798 N.E.2d at 968, 969. The high courts of New Jersey and Vermont have each held that same-sex couples are entitled, as a matter of constitutional law, to the same rights heterosexual couples derive from marriage. Lewis v. Harris, 908 A.2d 196, 223, 224 (N.J. 2006); Baker v. Vermont, 744 A.2d 864, 867 (Vt. 1999). Both courts, however, very deliberately exempt one particular marriage right from the otherwise broad sweep of their rulings—the simple right to have one’s putative marriage-equivalent actually called a marriage by the sovereign authority that established it. Lewis, 908 A.2d at 224; Baker, 744 A.2d at 867. Many find this difference significant and disturbing; others trivialize it. Compare Opinions of the Justices, 802 N.E.2d at 569 (“Because the proposed law by its express terms forbids same-sex couples entry into civil marriage, it continues to relegate same-sex couples to a different status.”), and Lewis, 908 A.2d at 226 (Poritz, C.J., concurring in part and dissenting in part) (“We must not underestimate the
In Massachusetts, a proposed initiative amendment does not become eligible for placement on the ballot until it obtains the support of not less than twenty-five percent of the General Court in each of two consecutive legislative sessions. Once on the ballot, the initiative must then receive a majority of the popular vote before it can operate to amend the state constitution. The July 12, 2006 constitutional convention was the first occasion on which the MFI initiative came before the legislature. The measure was widely expected to receive the support necessary to advance to the next session of the General Court. Instead, before a vote on the merits of the initiative could be taken, the convention decided by a simple majority vote to recess until November 9, 2006. This outcome infuriated the MFI, for whom success on the merits would have required less than half of a simple majority. The initiative was sidelined again on November 9, when the convention voted to recess until the final day of the legislative session—January 2, 2007—rather than take a substantive vote on the measure. Because an initiative expires unless it succeeds in the legislative session during which it is introduced, proponents and detractors of the MFI initiative alike believed that the November 9 convention had ensured the measure’s demise.

power of language. Labels set people apart as surely as physical separation on a bus or in school facilities. . . . By excluding same-sex couples from civil marriage, the State declares that it is legitimate to differentiate between their commitments and [those] of heterosexual couples.

17 Mass. Const. amend. art. XLVIII, Init., pt. IV, §§ 4, 5. To merit consideration by the General Court, an initiative must have been signed by a number of registered voters not less than three percent of the total number of votes cast in the preceding gubernatorial election. Id. § 2.

18 Id. § 5. More precisely, the initiative is required to receive the support of both (1) a majority of voters who choose to vote on the initiative itself and (2) thirty percent of voters who cast a ballot generally. Id.

19 Helman, supra note 10.

20 Id.; see Mass. Const. amend. art. XLVIII, Init., pt. IV, §§ 4, 5.


23 Estes & Helman, supra note 15.


17 Mass. Const. amend. art. XLVIII, Init., pt. IV, §§ 4, 5. To merit consideration by the General Court, an initiative must have been signed by a number of registered voters not less than three percent of the total number of votes cast in the preceding gubernatorial election. Id. § 2.

18 Id. § 5. More precisely, the initiative is required to receive the support of both (1) a majority of voters who choose to vote on the initiative itself and (2) thirty percent of voters who cast a ballot generally. Id.

19 Helman, supra note 10.

20 Id.; see Mass. Const. amend. art. XLVIII, Init., pt. IV, §§ 4, 5.


23 Estes & Helman, supra note 15.

Would it were so.\textsuperscript{25} On November 24, Governor Mitt Romney and the ten original signatories to the MFI’s initiative petition brought suit against Secretary of the Commonwealth William Galvin and Senate President Robert Travaglini.\textsuperscript{26} The plaintiffs sought, among other even more extraordinary forms of relief, a declaration that “the Marriage Initiative Amendment is a matter constitutionally required to be voted on by the joint session . . . and that such a vote is required to be on the merits of the initiative.”\textsuperscript{27} In a unanimous decision, the SJC correctly noted that it lacked “statutory authority to issue a declaratory judgment concerning the constitutionality of legislative action, or inaction, in this matter.”\textsuperscript{28} Yet the court, in uncharacteristically expansive dicta, proceeded to issue the practical equivalent of a declaratory judgment nonetheless:

We conclude that, while the plaintiffs cannot obtain declaratory judgment or mandamus against the Legislature, and, therefore, the complaint must be dismissed, it is our obligation, in these circumstances, to restate what [the constitution] requires.

. . . .

. . . The members of the joint session have a constitutional duty to vote, by the yeas and nays, on the merits of all pending initiative amendments before recessing on January 2, 2007 . . . .\textsuperscript{29}

\textsuperscript{25} Editorial, \textit{A Shameful Reversal of Rights}, \textit{Boston Globe}, Jan. 3, 2007, at A10 (“[A] vote for the amendment is a vote to eliminate a civil right that is contained in the state Constitution—a shameful and perhaps unique reversal of the long forward march of civil rights . . . . Each such vote is, as Governor-elect Deval Patrick said yesterday, ‘irresponsible and wrong.’”).

\textsuperscript{26} Complaint at 1, Doyle v. Sec’y of the Commonwealth, 858 N.E.2d 1090 (Mass. 2006) (No. SJ 2006–0486) [hereinafter Romney Complaint]; \textit{see also} \textit{Initiative Petition 05-02}, \textit{supra} note 12. Plaintiffs sued in their individual capacities; Travaglini was sued principally in his capacity as Presiding Officer of the constitutional convention. \textit{See} Romney Complaint, at 1.

\textsuperscript{27} Romney Complaint, \textit{supra} note 26, at 7. Plaintiffs also requested writs of mandamus to compel Sen. Travaglini to hold a vote on the merits of the MFI initiative and, failing that, to compel Secretary Galvin to place the measure directly on the ballot. \textit{See id.} at 7–8; Brief of the Plaintiffs, \textit{Doyle}, 858 N.E.2d 1090 (No. SJC–09887), at 1–2. These requests were so plainly overreaching that counsel abandoned them at oral argument. \textit{See Doyle}, 858 N.E.2d at 1092 n.4.

\textsuperscript{28} \textit{Doyle}, 858 N.E.2d at 1095.

\textsuperscript{29} \textit{Id.} at 1092–93. The court did not merely lack statutory authority to issue a declaratory judgment—it was statutorily forbidden from doing so. \textit{See Mass. Gen. Laws} ch. 231A, \textsection 2 (2006) (“[T]his section shall not apply to the governor and council or the legislative
As a direct result of the SJC’s strongly-worded opinion, lawmakers at the January 2 constitutional convention decided to vote on the merits of the MFI amendment.\textsuperscript{30} As expected, the measure received the support of slightly more than twenty-five percent of legislators (passing 62 yeas to 134 nays) and thereby became cleared for consideration by the next General Court.\textsuperscript{31}

Already twice the subject of litigation, the MFI initiative continues to raise elemental and largely unresolved questions of law.\textsuperscript{32} Should further legal challenges to the initiative be advanced, the central inquiry is likely to be whether the character of the proposed amendment is rights-stripping or merely definitional.\textsuperscript{33} If the former characteriza-
tion is found to control, the courts would then have to determine whether the Massachusetts and Federal Constitutions each could abide, let alone compel, enforcement of a measure so antithetical to the protection of equality and fundamental rights.\textsuperscript{34}

This Book Review attempts to resolve these constitutional questions. Part I examines Daniel Pinello’s \textit{America’s Struggle for Same-Sex Marriage} and finds it to be neglectful of the courts’ role in ensuring that state constitutions do not become vehicles for discrimination.\textsuperscript{35} Part II defends judicial review, argues that the framers intended its potentially anti-majoritarian effect, and discusses how the MFI initiative threatens the integrity of the Massachusetts Constitution. Part III argues for the nullification, on federal equal protection grounds, of all state constitutional provisions that abridge rights discriminatorily.

\section*{I. An Indecent Proposal?}

In \textit{America’s Struggle for Same-Sex Marriage}, author Daniel Pinello chronicles the ensuing social and political controversies in five states where, through varied means and with widely differing outcomes, marriage licenses have been issued to same-sex couples.\textsuperscript{36} For each featured state, Pinello constructs a separate narrative by juxtaposing related excerpts from his interviews with numerous, ideologically-diverse subjects.\textsuperscript{37} The book profiles California,\textsuperscript{38} Massachusetts,\textsuperscript{39} New Mexico,\textsuperscript{40} seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.”), \textit{with id.} at 636 (Scalia, J., dissenting) (characterizing the amendment as definitional) (“The constitutional amendment before us here is . . . a modest attempt . . . to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws.”).

\textsuperscript{34} \textit{See Schulman}, 850 N.E.2d at 512–13 (Greaney, J., concurring). “If the initiative is approved by the Legislature and ultimately adopted, there will be time enough, if an appropriate lawsuit is brought, for this court to resolve the question whether our Constitution can be home to provisions that are apparently mutually inconsistent and irreconcilable.” \textit{Id.} at 512; \textit{see also Romer}, 517 U.S. at 633 (majority opinion).

\textsuperscript{35} \textit{See generally Pinello, supra} note 4.

\textsuperscript{36} \textit{See id.} at 18–20.

\textsuperscript{37} \textit{See id.} at 21 (expressing author’s intention “to collect and to present . . . the unvarnished words of the people who lived them”).

\textsuperscript{38} \textit{Id.} at 73–101. On February 12, 2004, San Francisco Mayor Gavin Newsom announced his decision to instruct the San Francisco County Clerk to issue marriage licenses to same-sex couples. \textit{Id.} at 73–74. Licenses were issued to 4037 same-sex couples during that so-called “Winter of Love” until March 11, when California Attorney General Bill Lockyer secured a judicial stay from the California Supreme Court. \textit{Id.} at 74, 80. Later, in August, the high court also held that the California same-sex marriages were void from their inception. Lockyer v. City of San Francisco, 95 P.3d 459, 498 (Cal. 2004). The court quite correctly identified the issuance of marriage licenses as a ministerial rather than a
discretionary duty. *Id.* at 472. The court also found that the relevant statutes confer no authority (ministerial or discretionary) upon a mayor with regard to marriage licensure; these powers are vested in county clerks and recorders alone. *Id.* at 471. Significantly, the court emphasized that the constitutionality of California’s statutory ban on same-sex marriage was not a matter before the court and that the *Lockyer* decision therefore “is not intended, and should not be interpreted, to reflect any view on that issue.” *Id.* at 464.

In a fascinating coda to the *Lockyer* affair, the California Legislature, on September 6, 2005, became the first in the United States to pass, without judicial prompting, a measure legalizing same-sex marriage. Assem. B. 849, 2005-06 Reg. Sess. (Cal. 2005); Dean E. Murphy, *Same Sex Marriage Wins Vote in California*, N.Y. Times, Sept. 7, 2005, at A14 [hereinafter Murphy, *Marriage Wins Vote*]. Some opponents of same-sex marriage unwittingly showcased the disingenuousness of their customary attacks against the judiciary by mobilizing the exact same arguments against what, one imagines, they might call “activist legislators.” See Murphy, *Marriage Wins Vote*, supra. Assemblyman Ray Haynes, for example, offered the following insight: “Engaging in social experimentation with our children is not the role of the legislature. . . . [W]e are gambling with the lives and future of generations not yet born.” *Id.* (emphasis added).

California Governor Arnold Schwarzenegger immediately vowed to veto the measure—and ultimately did so. *California: No Same-Sex Marriages*, N.Y. Times, Sept. 30, 2005, at A18. Schwarzenegger justified the veto by pointing to the fact that the marriage ban had been adopted by the people via Proposition 22 (an initiative that appeared on the 2000 California ballot)—and that it would therefore be unconstitutional for the legislature to permit same-sex marriage absent a court decision or another popular vote. Cal. Prop. 22 (2000) (codified at CAL. FAM. CODE § 308.5 (2006)) (“Only marriage between a man and a woman is valid or recognized in California.”); Dean E. Murphy, *Schwarzenegger to Veto Same-Sex Marriage Bill*, N.Y. Times, Sept. 8, 2005, at A18. Schwarzenegger’s claim is probably correct because Proposition 22 does not contain a provision allowing for its unilateral amendment or repeal by the legislature. See CAL. CONST. art. II, § 10(c) (“The Legislature . . . may amend or repeal an initiative statute [solely] by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval.”); Cal. Prop. 22 (2000).

The main constitutional defense of the legislature’s attempt to establish same-sex marriage without a prior popular vote is an argument that Proposition 22 concerned only whether California would recognize same-sex marriages established in other jurisdictions. Assem. B. 849 § 3(k), 2005-06 Reg. Sess. (Cal. 2005). This strained reading of Proposition 22 is plausible only because California amended its marriage statutes in 1977 to remove certain ambiguities that could have been construed to permit same-sex marriage. See 1977 CAL. STAT. ch. 339, § 1 (codified in part at CAL. FAM. CODE § 300 (2006)). As a result of these modifications, the establishment of same-sex marriages in California was already clearly prohibited at the time Proposition 22 was passed. *Id.* Arguably, then, the only purpose of Proposition 22 was to ensure that same-sex marriages formed in other jurisdictions were not recognized in California. See *id.*; Cal. Prop. 22 (2000). Only on this decidedly counter-textual reading could Proposition 22 present no constitutional impediment to the establishment, by ordinary legislation, of marriage equality in California. See CAL. CONST. art. II, § 10(c); Cal. Prop. 22 (2000).

39 See Pinello, supra note 4, at 33–72.

40 See *id.* at 1–17. Victoria Dunlap, clerk of Sandoval County, New Mexico, began issuing same-sex marriage licenses on February 20, 2004. *Id.* at 1, 2. Constituents had requested such licenses, and no one was able to demonstrate to Dunlap’s satisfaction that New Mexico law expressly forbade them. *Id.* at 1, 2–4. Sixty-four same-sex couples were issued licenses on February 20. *Id.* at 4. That same day, New Mexico Attorney General Patricia Madrid issued an expedited advisory letter asserting that New Mexico law re-
New York, \(^{41}\) and Oregon, \(^{42}\) but among these and all other states, only Massachusetts has issued marriage licenses to same-sex couples state-wide or for any appreciable length of time.\(^{43}\) The exceptional stability of same-sex marriage in Massachusetts is surely a result of the judicial (or, strictly speaking, constitutional) origin of marriage equality in that state.\(^{44}\) The great advantage of constitutional litigation, in general, is its ability to shield fundamental rights from the vicissitudes of politics.\(^{45}\) So it was here: in *Goodridge v. Depart-

stricted marriage to “a man and a woman” and that same-sex marriage licenses ought not to have any legal effect. *Id.* at 16. Although the Sandoval County Commission voted to allow the same-sex couples married on February 20 to register their marriages with the clerk’s office, it also joined Attorney General Madrid in seeking (and obtaining) a restraining order to enjoin Dunlap from issuing additional same-sex marriage licenses. *Id.* The legal status of the New Mexico same-sex marriages remains uncertain. See *id.*

\(^{41}\) See *id.* at 143–55. On February 27, 2004, Jason West, the Mayor of the Village of New Paltz, New York, presided over the marriage of twenty-four same-sex couples. *Id.* at 144. He felt it “crystal-clear” that New York law permitted same-sex marriage. *Id.* at 143. Within a week, West was criminally charged with solemnizing marriages without a license. *Id.* at 144. The District Attorney, having concluded that a trial would be inflammatory, dropped all charges against West in July 2005. *Id.* at 147. In July 2006, the Court of Appeals of New York effectively repudiated West’s interpretation of New York law governing marriage. See *Hernandez v. Robles*, 855 N.E.2d 1, 5 (N.Y. 2006). The court ruled that New York statutes impliedly forbid same-sex marriage and that the state constitution does not require such marriages to be recognized. *Id.* at 5–6.

\(^{42}\) See *Pinello*, *supra* note 4, at 102–42. Largely at the prompting of the gay rights organization Basic Rights Oregon, the Multnomah County Commission issued approximately 3000 marriage licenses to same-sex couples during March and April 2004. *Id.* at 103, 105–06. That November, Measure 36—a ballot initiative forbidding same-sex marriage by constitutional amendment—passed by a margin of fifty-seven to forty-three. Or. Const. art. XV, § 5a; *Pinello*, *supra* note 4, at 102, 113, 123, 131. In April 2005, the Supreme Court of Oregon declared the same-sex marriages to have been void from their inception. *Li v. Oregon*, 110 P.3d 91, 102 (Or. 2005). The court invalidated the Oregon same-sex marriage licenses on the grounds that Multnomah County officials had lacked the authority to issue them. See *id.* at 91. The *Li* decision preceded, and was thus independent of, Measure 36. *Id.*

\(^{43}\) See *Pinello*, *supra* note 4, at 19. See generally *Li*, 110 P.3d 91; *Lockyer v. City of San Francisco*, 95 P.3d 459 (Cal. 2004). Pinello acknowledges that the town clerk of Asbury Park, New Jersey issued marriage licenses to seven same-sex couples on March 8, 2004, but neglects to further discuss the circumstances surrounding these New Jersey licenses. *Pinello*, *supra* note 4, at 19.

\(^{44}\) See, e.g., *Opinions of the Justices to the Senate*, 802 N.E.2d 565, 571 (Mass. 2004). Here, the court emphasizes its function of shielding a minority’s rights from the antipathy of the majority: “The argument . . . that, apart from the legal process, society will still accord a lesser status to [same-sex] marriages is irrelevant. Courts define what is constitutionally permissible . . . . That [anti-gay] prejudice exists is not a reason to insist on less than the Constitution requires.” *Id.* Recall that *Opinions of the Justices* itself resulted from a legislative attempt to forestall marriage equality. *Id.* at 566, 569; see also *Pinello*, *supra* note 4, at 19, 186.

ment of Public Health, the SJC held that “barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution.” 46 The order in Goodridge was stayed for 180 days to allow the legislature to enact corrective legislation independently, without further involvement by the court. 47 Yet, at the time, most legislators were disinclined to implement marriage equality unless absolutely necessary. 48 Within a month of the Goodridge decision, a bill entitled “An Act Relative to Civil Unions” was brought before the Senate. 49 Its stated intention was “to give same-sex couples the opportunity to obtain the legal protections, benefits, rights and responsibilities associated with civil marriage, while preserving the traditional, historic nature and meaning of the institution of civil marriage.” 50 These dual objectives were to be accomplished by the creation of “civil unions” for same-sex couples, mirroring civil marriage in every way but name. 51

www.glad.org/marriage/Goodridge/MAmarriagecomplaint.PDF (“The . . . practice of refusing same-sex couples the opportunity to apply for a marriage license is in violation of . . . their rights under the Declaration of Rights, articles I, VI, VII, X, XII and XVI, and Pt. II, c.1, sec. 1, art. 4, as amended, of the Massachusetts Constitution.”); see also Lockyer, 95 P.3d at 485.

46 Goodridge, 798 N.E.2d at 969.
47 Id. at 970.
48 See Pinello, supra note 4, at 45, 56. In March 2004, at a constitutional convention, the General Court voted 105 to 92 in favor of the Travaglini-Lees Amendment. Id. at 56. That Amendment, if successful, would have excluded same-sex couples from marriage and then established a separate legal status for them equivalent to marriage in everything but name. Id. Under Massachusetts law, a constitutional amendment is either an initiative amendment (introduced to the legislature by an initiative petition) or a legislative amendment (introduced to the legislature by a Senator or Representative). Mass. Const. amend. art. XLVIII, Init., pt. IV, § 1. To succeed, a legislative amendment (of which the Travaglini-Lees Amendment was one) must receive the votes of a majority of the General Court in each of two consecutive legislative sessions and then the majority of votes cast by the public. Id. at §§ 4, 5; Pinello, supra note 4, at 55–56. Consistent with the above, the Travaglini-Lees Amendment came before the next General Court at a constitutional convention held in September 2005. Pinello, supra note 4, at 71. Only then was the Amendment defeated, by a vote of 157 to 39. Id. The MFI initiative, unlike the Travaglini-Lees Amendment, intentionally makes no provision for extending a parallel set of benefits (i.e., civil unions) to same-sex couples. Mineau Press Conference, supra note 11. Some of the votes against the Travaglini-Lees Amendment, particularly at the second convention, resulted not from support for same-sex marriage, but from opposition to extending any kind of benefits whatsoever to same-sex couples. See Pinello, supra note 4, at 182.
50 Id. § 1(g).
51 Id. § 2. The tangible (i.e., not strictly dignitary, expressive, or symbolic) benefits and burdens of marriage identified by the court in Goodridge include: joint Massachusetts income tax filing; automatic rights to inherit the property of an intestate spouse; the right to share the medical insurance policy of one’s spouse; equitable division of marital property
The Senate admitted “grave doubt” as to whether the bill would satisfy the constitutional demands of Goodridge. Yet these doubts did not prompt the Senate to reject the constitutionally suspect measure. Instead, demonstrating a predilection for minimal compliance with Goodridge, the Senate requested an advisory opinion as to the measure’s constitutionality from the Justices of the SJC. In Opinions of the Justices to the Senate, the court stated that the Senate’s proffered “civil union” scheme would be unconstitutional. The court found that the proposal’s only purpose was to ensure reservation of the word “marriage” for heterosexual couples. Unable to imagine any legitimate state interest that this form of discrimination rationally could be thought to advance, the SJC was constrained to conclude that the Senate proposal had been motivated by a naked desire to ascribe same-sex relationships an inferior status. The court’s insinuation that proponents of the bill sought only to legislate this prejudice was not subtle: “If . . . no message is conveyed by eschewing the word ‘marriage’ and replacing it with ‘civil union’ for same-sex ‘spouses,’ we doubt that the attempt to circumvent [our] decision in Goodridge would be so purposeful.”

Opinions of the Justices dispelled any lingering doubts as to whether marriage equality was required in Massachusetts as a matter of constit...

53 See id.
54 Id. In Massachusetts, each house of the legislature has the authority “to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions.” Mass. Const. pt. II, ch. III, art. II.
55 Opinions of the Justices to the Senate, 802 N.E.2d 565, 572 (Mass. 2004) (“The bill maintains an unconstitutional, inferior, and discriminatory status for same-sex couples . . . .”). Advisory opinions, it is important to acknowledge, “are . . . given by the justices as individuals . . . without the aid of arguments, are not adjudications by the court, and do not fall within the doctrine of stare decisis.” Commonwealth v. Welosky, 177 N.E. 656, 658 (Mass. 1931). However, because (1) the majorities in Goodridge (which was not advisory) and Opinions of the Justices comprise exactly the same individuals and (2) the opinions decide the same constitutional question, Opinions of the Justices should be entitled to unusual deference. See Opinions of the Justices, 802 N.E.2d at 571, 572 (indicating that the issue presented is equivalent to that in Goodridge); Goodridge, 798 N.E.2d at 948, 974.
56 Opinions of the Justices, 802 N.E.2d at 571. “We recognize the efforts of the Senate to draft a bill in conformity with the Goodridge opinion. Yet the bill, as we read it, does nothing to ‘preserve’ the civil marriage law, only its constitutional infirmity.” Id. at 569.
57 See id. at 570.
58 Id.
tional law. The result was a remarkable shift in the dynamics of the marriage debate in Massachusetts. Prior to Goodridge, civil rights activists carried the full burden of persuading legislators to enact measures for the recognition of same-sex couples. After Opinions of the Justices, by contrast, equal marriage was a legal certainty in Massachusetts—so much so that at least a constitutional amendment would be required to alter that result. Redressing this dramatic inversion of power is the admitted purpose of the MFI, and the MFI initiative is but its most recent attempt to accomplish this goal by saddling the Massachusetts Constitution with discrimination.

Pinello’s book attempts to distill, from numerous accounts of the same-sex marriage controversy, a better model of “how citizens, interest groups, and government interact to produce policy in America.” Not surprisingly, Pinello is quick to identify “the role and impact of courts in a democratic society” as a prominently recurring theme in his study. He goes on, however, to identify “a conspicuous absence of consensus [among academics] whether American courts are important governing institutions with their own distinct power.” Pinello’s ultimate contribution to this debate is surprisingly tepid—particularly given his consistent praise for Goodridge. Indeed, he concludes only that his findings should “diminish the perception that courts are hollow hopes for significant social reform.” This clear understatement of the judicial capacity to correct social injustice is difficult to reconcile with the effusive sentence that immediately follows it:

With nearly all other state and national policy makers at odds with its goal, the Massachusetts Supreme Judicial Court none-
theless achieved singular success in expanding the ambit of who receives the benefits of getting married in America, in inspiring political elites elsewhere in the country to follow suit, and in mobilizing grass-roots supporters to entrench their legal victory politically.69

Pinello may have contemplated a more modest role for the judiciary because past court decisions recognizing marriage equality have had such unpleasant secondary effects—including a torrent of state constitutional amendments and so-called “Defense of Marriage Acts.”70 The threat of popular backlash has, without doubt, delayed or otherwise tempered past efforts to litigate violations of gay rights.71 But such concerns cannot alone explain Pinello’s reserved conclusion, particularly given his contention that the negative repercussions of Goodridge have been “relatively modest.”72

Inexact conceptions of the judicial task have led many—and perhaps Pinello as well—to define too attenuated a role for the courts in the struggle for equal marriage.73 Pinello, for example, tends to portray courts as fully autonomous sources of public policy, neglecting to make clear that almost all policies “created” by the courts represent their attempt to give effect to statutory provisions or, in the case of marriage equality, to constitutional constraints.74 The relevant distinction is between purposefully outcome-driven policymaking (which freely selects a given policy), on the one hand, and principled constitutional adjudication (which sometimes necessitates a given policy), on the other.75 One particularly clear mischaracterization of the judiciary as outcome-driven occurs when Pinello asserts that the Goodridge court “achieved singular success . . . in inspiring political elites elsewhere in the country to follow suit [by issuing marriage licenses to same-sex couples in their

69 Pinello, supra note 4, at 193.
70 See id. at 32.
71 See id. at 24–25.
72 See id. at 180.
73 Compare id. at 193 (discussing the success of the SJC in attaining a “goal”), with Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 966 (Mass. 2003) (“We owe great deference to the Legislature to decide social and policy issues, but it is the traditional and settled role of the courts to decide constitutional issues.”) (emphasis added).
74 See Goodridge, 798 N.E.2d at 966 (“The Massachusetts Constitution requires that legislation meet certain criteria and not extend beyond certain limits. It is the function of courts to determine whether these criteria are met and whether these limits are exceeded.”); Pinello, supra note 4, at 30–31, 32, 33, 193.
75 See supra note 73.
own jurisdictions]. . . .”76 To describe the behavior of these politicians as a “singular success” for the SJC is to play right into the hands of those waiting to pounce at the first hint of a supposed “activist” judge.77 Pinello’s attribution of “success” here suggests that the Goodridge court had political motives when, in fact, there is no cause whatsoever to doubt that the only “goal” of the court was a faithful interpretation of the constitution.78

An additional consequence of this mistaken characterization becomes apparent in Pinello’s treatment of constitutional amendments purporting to forbid same-sex marriages.79 At no point, unfortunately, does Pinello discuss the possibility that such amendments are themselves vulnerable to legal challenge.80 Such a broad omission suggests that Goodridge has been treated more like ordinary public policy (e.g., equal marriage is desirable) than constitutional law (e.g., due process and equal protection require equal marriage).81 This is a dangerous error for Pinello and others to propagate—especially when the fate of

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76 Pinello, supra note 4, at 193. Pinello is referring mainly to the municipal officials who issued marriage licenses to same-sex couples in San Francisco, Sandoval County (New Mexico), New Paltz (New York), and Multnomah County (Oregon). See id. at 18–20, 32.

77 See id. at 32, 193; O’Connor, supra note 8.

78 Compare Goodridge, 798 N.E.2d at 966 (asserting a basis in law), with Pinello, supra note 4, at 32, 193 (suggesting a basis in politics). The attribution here is especially improper because many of the politicians whom Pinello discusses knowingly violated the marriage statutes in their respective jurisdictions. See Pinello, supra note 4, at 75–76 (referring to the refusal of San Francisco’s mayor to abide by an explicit same-sex marriage ban that, in his view, was unconstitutional). But see id. at 2–4 (relating how the Sandoval County clerk, upon finding that New Mexico law was silent on same-sex marriage, refused to prohibit such marriages). Municipal officials who adopt extralegal tactics undermine their own legitimacy and may even compromise more fundamental protections. See Lockyer v. City of San Francisco, 95 P.3d 463 (Cal. 2004) (emphasizing societal interest in “ensuring that public officials execute their official duties in a manner that respects the limits of the authority granted to them as officeholders”). As the California Supreme Court aptly notes, it remains inappropriate, post-Goodridge, for executive officials in other jurisdictions to make ad hoc declarations that state marriage laws are unconstitutional and not to be followed. See id. at 492 n.36. A legitimate use of Goodridge, by contrast, would be to file an analogous lawsuit in one’s jurisdiction and then argue that the local constitution, like the Massachusetts Constitution, compels the result reached in Goodridge. See id. at 485.

79 See, e.g., Pinello, supra note 4, at 45–72 (discussing attempts to amend the Massachusetts Constitution in response to Goodridge).

80 See generally id.

81 See Goodridge, 798 N.E.2d at 961 (“We conclude that the [same-sex] marriage ban does not meet the rational basis test for either due process or equal protection.”).
marriage equality itself may come to turn upon the legal viability of this disturbing new class of rights-stripping amendments.  

II. LET THE JUSTICES ADJUDICATE!

Tension between courts and legislators, though perhaps brought to a new prominence by the same-sex marriage controversy, is neither unique to Massachusetts nor a recent development. This sort of friction has always been a predictable outcome of the judiciary’s legitimate protection of minority rights from undue abridgment by majority rule. Indeed, it would be decidedly odd were legislatures—beholden as they are, in theory, to democratic majorities—not regularly found arrayed against courts engaged in their potentially anti-majoritarian function of judicial review. Nonetheless, the recent inundation of our public discourse with accusations that “activist judges” and “elitist judges” are “legislat[ing] from the bench” remains a rather alarming

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82 See Schulman v. Attorney Gen., 850 N.E.2d 505, 512 (Mass. 2006) (Greaney, J., concurring). If the MFI initiative succeeds in amending the Massachusetts Constitution, and the resulting amendment survives legal challenge, the consequences will be enormous:

The . . . effect . . . will be to make same-sex couples, and their families, unequal to everyone else; this is discrimination in its rawest form. Our citizens would, in the future, be divided into at least three separate and unequal classifications: heterosexual couples who enjoy the right to marry; same-sex couples who were married before the passage of the amendment (but who, if divorced, would not be permitted to remarry someone of the same sex); and same-sex couples who have never married and, barring the passage of another constitutional amendment on the subject, will be forever denied that right.

Id.

83 See 102 Cong. Rec. 4459–60 (1956) (the “Southern Manifesto”) (“We regard the decisions of the Supreme Court in the school [racial desegregation] cases as a clear abuse of judicial power. It climaxes a trend in the Federal Judiciary undertaking to legislate, in derogation of the authority of Congress, and to encroach upon the reserved rights of the States and the people.”). See generally Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004).

84 See The Federalist No. 51, supra note 9, at 332 (James Madison or Alexander Hamilton) (identifying the legislative branch as that most prone to abuse its power and advocating extensive structural precautions “to guard against [its] dangerous encroachments”).

85 See The Federalist No. 52, supra note 9, at 337 (James Madison or Alexander Hamilton) (“As it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the [House of Representatives] should have an immediate dependence on, and an intimate sympathy with, the people.”); John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 78 (1980) (noting diminished capacity of the political process to correct the unjust treatment of electoral minorities and the disenfranchised).
development. The trend is worrisome, in particular, because friction among the framers to establish structural protections of liberty. Courts assessing the constitutionality of legislation are performing their job, and today’s characterization of the separation of powers as an annoyance or usurpation for which the judiciary is to be blamed is a most unwise innovation.

Yet opponents of equal marriage find it expedient, and perhaps even necessary, to dismiss judicial review as though it were somehow a misappropriation of power by the nation’s courts. Goodridge itself has come to be held out as a paradigmatic example of judicial usurpation, with some of the most scathing criticism coming from dissenting Justices on the SJC. Indeed, the wholly imagined perils of Goodridge—including the destruction of democracy, marriage itself, and God’s

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86 O’Connor, supra note 8.
87 See The Federalist No. 51, supra note 9, at 331 (James Madison or Alexander Hamilton) (“[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition.”); O’Connor, supra note 8.
88 O’Connor, supra note 8.
89 See, e.g., President George W. Bush, State of the Union Address (Jan. 20, 2004), 150 Cong. Rec. H20, H23. President George W. Bush, for example, has mobilized such rhetoric to transform a discussion about the importance of marriage into one about the ostensibly subversion of democracy by tyrannical judges:

A strong America must also value the institution of marriage. . . . Activist judges . . . have begun redefining marriage by court order, without regard for the will of the people and their elected representatives. On an issue of such great consequence, the people’s voice must be heard. If judges insist on forcing their arbitrary will upon the people, the only alternative left to the people would be the constitutional [amendment] process.

Id.

90 See Opinions of the Justices to the Senate, 802 N.E.2d 565, 574 (Mass. 2004) (Sosman, J., dissenting) (“[I]t is beyond the ability of . . . this court, no matter how activist it becomes in support of [same-sex marriage,] to confer . . . on same-sex ‘married’ couples . . . the entire package of benefits and obligations that being ‘married’ confers on opposite-sex couples.”). It is shocking to find judges themselves, surely aware of the acute harm caused the judiciary and constitution, participating in the “judicial activist” smear campaign. See O’Connor, supra note 8.
91 See Lewis v. Harris, 908 A.2d 196, 222 (N.J. 2006) (“Before the Legislature has been given the opportunity to act, the dissenters are willing to substitute their judicial definition of marriage for the statutory definition [and] for the definition that has reigned for centuries . . . .”); Laura Mansnerus, Legislators Vote for Gay Unions in New Jersey, N.Y. Times, Dec. 15, 2006, at A1.
92 See Mel White, Religion Gone Bad 187 (2006).
natural order\textsuperscript{93}—are so fanciful and outrageous that one not knowing better could mistake the SJC for a modern-day Star Chamber.\textsuperscript{94} Other attacks on judicial review are presented in a distinctly more moderated way, often evincing concern for the ability of overworked judges to make sound policy decisions.\textsuperscript{95} Here the danger of disingenuousness is extreme, as many speakers cynically adopt this tack simply to lend an underserved semblance of objectivity to their criticism of policies whose substance—not source—they find objectionable.\textsuperscript{96}

In fairness, some objections to the judicial recognition of marriage equality are more misguided than cunning.\textsuperscript{97} For instance, one Pinello interviewee supports equal marriage in principle but takes offense at what she considers the unspoken message of the related litigation: that voters are not “smart enough or fair enough or wise enough” to extend such rights themselves at the polls.\textsuperscript{98} Though genuine, this viewpoint fails to appreciate the reason for—and effect of—the framers’ decision to temper our democracy with a written constitution.\textsuperscript{99} In America, nei-

\textit{Id.} (omissions in original) (quoting Dr. James Dobson).

\textsuperscript{93} See Pinello, supra note 4, at 158–59 (“[E]ven though [the court] can write a new definition for marriage, I say that marriage is a part of the moral law, that it was spoken into our very creation. . . . It goes right to the core of our understanding of scripture, of what’s good, of what’s right, and what’s best.”) (quoting interviewee).

\textsuperscript{94} See Frederic W. Maitland & Francis C. Montague, A Sketch of English Legal History 118–19 (James F. Colby ed., 1915) (describing the Star Chamber as “a political court and a cruel court, a court in which divines sought to impose their dogmas and their ritual upon a recalcitrant nation”).

\textsuperscript{95} See, e.g., Pinello, supra note 4, at 172–73. Pinello interviewee Tim Nashif argues: “Legislators are sensitively going to listen to hearings and [the] people[. . . .] . . . When an activist judge drops a gavel and says, this is the way it should be, he has no clear understanding of . . . how that choice is going to affect the economy, jobs, and society.” Id.

\textsuperscript{96} See id. at 159. MFI’s Ronald Crews remarks: “What [the Goodridge] court did . . . overlooked mountains of social science evidence, historical precedent, and the right of legislators to legislate. Instead, by fiat, the court created a social experiment . . . . What they’ve done is create—not homosexual marriage—but fatherless unions and motherless unions.” Id. (emphasis added); see also O’Connor, supra note 8 (“[E]lected officials routinely score cheap points by railing against the ‘elitist judges,’ who are purported to be out of touch with ordinary citizens and their values.”).

\textsuperscript{97} See Pinello, supra note 4, at 134.

\textsuperscript{98} Id.

\textsuperscript{99} See Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003). Goodridge acknowledges the diversity, but also the legal irrelevance, of public opinion concerning the propriety of same-sex marriage:
ther the electorate itself (irrespective of how smart, fair, or wise it is) nor its representatives may define the substance or applicability of constitutional rights by means of an ordinary vote.\(^{100}\) The people have the authority to advance marriage equality, but they certainly are not entitled to withhold or impede it.\(^{101}\) More generally, it is both dangerous and incorrect to propose that asserting a constitutional claim impugns the intelligence, fairness, or wisdom of the people—litigation, in truth, advances the fundamental will of the people by enabling the judiciary to accomplish its constitutionally intended purpose of redressing legal injuries swiftly and justly.\(^ {102}\)

Many people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman, and that homosexual conduct is immoral. Many hold equally strong religious, moral, and ethical convictions that same-sex couples are entitled to be married, and that homosexual persons should be treated no differently than their heterosexual neighbors. \textit{Neither view answers the question before us. Our concern is with the Massachusetts Constitution as a charter of governance for every person properly within its reach.} Id. (emphasis added).

\(^ {100}\) See U.S. Const. art. V; see also Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental, and as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent. 

\textit{Marbury}, 5 U.S. (1 Cranch) at 176. The framers’ insistence upon an independent judiciary provides further evidence that the purpose of a constitution was, in their view, to shield the provisions contained therein from public sentiment. \textit{See The Federalist No. 78, supra note 9, at 500 (Alexander Hamilton) (“If . . . the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices [to permit the] independent spirit . . . essential to the faithful performance of so arduous a duty.”).}

\(^ {101}\) See Opinions of the Justices to the Senate, 802 N.E.2d 565, 569 (Mass. 2004) (“[Equal marriage] is not a matter of social policy but of constitutional interpretation.”). Here, the court is criticizing not the substance of popular opinion but the notion that it is, at all times, a relevant and appropriate consideration. \textit{See id.} The infirm practice of measuring constitutional law against popular opinion necessarily subordinates the former to the latter, giving rise to a false and dangerous sense of entitlement among voters to decide who is entitled to what fundamental rights. \textit{See, e.g., Pinello, supra note 4, at 134 (quoting voter offended by reliance on courts for the acknowledgment and defense of gay rights).}

\(^ {102}\) See U.S. Const. art. III, § 2 (requiring case or controversy as a prerequisite to adjudication); \textit{see also James Madison, Memorial and Remonstrance Against Religious Assessments, Address Before the General Assembly of the Commonwealth of Virginia (June 20, 1785), in 2 The Writings of James Madison 185–86} (Gaillard Hunt ed., Putnam 1901).
Goodridge and Opinions of the Justices held that no legitimate governmental purpose is advanced by the exclusion of same-sex couples from marriage.\textsuperscript{103} Rarely is a direct response made to this controlling legal argument, as the inquiry tends to be diverted to the entirely separate question of what governmental interests are furthered by "heterosexual" marriage.\textsuperscript{104} The social utility of heterosexual marriage, however substantial, is inapposite for the simple reason that same-sex marriages are intended to exist alongside opposite-sex marriages—not to replace them.\textsuperscript{105} While a great number of legitimate state interests are surely achieved by permitting heterosexual couples to marry,\textsuperscript{106} the desirability of heterosexual marriage, standing alone, provides no justification at all for barring same-sex couples from marriage.\textsuperscript{107} Indeed, it suggests that the state is likely to have an analogous interest in encouraging same-sex couples to marry.\textsuperscript{108} Thus, recognizing that no rational reason exists

\begin{quote}
[I]t is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of Citizens, and one of the noblest characteristics of the late Revolution. The free men of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle.
\end{quote}

MADISON, supra, at 185–86.

\textsuperscript{103} See Opinions of the Justices, 802 N.E.2d at 570 ("[N]either may the government, under the guise of protecting ‘traditional’ values, even if they be the traditional values of the majority, enshrine in law an invidious discrimination that our Constitution . . . forbids.").

\textsuperscript{104} See, e.g., Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 995 (Mass. 2003) (Cordy, J., dissenting). When the lead dissent in Opinions of the Justices attempts to rationalize the exclusion, it can only lamely propose that Massachusetts may wish to call its same-sex unions something other than “marriages” to avoid confusing other jurisdictions. See 802 N.E.2d at 575–76 (Sosman, J., dissenting).

\textsuperscript{105} See Opinions of the Justices, 802 N.E.2d at 569; Goodridge, 798 N.E.2d at 965, 969.

\textsuperscript{106} Goodridge, 798 N.E.2d at 995 (Cordy, J., dissenting). The encouragement of a stable family environment in which potential children could be raised tends to be the strongest governmental interest cited. See, e.g., Hernandez v. Robles, 855 N.E.2d 1, 7 (N.Y. 2006).

\textsuperscript{107} See Goodridge, 798 N.E.2d at 965, 968.

\textsuperscript{108} Id. at 965; Hernandez, 855 N.E.2d at 32 (Kaye, C.J., dissenting).

The State plainly has a legitimate interest in the welfare of children, but excluding same-sex couples from marriage in no way furthers this interest. In fact, it undermines it. Civil marriage provides tangible legal protections and economic benefits to married couples and their children, and tens of thousands of children are currently being raised by same-sex couples in New York. Depriving these children of the benefits and protections available to the children of opposite-sex couples is antithetical to their welfare . . . . The State’s interest in a stable society is rationally advanced when families are established and remain intact irrespective of the gender of the spouses.

Hernandez, 855 N.E.2d at 32 (Kaye, C.J., dissenting).
for excluding same-sex couples from civil marriage, the SJC acted squarely within the scope of its authority in Goodridge and, in fact, would have been remiss had it decided the case differently or fashioned the remedy less completely.\textsuperscript{109}

Now, however, the MFI initiative is poised to riddle the Massachusetts Constitution with alarming and ungainly contradictions.\textsuperscript{110} The venerable and elegant constitutional guarantees of due process and equal protection would be precisely and designedly countervailed by operation of the theoretically degenerate MFI initiative.\textsuperscript{111} Nor could the irreconcilability be any more sweeping or fundamental.\textsuperscript{112} Given the constitutional holdings in Goodridge and Opinions of the Justices, it is now a legal certainty that any enforcement of the MFI amendment would require nothing short of suspending the due process and equal protection guarantees of same-sex couples unjustly denied the right to wed.\textsuperscript{113} As one SJC Justice notes,

There is no Massachusetts precedent discussing, or deciding, whether the initiative procedure may be used to add a constitutional provision that purposefully discriminates against an oppressed and disfavored minority of our citizens in direct contravention of the principles of liberty and equality protected by . . . the Massachusetts Declaration of Rights.\textsuperscript{114}

Fortunately, Massachusetts and federal law together provide the tools needed to vindicate our storied traditions of due process and equal protection and, thus, to thwart the MFI’s perverse effort to turn the Massachusetts Constitution against the liberty, freedom, and dignity of those who need its protections most.\textsuperscript{115}

\textsuperscript{109} See Goodridge, 798 N.E.2d at 966 (“To label the court’s role as usurping that of the Legislature . . . is to misunderstand the nature and purpose of judicial review.”). Compare \textit{id.}, with Lewis v. Harris, 908 A.2d 196, 224 (N.J. 2006) (civil unions sufficient), and Baker v. Vermont, 744 A.2d 864, 867 (Vt. 1999) (civil unions sufficient).


\textsuperscript{111} See \textit{id.} at 512.

\textsuperscript{112} See \textit{id.}

\textsuperscript{113} See Opinions of the Justices to the Senate, 802 N.E.2d 565, 572 (Mass. 2004); Goodridge, 798 N.E.2d at 968.

\textsuperscript{114} Schulman, 850 N.E.2d at 512 (Greaney, J., concurring).

\textsuperscript{115} See Romer v. Evans, 517 U.S. 620, 631–32 (1996); Schulman, 850 N.E.2d at 513 n.3 (Greaney, J., concurring).
III. KEEPING STATE CONSTITUTIONS CONSTITUTIONAL

There is, perhaps, no better indication of how wildly specious the MFI’s siren song is than what happened the last time a state simply “let the people vote” on whether to eviscerate the civil rights of gays and lesbians. In 1992, the people of Colorado amended the state constitution through a referendum (“Amendment 2”) to require that:

Neither the State of Colorado . . . nor any of its . . . political subdivisions . . . shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.

Amendment 2 was immediately challenged on equal protection grounds. The Colorado Supreme Court determined that the measure burdened a fundamental right—namely, that of equal participation in the political process—and thus applied strict scrutiny. The court then proceeded to hold Amendment 2 unconstitutional, finding that it furthered no “compelling governmental interest in a narrowly tailored way.” The U.S. Supreme Court upheld this outcome, but on substantially different grounds. In particular, the Court did not subject the measure to strict scrutiny. Instead, it ruled that Amendment 2 could not withstand even the exceedingly deferential “rational basis” test—a conclusion that obviated any need to engage in a separate strict scrutiny analysis.

116 See U.S. Const art. VI; U.S. Const amend. XIV, § 1; Romer, 517 U.S. at 631–32.
117 Romer, 517 U.S. at 624.
118 Evans v. Romer, 882 P.2d 1335, 1339 (Colo. 1994), aff’d on other grounds, 517 U.S. at 626.
119 Id.
120 Id. at 1350. Colorado argued that Amendment 2 was essential to “deterring factionalism;” “preserving the integrity of the state’s political functions;” “preserving the ability of the state to remedy discrimination against suspect classes;” “preventing the government from interfering with personal, familial, and religious privacy;” “preventing government from subsidizing the political objectives of a special interest group;” and “promoting the physical and psychological well-being of Colorado children.” Id. at 1339–40.
121 Romer, 517 U.S. at 626.
122 Id. at 635.
123 Id. at 632. The rational basis test is summarized as follows: “[I]f a law neither burdens a fundamental right nor targets a suspect class, [the Court] will uphold the legislative classification so long as it bears a rational relation to some legitimate end.” Id. at 631. Note that the dissent in Romer incorrectly insinuates that use of the rational basis test may be
Despite the Court’s application of the most deferential standard of review, its scrutinization of the Colorado amendment was rigorous and evinced particular dissatisfaction with the measure’s brazenly malicious purpose:

Amendment 2 fails, indeed defies, [rational basis] inquiry. First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects . . . .

In order to appreciate why the Court relegates Amendment 2 to an “invalid” class of legislation, one must understand what kind of “broad and undifferentiated disability” the Colorado amendment intended to perpetrate upon gays and lesbians. Defenders of Amendment 2 contend that the measure sought only to prevent gays and lesbians from procuring “special treatment” and would be limited in effect to keeping them “in the same position as all other persons.” But, as the Court rightly observed,

Amendment 2’s reach may not be limited to specific laws passed for the benefit of gays and lesbians. It is a fair, if not necessary, inference from the broad language of the amendment that it deprives gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings.

Thus Romer, at a minimum, may be relied upon for the proposition that it is unconstitutional to withhold the general benefits and protections of the law from a group based solely upon that group’s unpopularity among the electorate. This aspect of Romer critically undermines
state constitutional amendments seeking to prohibit same-sex marriage. Proving the vulnerability of these amendments requires both (1) demonstrating their essential similarity to Amendment 2 in Colorado and (2) explicating the theoretical underpinnings of the Romer Court’s assertion, concerning Amendment 2, that “[i]t is not within our constitutional tradition to enact laws of this sort.”

In Massachusetts, where marriage equality is required by law, it is undeniable that a constitutional amendment purporting to define marriage strictly as the union of one man and one woman is nothing but a particularized version of Colorado’s Amendment 2. Opinions of the Justices definitively established that civil marriage is a benefit that derives from universally applicable state law. The availability of same-sex marriage is therefore most emphatically not a “special benefit” conferred upon gays and lesbians. Accordingly, any constitutional provision that aims to “define” marriage in a manner that excludes same-sex couples per se strips gays and lesbians of a fundamental right the law itself makes generally available. That such is the precise objective of those who promote amendments of this unprincipled variety is made wholly apparent by their otherwise inexplicable insistence upon and obsession with modifying constitutions. Few people, until recently, would have ever regarded state constitutions as sensible or even vaguely appropriate repositories for supposed family law “definitions.”

Looking beyond Massachusetts, it is essential to remember that the failure of all other states to acknowledge the marriage rights of same-sex couples does nothing to prove that there are no such yet-to-be rec-

_principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare.

Id. at 633.


130 See Romer, 517 U.S. at 633.

131 See Schulman, 850 N.E.2d at 513 n.3 (Greaney, J., concurring).


133 See id.

134 See Schulman, 850 N.E.2d at 512 (Greaney, J., concurring).

135 See id.

136 See Ely, supra note 85, at 88 (quoting Lon Fuller). Note that the purported “definitions” of marriage advanced by those who assert a need to “protect” that institution from the inclusion of same-sex couples tend to be far more illustrative of anti-gay prejudice than of the attributes of marriage itself. Note, Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage, 117 HARV. L. REV. 2684, 2700–01 (2004) (“The [Federal Defense of Marriage] Act ‘defines’ marriage only so far as to say that it is something that same-sex couples cannot have. The singling-out function of this exclusionary definition is quite similar to the effect of Colorado’s Amendment 2 . . . .”).
ognized constitutional entitlements elsewhere. The obvious-yet-profound corollary of this observation is that provisions claiming to ban same-sex marriage are rights-stripping in all jurisdictions where the underlying right to equal marriage itself exists—regardless of whether that right is formally acknowledged. Moreover, because American constitutional law regards marriage as a fundamental (and therefore universal) right, the discrimination inherent in these anti-gay provisions very directly implicates the protections extended by the Court in Romer.

Two interrelated standards should guide any assessment of a law’s legitimacy: (1) electoral vulnerability and (2) general applicability. In the absence of either, the likelihood that the enactment in question is, as the Supreme Court concluded in Romer, “not within our constitutional tradition” is substantially increased. Electoral vulnerability is present when those significantly burdened by a particular piece of legislation possess, in the aggregate, enough influence to exert a correspondingly substantial effect upon the composition of the legislature. This structural protection of liberty, despite its immense power, can do nothing to protect fundamental rights the democratic majority


138 See Schulman, 850 N.E.2d 512, 513 & n.3 (Greaney, J., concurring). An unacknowledged right to equal marriage very plausibly exists throughout the United States on account of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. U.S. Const. amend. XIV, § 1; see Schulman, 850 N.E.2d at 512, 513 & n.3 (Greaney, J., concurring); Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 959 (Mass. 2003).

139 See Romer v. Evans, 517 U.S. 620, 630 (1996); Loving v. Virginia, 388 U.S. 1, 12 (1967). The U.S. Supreme Court discusses same-sex marriage throughout Lawrence, almost certainly in response to Justice Scalia’s argument that the majority’s holding eviscerates the supposed legal basis upon which equal marriage can be forbidden. See 539 U.S. at 604–05 (Scalia, J., dissenting). Writing alone, Justice O’Connor suggests arguments for the constitutionality of same-sex marriage bans that would, in her view, survive the majority’s holding. Id. at 585 (O’Connor, J., concurring). Interestingly, however, the majority never attempts to refute Justice Scalia’s assertion that its decision lays the foundation for a constitutional imperative that same-sex marriage be recognized. Compare id. at 578 (majority opinion) (saying only that “[t]he present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter”), with id. at 585 (O’Connor, J., concurring) (directly contesting Justice Scalia’s claim).


142 See McCulloch, 17 U.S. (4 Wheat.) at 428 (“The only security against the abuse of [the taxation] power, is found in the structure of government itself. In imposing a tax, the legislature acts upon its constituents.”).
regards with indifference or hostility—an important argument for judicial review.\textsuperscript{143} General applicability, on the other hand, is present when a law makes no arbitrary or improper distinctions in its distribution of benefits and burdens.\textsuperscript{144} This precept, without which there could be no meaningful legislative accountability, relies substantially upon the Equal Protection Clause for enforcement:

Invocation of the equal protection clause . . . does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact . . . The framers of the Constitution knew, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus escape the political retribution that might be visited upon them if larger numbers were affected.\textsuperscript{145}

Most Western philosophy reflects essentially the same view, finding justice to reside in general principles from which no one is exempt.\textsuperscript{146}

\textsuperscript{143} See United States v. Caroline Prods., 304 U.S. 144, 152–53 n.4 (1938); Ely, supra note 85, at 78 (“What the [political] system . . . does not ensure is the effective protection of minorities whose interests differ from most of the rest of us. For if it is not the ‘many’ who are being treated unreasonably but rather only some minority, the situation will not be so comfortably amenable to political correction.”).

\textsuperscript{144} See Smith, 494 U.S. at 879; Ry. Express Agency, 336 U.S. at 112, 113 (Jackson, J., concurring); see also Plyler v. Doe, 457 U.S. 202, 216 (1982); Loving v. Virginia, 388 U.S. 1, 8–9 (1967).

\textsuperscript{145} Ry. Express Agency, 336 U.S. at 112 (Jackson, J., concurring).

\textsuperscript{146} See, e.g., Immanuel Kant, Fundamental Principles of the Metaphysic of Morals, in KANT’S CRITIQUE OF PRACTICAL REASON AND OTHER WORKS 1, 19–20 (Thomas Kingsmill Abbott ed. & trans., London, Longmans, Green, & Co., rev. 4th ed. 1899) (1785) (“I do not, therefore, need any far-reaching penetration to discern what I have to do in order that my will may be morally good. . . . I only ask myself: Canst thou also will that thy maxim should be a universal law? If not, then it must be rejected . . . .”); see also John Rawls, A THEORY OF JUSTICE 12 (1971).

Among the essential features of the [original position] is that no one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. . . . [T]he parties do not know their conceptions of the good or their special psychological propensities. The principles of justice are chosen behind a veil of ignorance. . . . [A]ll are similarly situated and no one is able to design principles to favor his particular condition . . . .
Constitutional amendments obstructing same-sex marriage are not generally applicable in any meaningful sense.\textsuperscript{147} Nor have they proven susceptible to correction by ordinary political processes; such measures instead have spread like a contagion and now defile the constitutions of more than half of all American states.\textsuperscript{148} Only in Arizona have voters arguably defeated an amendment of this kind on the ballot.\textsuperscript{149} By contrast, in Mississippi, a constitutional provision opposing marriage equality captured the support of an astonishing eighty-six percent of voters in 2004.\textsuperscript{150} Statistics this dismal suggest that equal protection challenges to such enactments may be as strategically necessary as they are legally meritorious.\textsuperscript{151}

An amendment to the Massachusetts Constitution seeking to end marriage equality could not withstand an equal protection challenge modeled after that in \textit{Romer}.\textsuperscript{152} Indeed, the parallels between \textit{Romer} and \textit{Goodridge} are striking.\textsuperscript{153} \textit{Romer} concludes: “Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws.”\textsuperscript{154} \textit{Goodridge} condemns discriminatory marriage policies on exactly the same grounds and, also

\begin{footnotesize}
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\item 147 \textit{See} Schulman v. Attorney Gen., 850 N.E.2d 505, 512, 513 & n.3 (Mass. 2006) (Greaney, J., concurring). These amendments are generally applicable only insofar as they forbid both heterosexuals and homosexuals from marrying someone of the same sex. \textit{See} Hernandez v. Robles, 855 N.E.2d 1, 20 (N.Y. 2006) (Graffeo, J., concurring). Reliance upon such obviously contrived constructions, however, is both disingenuous and insulting. Cf. Lawrence v. Texas, 539 U.S. 558, 567 (2003) (“To say the issue [at stake is] simply the right to engage in certain sexual conduct demeans the claim . . . put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.”).
\item 148 \textit{See} Task Force, \textit{Marriage Map}, \textit{supra} note 14; Jenkins, \textit{supra} note 14.
\item 150 Pinello, \textit{supra} note 4, at 102.
\item 151 \textit{See} United States v. Caroline Prods., 304 U.S. 144, 152–53 n.4 (1938). To be clear, the enmity of the majority does not itself \textit{confer} constitutional status upon an asserted “minority” right, just as popular support for a constitutional right does not strip it of its constitutional status. \textit{See id}. This in no way conflicts with the proposition that laws tending to suggest “prejudice . . . against discrete and insular minorities” are \textit{more likely} to abrogate constitutional rights. \textit{See id}.
\item 154 \textit{Romer}, 517 U.S. at 635.
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like *Romer*, declares that laws grounded in animus *can never* rationally advance a legitimate governmental purpose:

The marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason. The absence of any reasonable relationship between, on the one hand, an absolute disqualification of same-sex couples who wish to enter into civil marriage and, on the other, protection of public health, safety, or general welfare, suggests that the marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual. “The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”

Thus, were something like the MFI initiative ever to succeed in Massachusetts, one dispositive inquiry in the inevitable equal protection challenge—whether a rational basis underlies the measure—would have to be answered, as a matter of state constitutional law, have to be answered with a resounding “No!”

The prospects for success in states other than Massachusetts are vastly more difficult to predict and depend, for the most part, upon what standard of review is selected by the courts. At present, only

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155 *Goodridge*, 798 N.E.2d at 968 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)). In a remark that will doubtless cause him much difficulty in the future, Justice Scalia effectively concedes that bans on same-sex marriage are based solely upon “persistent prejudices” of the kind condemned by the Massachusetts court: “If moral disapprobation of homosexual conduct is ‘no legitimate state interest’ for purposes of proscribing that conduct, . . . what justification could there possibly be for denying the benefits of marriage to homosexual couples? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry.” *Lawrence v. Texas*, 539 U.S. 558, 604–05 (2003) (Scalia, J., dissenting) (internal citations omitted).

156 See *Goodridge*, 798 N.E.2d at 968; see also *Schulman*, 850 N.E.2d at 512 (Greaney, J., concurring) (“[T]he *Goodridge* decision may be irreversible because of its holding that no rational basis exists, or can be advanced, to support the definition of marriage proposed by the initiative and the fact that the *Goodridge* holding has become part of the fabric of the equality and liberty guarantees of our Constitution.”); *Opinions of the Justices*, 802 N.E.2d at 570 (“For no rational reason the marriage laws of [Massachusetts] discriminate against a defined class; no amount of tinkering with language will eradicate that stain.”). Further, strong evidence that civil rights and liberties were not intended to be among the permissible subjects of an initiative petition makes the MFI amendment and its ilk even less likely to survive judicial scrutiny. See *Mass. Const.* amend. art. XLVIII, Init., pt. II, § 2 (barring initiatives that impede, among other rights, “access to and protection in courts of justice”).

157 See *Schulman*, 850 N.E.2d at 513 n.3 (Greaney, J., concurring).
Massachusetts law expressly holds that no legitimate state interest is advanced by denying same-sex couples access to civil marriage.\textsuperscript{158} Other state courts, even in relatively progressive jurisdictions, have shown themselves to be more inclined to invent hypothetical “legitimate” governmental interests to be “rationally” advanced by the exclusion.\textsuperscript{159} Thus, to the extent that courts continue to apply the rational basis test to discrimination against gays and lesbians, there may be little success in voiding the numerous constitutional amendments that now obstruct access to civil marriage for same-sex couples.\textsuperscript{160}

Recent developments in constitutional jurisprudence do, however, provide much cause for optimism.\textsuperscript{161} In 2003, the Supreme Court declared anti-sodomy laws unconstitutional in the landmark case of \textit{Lawrence v. Texas}.\textsuperscript{162} In doing so, the Court subjected Texas’s anti-sodomy law to a conspicuously more stringent analysis than the “rational basis” test normally entails, all the while avoiding any express indication of what level of scrutiny had been applied.\textsuperscript{163} Many scholars therefore believe that \textit{Lawrence} signifies an intention to return to defining “fundamental rights” (i.e., those of constitutional import) broadly and abstractly rather than narrowly and by rigid enumeration.\textsuperscript{164} If this understanding is correct, then the outrageous practice of sanctioning discrimination against gay and lesbian citizens so long as there is an asserted “rational basis” finally will cease and the prospects for invalidating anti-gay and anti-family “defense of marriage” amendments will be much enhanced.\textsuperscript{165}

\textsuperscript{158} See Task Force, Marriage Map, \textit{supra} note 14; Jenkins, \textit{supra} note 14.

\textsuperscript{159} See Lewis v. Harris, 908 A.2d 196, 222 (N.J. 2006); Hernandez v. Robles, 855 N.E.2d 1, 7 (N.Y. 2006).

\textsuperscript{160} See Lewis, 908 A.2d at 222; Hernandez, 855 N.E.2d at 7.

\textsuperscript{161} See generally Lawrence v. Texas, 539 U.S. 558 (2003).

\textsuperscript{162} Id. at 578.


\textsuperscript{164} See id. at 1904, 1934.

\textsuperscript{165} See id. at 1939, 1940 & n.181.
THE REASONABLE WOMAN: HAS SHE MADE A DIFFERENCE?

Nicole Newman*

LEGAL FEMINISM: ACTIVISM, LAWYERING AND LEGAL THEORY.

Abstract: It has been fifteen years since the Ninth Circuit decided to utilize the reasonable woman standard in sexual harassment cases, and the Supreme Court has yet to comment on its legitimacy or the split in federal circuits. In Legal Feminism, Ann Scales promotes a feminist way of understanding law that takes history, suffering, and context seriously. Among other things, she identifies philosophical liberalism as a limiting rhetoric that hides structures of privilege behind a pretense of neutrality. Consequently, Scales prescribes eschewing neutrality to overcome the historic equation of rationality with maleness, and to expose the colossal privilege that allows those in power to believe they are acting neutrally. Neutrality and its pretense are at the heart of the ongoing debate over the use of the “reasonable woman” instead of the “reasonable person” to satisfy the objective prong of Title VII hostile work environment claims. This Book Review examines the evolution of the reasonable woman and explores her successes and failures in fifteen years of jurisprudence.

Introduction

One of the primary topics Ann Scales discusses in Legal Feminism is how the illusion of neutrality in the law has presented special obstacles to women and other historically disempowered groups.¹ These special obstacles, she explains, exist for two reasons: (1) rationality has historically been equated with maleness, and (2) those in power also have the colossal privilege that allows them to believe that they are

¹ Ann Scales, Legal Feminism: Activism, Lawyering, and Legal Theory 103 (Deborah Gershenowitz ed., 2006). Some of these special obstacles include that “human” is defined by maleness, that perception is not just given but is directed by socially constructed power relations, and that equality is guaranteed only when the sexes are already equal. See id. at 84, 86, 93. For further discussion on radical feminism’s attack on liberalism’s central principle of neutrality, see Linda Kelly Hill, The Feminist Misspeak of Sexual Harassment, 57 Fla. L. Rev. 133, 139–40 & n.29 (2005) (explaining the belief that the liberal state is at its worst when it is most neutral).
acting neutrally. Consequently, the illusion of neutrality converts the comfortable version of experience of those in power into an “objective” fact. The bottom line is that legal analysis that describes existing social imbalances as the neutral background of experience only serves those already in power by maintaining the status quo.

Thirty years ago, the first American court recognized sexual harassment as discriminatory conduct that violates Title VII of the Civil Rights Act of 1964. Today, sexual harassment is widely accepted as a form of sex discrimination in violation of Title VII. After three decades of increasing public awareness, it is somewhat difficult to remember that before 1976, federal courts refused to recognize sexual harassment as a form of discrimination. Although sexual harassment law is said to

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2 Scales, supra note 1, at 103. She claims, “[A]ll of law is already an affirmative action plan for somebody (usually, for whoever got to write the law).” Id. at 77.

3 Id. at 103.

4 See id. at 86.

5 Title VII of The Civil Rights Act of 1964 provides the following:

   It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.

42 U.S.C. § 2000e–2(a)(1) (1994); Williams v. Saxbe, 413 F. Supp. 654, 663 (D.D.C 1976), rev’d in part, vacated in part, 587 F.2d 1240 (D.C. Cir. 1978) (holding retaliatory actions of male supervisor, taken because the female employee had declined his sexual advances, constituted sex discrimination under Title VII of the Civil Rights Act of 1964); see Jeffrey A. Gettle, Sexual Harassment and the Reasonable Woman Standard: Is It a Viable Solution?, 31 Duq. L. Rev. 841, 843 & n.9 (1993) (explaining the origins of sexual harassment in Williams). Sexual harassment has gained a majority of its attention over the past thirty years when male political figures have been accused of harassment. See Noelle C. Brennan, Hostile Environment Sexual Harassment: The Hostile Environment of a Courtroom, 44 DePaul L. Rev. 545, 545 (1995) (noting heightened awareness of sexual harassment after the Clarence Thomas and Anita Hill debacle); Tam B. Tran, Title VII Hostile Work Environment: A Different Perspective, 9 J. Contemp. Legal Issues 357, 357 (1998) (noting the wake of the dismissal of Paula Jones’s sexual harassment suit against President Bill Clinton as a catalyst for addressing the status of the law). For example, in the three months following the Clarence Thomas confirmation hearings, the Equal Employment Opportunity Commission (EEOC) reported a seventy percent increase in the reports of sexual harassment, as compared to the previous year. Brennan, supra at 545 n.3.


7 See Shoenfelt et al., supra note 6, at 645–46. In Corne v. Bausch & Lomb, Inc., two female clerical workers alleged that they were repeatedly sexually propositioned and molested by a supervisor. 390 F. Supp. 161, 162 (D. Ariz. 1975), vacated, 562 F.2d 55 (9th Cir. 1977). The court denied relief for the plaintiffs, stating that the supervisor’s conduct was a “personal proclivity, peculiarity, or mannerism” that “had no relationship to the nature of employment.” Id. at 163. Courts tended to relegate the problem of sexual harassment to
have subversive legislative origins, its evolution is now well documented among legal scholars.8

Title VII makes it unlawful for an employer to discriminate on the basis of sex.9 Although sexual harassment encompasses many types of conduct, two broad categories are defined by the EEOC guidelines as actionable under Title VII.10 The first is “quid pro quo” sexual harassment, which is harassment that involves the conditioning of employment or employment benefits on sexual favors.11 The second, more
The subtle type of sexual harassment is “hostile work environment.” A hostile work environment arises when the unwelcome sexual conduct unreasonably interferes with the individual’s job performance, or creates an intimidating, hostile, or offensive work environment.

Fifteen years ago, the Ninth Circuit was the first court to unequivocally adopt the reasonable woman standard in hostile work environment sexual harassment claims to determine whether the unwelcome conduct was objectively offensive enough to trigger liability. Today, the Third Circuit is the only court that has clearly followed the Ninth Circuit by employing the “reasonable person of the same sex in that position.” Meanwhile, the Fifth, Sixth, Eighth, and Eleventh Circuits have clearly rejected a gender-specific standard. To date, the

12 See Shoenfelt et al., supra note 6, at 642.

13 Adler & Pierce, supra note 8, at 780. The Court first recognized a hostile work environment claim in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 72 (1986). Because hostile environment sexual harassment is the less detectible form of harassment, it is not surprising that it was not recognized for a full ten years after quid pro quo claims had been adopted. See id.; Glette, supra note 5, at 842.

14 Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991). Although prior cases adopted similar standards, Ellison was the first to affirmatively hold that a female plaintiff states a prima facie case of hostile environment sexual harassment “when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.” Id. at 879 (emphasis added) (citation omitted); see Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990) (holding that discrimination would detrimentally affect a reasonable person of the same sex in that position); Yates v. Avco Corp., 819 F.2d 630, 636–37 (6th Cir. 1987) (adopting the reasonable woman standard in constructive discharge actions involving sexual harassment by a male supervisor); Rabidue v. Osceola Refining Co., 805 F.2d 611, 626 (6th Cir. 1986) (Keith, J., dissenting) (disagreeing with the majority’s use of the reasonable person perspective instead of reasonable woman); Cigoy, supra note 8, at 1079–88 (detailing the origins of the reasonable woman standard through case law).

15 Andrews, 895 F.2d at 1492; Shoenfelt et al., supra note 6, at 637–38 & nn.25–26.


The remaining circuits, the First, Second, Fourth, Seventh, and Tenth apply the reasonable person standard in the great majority of cases, but have never actually rejected the use of the reasonable woman standard. See, e.g., Valentin-Almeyda v. Municipality of Aguadilla, 447 F.3d 85, 94 (1st Cir. 2006) (applying the reasonable person standard); Jennings v. Univ. of N.C., 444 F.3d 255, 269 (4th Cir. 2006) (applying the reasonable person standard); Whittaker v. N. Ill. Univ., 424 F.3d 640, 645 (7th Cir. 2005) (holding that hostile work environment requires both subjective and objective severity or pervasiveness);
U.S. Supreme Court has failed to answer the question at the heart of the debate: whose perspective objectively determines whether the plaintiff should have been offended by the alleged harassment?  

In light of Scales’s warning against the illusion of neutrality, this Book Review examines the value of a measure taken by some jurisdictions to eschew a gender-neutral standard because it “tends to be male-biased and tends to systematically ignore the experiences of women.” Part I of this Book Review briefly summarizes sexual harassment law, addresses the leading cases that define it as a cause of action, and accounts for the origins of the split in the federal circuits over the reasonableness standard. Part II maps out the heated debate over the advantages and disadvantages of using the reasonable woman instead of the reasonable person as the objective perspective in hostile environment cases. Part III surveys the federal circuits to provide a glimpse of the different rates at which plaintiffs have established, in the least, that the harassing conduct created an objectively hostile work environment. By analyzing these varying success rates over the past fifteen years, this Book Review will conclude that this highly debated difference in reasonableness standards has had little practical effect.

Petrosino v. Bell Atl., 385 F.3d 210, 221–22 (2d Cir. 2004) (considering reasonable woman, but applying the reasonable person standard); Stinnett v. Safeway, Inc., 337 F.3d 1213, 1219 (10th Cir. 2003) (applying the reasonable person standard).


18 *Ellison*, 924 F.2d at 879.

19 Considering the wealth of detailed documentation of the origins and evolution of sexual harassment law under Title VII, Part I seeks only to provide a brief overview of the pertinent history and current status of the law. *See infra* Part I.

20 *See Harris*, 510 U.S. at 21.

21 For the purposes of this Book Review, the “success rates” refer to any favorable outcome for the plaintiff regarding the objectively hostile element of the claim. For example, successes would include both *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 387, 400–01 (1st Cir. 2002), where the court affirmed the jury verdict against employer for all elements of plaintiff’s hostile work environment claim, and *Chavez v. New Mexico*, 397 F.3d 826, 837, 838 n.2 (10th Cir. 2005), where the court overturned the district court grant of summary judgment against plaintiff hostile work environment claim, but noted that employer liability remained an issue for remand. However, plaintiff success would not include *Whittaker*, where the court found the offensive conduct was neither severe nor pervasive enough to create objectively hostile work environment. *See 424 F.3d at 646.*

Although each jurisdiction has developed somewhat different elements required to establish a prima facie case for hostile work environment, they all include requirements of sufficient objective severity or pervasiveness and some basis of employer liability. *See, e.g., O’Rourke v. City of Providence*, 235 F.3d 713, 728 (1st Cir. 2001) (noting that, to establish a hostile work environment, plaintiff must show: “(1) that she (or he) is a member of a protected class; (2) that she was subjected to unwelcome sexual harassment; (3) that the
I. Vague Supreme Court Decisions Split the Circuits

A. Judicial Recognition of the Reasonable Woman

In *Meritor Savings Bank v. Vinson*, the Court set the standards for hostile work environment claims under Title VII.\(^22\) Vinson filed a claim of sexual harassment against her supervisor and the bank.\(^23\) She alleged that the supervisor fondled her in front of other employees, followed her into the women’s restroom, exposed himself to her, and even forcibly raped her on several occasions.\(^24\)

Ruling in favor of Vinson, the Supreme Court found that a hostile work environment theory existed under Title VII, which meant that the tangible or economic injuries needed to show quid pro quo harassment were no longer the only means of stating a claim.\(^25\) In addition, the Court articulated that a valid Title VII sexual harassment claim “must be sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’”\(^26\)

The Court successfully established a sexual harassment violation based on a hostile work environment, but it failed to specify the reasonableness standard by which the harassment should be viewed.\(^27\) Following the Supreme Court’s decision in *Meritor*, the circuit courts split over whether the conduct involved in a sexual harassment claim should be

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\(^{23}\) *Meritor*, 477 U.S. at 60.

\(^{24}\) *Id.* Vinson estimated that over the course of four years, he had coerced her into having intercourse approximately forty or fifty times. *Id.*

\(^{25}\) 42 U.S.C. § 2000e–2(a)(1); *Meritor*, 477 U.S. at 68. The Court found that “the language of Title VII is not limited to ‘economic’ or ‘tangible’ discrimination. The phrase ‘terms, conditions, or privileges of employment’ evinces a congressional intent ‘to strike at the entire spectrum of disparate treatment of men and women’ in employment.” *Meritor*, 477 U.S. at 64. The Court also recognized that the district court had erred by focusing on the “voluntariness” of the victim’s participation as opposed to the victim’s conduct as an indication that the advances were unwelcome. *Id.* at 68.

\(^{26}\) 42 U.S.C. § 2000e–2(a)(1); *Meritor*, 477 U.S. at 67 (quoting Henson v. Dundee, 682 F.2d 897, 904 (1982)).

\(^{27}\) See Hill, *supra* note 1, at 172; Shoenfelt et al., *supra* note 6, at 642.
judged from the viewpoint of the reasonable person or the reasonable woman.28

When the Sixth Circuit decided *Rabidue v. Osceola Refining Co.* in 1986, it held that to prevail in a hostile environment claim a plaintiff must show that the harassment unreasonably interfered with her work and created a hostile work environment that affected her psychological well-being.29 Among other complaints, Rabidue claimed that, on a daily basis, male employees displayed pictures of nude and semi-nude women on calendars, on desks, and on posters.30

To determine whether Rabidue had satisfied her burden of proof, meaning that the harassment had created a hostile work environment and had affected her psychological well-being, the majority opinion asked how a *reasonable person* in similar circumstances would have perceived the conduct.31 Furthermore, through the perspective of a reasonable person, the court stated that the sexual posters only had a de minimus effect on Rabidue’s work environment considering the common exploitation of women in film, television, radio, and other public places.32

Judge Damon Keith’s dissent in *Rabidue* is generally credited as the origin of the reasonable woman standard in hostile work environment claims.33 Stressing a wide divergence between most women’s views of appropriate sexual conduct and those of men, Judge Keith advocated

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29 805 F.2d 611, 620, 623 (6th Cir. 1986) (holding that the plaintiff failed to sustain her burden of proving that she was victim of Title VII sexual harassment).

30 See *id.* at 623–24 (Keith, J., dissenting). One of the posters, which had been on the wall for eight years, showed a naked woman lying supine with a golf ball between her breasts and a man standing over her, with a golf club raised, yelling “Fore!” *Id.* at 624. Rabidue also brought a claim against her supervisor, who made explicit and vulgar comments, including calling women whores, cunts, and pussies, and, when referring to Rabidue, saying, “All that bitch needs is a good lay,” and calling her a “fat ass.” *Id.*

31 *Id.* at 620 (majority opinion).

32 See *id.* at 622.

33 *Id.* at 624 (Keith, J., dissenting). In drafting his dissent, Judge Keith relied heavily on a 1984 law review article, Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1451, 1459 (1984) [hereinafter *Sexual Harassment Claims*].
the adoption of the new standard.\textsuperscript{34} He reasoned that Title VII’s precise purpose was to prevent discriminatory behavior and attitudes from poisoning the work environment of classes protected under the Act.\textsuperscript{35} Furthermore, Judge Keith warned that unless the outlook of the reasonable woman was adopted, defendants and courts would continue to perpetuate ingrained notions of reasonable behavior defined by the offenders—in most cases, men.\textsuperscript{36}

Although Judge Keith is credited with the introduction of the reasonable woman standard to hostile environment sexual harassment claims, the Ninth Circuit was the first court to explicitly adopt it, and did so in \textit{Ellison v. Brady}.\textsuperscript{37} In \textit{Ellison}, the plaintiff filed a hostile work environment sexual harassment claim against her employer, charging that her co-worker sexually harassed her by repeatedly asking her out and sending her strange letters.\textsuperscript{38} The Court of Appeals for the Ninth Circuit reversed the district court’s grant of summary judgment to the defendant and explicitly refused to follow the \textit{Rabidue} standard.\textsuperscript{39}

Instead, the Ninth Circuit adopted the perspective of a reasonable woman primarily because it found that “a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women.”\textsuperscript{40} The court asserted that the sexual experiences of women were different than those of men, and therefore, conduct that many men consider unobjectionable may offend many women.\textsuperscript{41}

\begin{footnotesize}
\begin{enumerate}
\item[Rabidue,] 805 F.2d at 626 (Keith, J., dissenting). For more detailed discussions of the differing perspectives of men and women, see Shoenfelt et al., supra note 6, at 667.
\item[42 U.S.C. § 2000e–2(a)(1) (1994); see Rabidue, 805 F.2d at 626 (Keith, J., dissenting). Judge Keith continues, “As I believe no woman should be subjected to an environment where her sexual dignity and reasonable sensibilities are visually, verbally or physically assaulted as a matter of prevailing male prerogative, I dissent.” See Rabidue, 805 F.2d at 626–27 (Keith, J., dissenting).
\item[See Rabidue, 805 F.2d at 626 (Keith, J., dissenting). Studies show that women face a twenty-five percent probability of being raped by a man, and a forty-six percent probability of being sexually assaulted in their lifetimes. Kerns, supra note 17, at 215–16.
\item[924 F.2d 872, 879 (9th Cir. 1991); Cigoy, supra note 8, at 1079.
\item[See 924 F.2d at 873–74. The letters implied an intimacy that was imagined by her co-worker, and was frightening to Ellison. \textit{Id.} at 874. Ellison testified that she “thought he was crazy,” and she “didn’t know what he would do next.” \textit{Id.}
\item[Id. at 877, 883.
\item[\textit{Id.} at 879. Paralleling Judge Keith’s warning, the \textit{Ellison} court noted, “If we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination. Harassers could continue to harass merely because a particular discriminatory practice was common, and victims of harassment would have no remedy.” \textit{Id.} at 878; see \textit{Rabidue}, 805 F.2d at 626 (Keith, J., dissenting).
\item[\textit{Ellison}, 924 F.2d at 879. The Ninth Circuit Court of Appeals described these differing experiences in the opinion as the following:
\end{enumerate}
\end{footnotesize}
B. The Supreme Court’s Silence

The landmark *Ellison* decision initiated the development of the controversial reasonable woman standard, which some circuits have followed and others have not.\(^{42}\) Since 1991, the Supreme Court has had multiple opportunities to comment on this divide, but it has instead opted to address other issues.\(^{43}\) Some suggest that the Supreme Court’s continued silence, in *Harris v. Forklift Systems, Inc.* and *Oncale v. Sundowner Offshore Services, Inc.*, implies that it has accepted and possibly endorsed the existence of the reasonable woman.\(^{44}\)

However, the primary issue in the *Harris* abusive work environment claim was the same as that in *Rabidue*: whether the plaintiff must suffer psychological injury to have an actionable claim.\(^{45}\) *Harris* was

\[^{42}\text{See, e.g., Weston v. Pennsylvania, 251 F.3d 420, 426 (3d Cir. 2001) (applying a reasonable person of same sex in that position standard); DeAngelis v. El Paso Mun. Police Officers Ass’n, 51 F.3d 591, 594 (5th Cir. 1995) (rejecting the reasonable woman as the objective standard), cert denied, 516 U.S. 974 (1995).}\]


\[^{44}\text{Oncale, 523 U.S. at 79; Harris, 510 U.S. at 22; Hill, supra note 1, at 172.}\]

\[^{45}\text{See Harris, 510 U.S. at 22. Because the *Meritor* decision initiated the circuit court split over whether to apply the reasonable person standard or reasonable woman standard, it seemed likely that in 1993, the Supreme Court would comment on the debate in *Harris. See Harris, 510 U.S. at 22; Meritor, 447 U.S. at 68; Kerns, supra note 17, at 206–07; Brennan, supra note 5, at 547. In fact, the trial court in *Harris* applied the reasonable woman standard, but the plaintiff did not specifically ask the Supreme Court to consider the propriety of the standard. 976 F.2d at 733, 733 (6th Cir. 1992), cert. granted, 510 U.S. 17; see Paul B. Johnson, *The Reasonable Woman in Sexual Harassment Law: Progress or Illusion?*, 28 Wake Forest L. Rev. 619, 668 (1993).}\]
often insulted because of her gender and made the target of unwanted sexual innuendos. The Supreme Court held that so long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious. The Court set a totality of circumstances test to determine whether an environment would be considered hostile or abusive.

Describing the limits of an actionable claim, Justice O’Connor wrote, “Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview.” Despite the Court’s use of the term “reasonable person,” it never explicitly rejected the “reasonable woman” test, leaving both feminists and courts confused over which legal standard is the more appropriate for sexual harassment claims. Following Harris, the lower courts continued to split on the question of the appropriate objective standard.

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46 Harris, 510 U.S. at 19. On several occasions in front of others, the president said to Harris, “You’re a woman, what do you know’ and ‘We need a man as the rental manager’; at least once, he told her she was ‘a dumb ass woman.’” Id. He suggested that the two of them “go to the Holiday Inn to negotiate [Harris’s] raise.” Id. He occasionally asked Harris and other female employees to get coins from his front pants pocket; he threw objects on the ground in front of Harris and other women, and asked them to pick the objects up. Id. After Harris complained to him about his conduct, he apologized, only to start up again a month later. Id. Despite all this, the district court found in favor of the defendant, reasoning that the president’s comments were not so severe as to seriously affect Harris’ psychological well-being. Id. at 20.

47 Id. at 22.

48 Id. at 23. These circumstances include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with the employee’s work performance. Id.

49 42 U.S.C. § 2000e–2(a) (1994); Harris, 510 U.S. at 21. Both the objective and the subjective prongs must be satisfied, otherwise the conduct has not actually altered the conditions of the victim’s employment, and there is no Title VII violation. Harris, 510 U.S. at 21. The subjective prong is satisfied when the victim actually perceives the environment to be hostile or abusive. Id.

50 Harris, 510 U.S. at 21; Kerns, supra note 17, at 208. Some interpreted the Court’s opinion as favoring the reasonable person standard because it used the term “reasonable person” throughout the opinion. Kerns, supra note 17, at 208. Others point out the Court’s emphasis on answering only the limited question on psychological injury, not all of the potential questions raised by the decision. See Harris, 510 U.S. at 22–23; Hill, supra note 1, at 174–75; Kerns, supra note 17, at 208.

Almost five years later, the Court broadened the extent of actionable hostile work environment sexual harassment, providing a claim for same-sex harassment in *Oncale.* In applying the *Meritor* and *Harris* decisions, the Court in *Oncale* elaborated explicitly on the objective perspective from which the harassment should be judged. The prospective should be that of a reasonable person in the plaintiff’s position, considering “all the circumstances.” The factors the Court specified as “all of the circumstances” were much more far-reaching and sensitive to the social context of the alleged harassment than those originally identified in *Harris.* Furthermore, the *Oncale* Court’s emphasis on placing “the reasonable person in the plaintiff’s position” to answer the question of severity has led some scholars to argue that *Oncale*’s redefinition of *Harris* not only protects the reasonable woman standard, but may implicitly encourage its use. Whether or not the Supreme Court intended to implicitly endorse the reasonable woman standard, it has yet to clearly accept or reject the standard, and the circuit courts remain split.

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52 See 523 U.S. 75, 79 (1998). On several occasions, Oncale was forcibly subjected to sex-related, humiliating actions, including being physically assaulted in a sexual manner and threatened with rape by supervisors and a co-worker. See id. at 77. The Fifth Circuit affirmed the district court decision that there was no cause of action for male-on-male harassment under Title VII, but the Supreme Court rejected that outright. Id. at 77, 79. Although male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII, Congress did intend “to strike at the entire spectrum of disparate treatment of men and women in employment.” See id. at 78, 79; *Meritor Savings Bank v. Vinson,* 477 U.S. 57, 64 (1986).

53 See *Oncale,* 523 U.S. at 81; *Harris,* 510 U.S. at 23; *Meritor,* 477 U.S. at 64.

54 *Oncale,* 523 U.S. at 81 (quoting *Harris,* 510 U.S. at 23).

55 Id. at 81–82; *Harris,* 510 U.S. at 23.

In same-sex (as in all) harassment cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff’s position would find severely hostile or abusive.

*Oncale,* 523 U.S. at 81–82.

56 *Oncale,* 523 U.S. at 81–82; *Harris,* 510 U.S. at 23; Hill, *supra* note 1, at 175.

57 See *Oncale,* 523 U.S. at 81; *Harris,* 510 U.S. at 21; Shoenfelt et al., *supra* note 6, at 636.
II. MAPPING OUT THE DEBATE

Over the past fifteen years, the reasonable woman standard has received much attention in academic literature.58 In fact, a study examining every reported federal district and appellate court opinion between 1986 and 1995 involving sexual harassment in the workplace found “more articles discussing the reasonable woman standard than courts adopting [it].”59 The crux of the debate lies in defining the purpose of Title VII and how best to achieve it.60

Those in favor of the reasonable woman standard view the precise purpose of Title VII as preventing behavior that is so debilitating that it hinders a woman’s job performance and thereby denies her an equal opportunity to achieve.61 From that perspective, the reasonable woman standard is a means of narrowing the divergent perceptions of men and women regarding acceptable behavior.62 Consequently, they reason, if male perceptions of acceptable behavior could be changed to more closely match those held by women, more men would reject the harassing conduct that poisons a female victim’s work environment.63 The hope is that greater success for female plaintiffs in the courtroom will more accurately reflect the reality of sexual harassment as experienced by American working women.64

In contrast, those opposed to the reasonable woman standard argue that it is inherently contrary to the principle of equality under Title VII.65 In that light, a separate reasonableness standard for women is actually a legal setback because it sends the message that women are inherently unreasonable.66 Furthermore, some suggest that it is both unfair and confusing for male fact-finders and well-intentioned em-

59 See id.
61 See 42 U.S.C. § 2000e–2(a)(1); Brenneman, supra note 9, at 1306; see also Rabidue v. Osceola Refining Co., 805 F.2d 611, 626 (6th Cir. 1986) (Keith, J., dissenting) (“In my view, Title VII’s precise purpose is to prevent such behavior and attitudes from poisoning the work environment of classes protected under the Act.”).
62 See Brenneman, supra note 9, at 1305.
63 See id. at 1306.
65 See 42 U.S.C. § 2000e–2(a)(1); Juliano & Schwab, supra note 58, at 583 & n.141.
ployers to be asked to apply such a standard. Although the majority of this vigorous debate has taken place in the abstract, each side’s rationale has fueled the ongoing circuit split.

A. Arguments for the Reasonable Woman Standard

1. Divergent Perceptions, Divergent Worlds

Central to the argument made by proponents of the reasonable woman standard, including the Ellison majority, is that men and women perceive certain interpersonal behaviors differently. They emphasize research showing that behavior that many men consider not only harmless and innocent, but even flattering, is perceived as offensive by many women. This gap between male and female perceptions, they claim, indicates a lack of social consensus on the appropriate standard of behavior.

The reason proponents give for such divergent perceptions is that men and women actually live in materially different social worlds, structured by a gender hierarchy. The differences between these two worlds include an economic and professional disparity between men and women, which creates unequal positions of power in the workforce. Furthermore, they point out that women live under a constant threat of sex-related violence. Most victims of sexual harassment in

68 See, e.g., Andrews v. City of Philadelphia, 895 F.2d 1469, 1483 (3d Cir. 1990) (citing Sexual Harassment Claims, supra note 33, at 1455); Juliano & Schwab, supra note 58, at 584.
69 See Baker, supra note 64, at 702 (“Conduct that many men consider unobjectionable may offend many women.”) (quoting Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991)).
71 Sexual Harassment Claims, supra note 33, at 1451. Dissenting in Rabidue, Judge Keith noted the irony in using the reasonable person standard to define sexual harassment because the notions of reasonable behavior according to that standard were fashioned by the offenders themselves—men. See 805 F.2d 611, 626 (6th Cir. 1986) (Keith, J., dissenting); Brenneman, supra note 9, at 1290.
72 See Kathryn Abrams, The New Jurisprudence of Sexual Harassment, 83 Cornell L. Rev. 1169, 1209 (1998); Baker, supra note 64, at 702.
73 See Kerns, supra note 17, at 219.
74 See id. at 215 & n.101.
the workplace are women, and women are victims of assault and rape in disproportionately higher numbers than men.\textsuperscript{75} Therefore, they claim that women will be more sensitive than men to conduct that is sexual in nature because to women any form of sexual conduct, even the most mild, may instinctively trigger concern that the conduct will lead to a more violent sexual assault.\textsuperscript{76}

Some of those in favor of the gendered reasonableness standard insist that the workplace is under male control.\textsuperscript{77} This means that sexual harassment functions to preserve male supremacy and reinforce masculine norms, particularly where the entry of a woman into a particular workforce appears to call that control into question.\textsuperscript{78} Frequently, proponents maintain, sexual harassment has more to do with power than with sexual desire.\textsuperscript{79} Therefore, these forms of sexual harassment are directed at women as a group as an accepted mode of expressing masculinity or masculine camaraderie, thereby entrenching male norms in the workplace.\textsuperscript{80}

Sexual harassment is not a gender-neutral problem.\textsuperscript{81} Therefore, according to advocates of the reasonable woman standard, a gender-neutral standard is simply inadequate because it will never reflect nor protect the unique interests of its victims.\textsuperscript{82}

2. "Gender-Neutral" Is Male-Biased

Furthermore, advocates of the reasonable woman standard claim, the reasonable person standard is inherently male-biased and it systematically ignores the experiences of women.\textsuperscript{83} They stress that American jurisprudence has historically evaluated conduct by comparing it to contemporary societal norms, represented by the "reasonable man."\textsuperscript{84}

\textsuperscript{75} See Cigoy, \textit{supra} note 8, at 1094. One proponent noted that one in three women in America will be raped, and at least one out of two women will be sexually harassed during her educational or professional career. See Kerns, \textit{supra} note 17, at 209 nn.73–74.

\textsuperscript{76} See Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991); Cigoy, \textit{supra} note 8, at 1094–95.

\textsuperscript{77} See Hill, \textit{supra} note 1, at 173.

\textsuperscript{78} See Abrams, \textit{supra} note 72, at 1205–06.

\textsuperscript{79} Kenealy, \textit{supra} note 66, at 204.

\textsuperscript{80} See Abrams, \textit{supra} note 72, at 1213.

\textsuperscript{81} Kerns, \textit{supra} note 17, at 197.

\textsuperscript{82} See id. at 196, 197.

\textsuperscript{83} See Ellison 924 F.2d at 879; Goldberg, \textit{supra} note 70, at 212; Hill, \textit{supra} note 1, at 173; Kerns, \textit{supra} note 17, at 210.

This tradition left women, among other groups, excluded from discussions on reasonableness in the law.\textsuperscript{85} Moreover, these advocates highlight the relatively recent replacement of the term “reasonable man” with “reasonable person” in a judicial attempt to create a sex-blind standard of neutrality.\textsuperscript{86} However, many believe that the reasonable person has always maintained its masculine roots because the one-word substitution did not catalyze a change in the underlying model.\textsuperscript{87} Therefore, this attempt at political correctness may have merely obscured the sexism within the law instead of eradicating it.\textsuperscript{88} By applying this standard, advocates reason, courts hide behind a guise of neutrality while they actually apply an unchanged, male-biased standard.\textsuperscript{89}

According to proponents of the reasonable woman standard, this problem is further exacerbated by the fact that the majority of judges are men, and that they apply a legal standard from their male perspective.\textsuperscript{90} They argue that, at the very least, the gender-specific reasonableness standard forces male fact-finders to address the hypothetical reasonable woman’s perspective that they would otherwise ignore.\textsuperscript{91} Otherwise, proponents contend, these male fact-finders would simply reinforce “the prevailing level of discrimination” against women if allowed to adhere to the male-biased standard.\textsuperscript{92} However, the fact that offensive behavior is common does not make it welcome, wanted, or acceptable to women.\textsuperscript{93} Nor does the fact that such behavior is common

\textsuperscript{85} See Kerns, supra note 17, at 210.
\textsuperscript{86} See Arbery, supra note 84, at 541; Kerns, supra note 17, at 210.
\textsuperscript{87} See Leslie Bender, A Lawyer’s Primer on Feminist Theory and Tort, 38 J. LEGAL EDUC. 3, 23 (1988); Kerns, supra note 17, at 218.
\textsuperscript{88} See Bender, supra note 87, at 21–23.
\textsuperscript{89} See Abrams, supra note 72, at 1173 (citing Anita Bernstein, Treating Sexual Harassment with Respect, 111 Harv. L. REV. 445, 464–71 (1997)); Goldberg, supra note 70, at 212.
\textsuperscript{90} See Kerns, supra note 17, at 210. One scholar argues:

\begin{quote}
[Judges] deny claims they deem unjustified because of one of four misconceptions: 1) if a work environment is sexually charged, women assume the risk of sexual harassment by entering it; 2) some women deserve and/or welcome sexual harassment; 3) women complaining of sexual harassment are not credible; or 4) men’s “innocent flirting” will suddenly become actionable as sexual harassment.
\end{quote}


\textsuperscript{91} See Gettle, supra note 5 at 856.
\textsuperscript{92} Hill, supra note 1, at 173 (quoting Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991)).
\textsuperscript{93} Pollack, supra note 70, at 65.
mean that a woman is not negatively affected by it.\textsuperscript{94} Without the reasonable woman standard, as the Ellison Court articulated, “[h]arassers could continue to harass merely because a particular discriminatory practice was common, and victims of harassment would have no remedy.”\textsuperscript{95} Consequently, these proponents consider the reasonable woman standard necessarily preferable to the reasonable person standard because they believe that the former is a male-biased “gender neutral” standard that only reinforces a male-dominated status quo.\textsuperscript{96}

3. Effectuating Title VII

Those in favor of the reasonable woman standard assert that Title VII was designed to eliminate barriers to equal opportunity, whether those barriers are constructed negligently or intentionally.\textsuperscript{97} They insist that the reasonable woman standard does not establish a higher level of protection for women than men; it simply allows women to participate in the workforce on equal footing with men.\textsuperscript{98} In general, courts that have adopted the woman’s view as the norm have done so with the intent to heighten male sensitivity to the effects of sexually offensive conduct in the workplace.\textsuperscript{99} The hope is that this heightened sensitivity will bridge the gender gap on perceptions of harassing conduct.\textsuperscript{100} Ultimately, as the theory goes, this will actually affect the behavior of the workers and supervisors who create discrimination and deny opportunity through sexual harassment.\textsuperscript{101}

These proponents maintain that Title VII was not intended to affirm the status quo, but rather “to strike at the entire spectrum of disparate treatment of men and women in employment.”\textsuperscript{102} Therefore, in order for it to succeed, Title VII must be interpreted in a way that can actually “bring about a magical transformation in the social mores of
American workers.” Proponents believe that the reasonable woman standard does just that by rejecting the hidden male bias in a “gender-neutral” standard, and reflecting instead the perspective of those the law actually seeks to protect—women.

B. Arguments for the Reasonable Person Standard

1. Defending the Reasonable Person

In contrast, those who support the reasonable person standard contend that it is necessary because it provides a neutral and abstract measure so that the law is not decided according to the whims of individual judges or juries, but rather based on societal consensus. Furthermore, the reasonable person represents an average or typical person, accounting for all weaknesses tolerated by the community, and for all the facts and circumstances surrounding the act in question.

This defense stems from the idea that objectivity and judicial neutrality are fundamental precepts of American jurisprudence. The principle of “reasonableness” is appealing, therefore, because it provides an objective means of superimposing community standards upon an individual and because its application requires judicial neutrality. Consequently, in order to function effectively, “reasonableness” must at least be facially neutral because prevailing social norms determine its boundaries.

For that reason, the major flaw these defenders find with the reasonable woman standard is that it is not even facially neutral. In fact, it is specifically constructed to categorically exclude the male perspec-

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103 See Brenneman, supra note 9, at 1306 (quoting Rabidue v. Osceola Refining Co., 805 F.2d 611, 620–22 (6th Cir. 1986)).
104 See Kerns, supra, note 17, at 230.
105 Naomi R. Cahn, The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice, 77 Cornell L. Rev. 1398, 1431 (1992); see also W. Page Keeton et al., Prosser & Keeton on the Law of Torts § 32 (5th ed. 1984) (“The standard of conduct which the community demands must be an external and objective one, rather than the individual judgment, good or bad of the particular actor; and it must be, so far as possible, the same for all persons, since law can have no favorites.”) (footnotes omitted).
106 See Keeton et al., supra note 105, § 32; Adler & Pierce, supra note 8, at 807.
108 See id. at 329. Unikel describes the American legal system’s need for objectivity as deriving from an attempt to reconcile the basic contradiction between an individual’s freedom to act and an individual’s security from the effects of others’ actions. See id. at 328.
109 See id. at 348.
110 See id. at 357.
tive and establish female norms as the sole measure of appropriate conduct in certain circumstances.111 Defenders argue that by explicitly promoting only the interests and ideals of women, the reasonable woman standard violates the fundamental principle of neutrality.112 Moreover, it violates each individual’s right to equal treatment under the law because it is not “indifferent and the same to all parties.”113 Therefore, unlike the reasonable person, the reasonable woman standard corrupts formal equality because it is not neutral, and it blatantly differentiates between parties.114

2. More Harm Than Good

Although the intentions behind the reasonable woman standard may be noble, opponents argue that its problems overwhelm its utility for women as a group because it (1) essentializes women, (2) affirms and entrenches gender stereotypes, and (3) undermines the legitimacy of sexual harassment claims.115

Feminists who oppose the gendered legal standard emphasize that different women define harassing behavior differently.116 They point out that the same suggestive conduct may strike some women as harassment, while others might accept it as normal.117 Moreover, women cannot be considered a homogeneous group because they each have different experiences, views, and perceptions.118 Opponents argue that the reasonable woman standard ignores those differences because it requires that all harassing behavior conform to certain acceptable cri-

111 Id.
112 Unikel, supra note 107, at 357.
113 See id. (quoting John Locke, Two Treatises of Government 367 (Peter Laslett ed., 1965) (1690)).
114 Id. at 356.
115 See Arbery, supra note 84, at 552; Cahn, supra note 105, at 1415–16, 1419–20; Kenealy, supra note 66, at 207, 210. Abrams explains that the verb “essentialize” comes from the noun “essentialism,” which pejoratively refers to a “monolithic” women’s experience “that can be described independent of other facets of experience like race, class, and sexual orientation.” Abrams, supra note 72, at 1173 n.23 (quoting Angela Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 581, 588 (1990)).
116 See Cahn, supra note 105, at 1416.
118 See Ashraf, supra note 67, at 502.
They point out that this certain acceptable criterion may look general, but is actually specific. They assert that a woman who does not fit into the confines of a white, upper-class, heterosexual profile may be unable to find a place in the reasonable woman standard.

Furthermore, feminist opponents argue that the reasonable woman standard is destructive to women because it actually embodies and perpetuates stereotypes, requiring women to conform to them in order to obtain a legal remedy. They believe that because the reasonable woman will be defined by a mostly male judiciary, it is likely that the judiciary will merely reflect preexisting stereotypes of womanhood as defined by men: that women are sensitive, delicate, and in need of special protection in the workplace. Ultimately, although it is easiest to simply use one stereotype to define the perceptions of all women on types of sexually harassing behavior, convenience does not justify the practice.

In addition, opponents maintain that the reasonable woman standard would eventually undermine the legitimacy of sexual harassment claims by sending negative messages to women and exculpatory messages to men. On one hand, the standard tells women that they are inherently unreasonable, for if they were objectively reasonable, a separate legal standard would not be necessary. Meanwhile, on the other hand, the standard provides men with an excuse, or plausible deniability, for their behavior: how are they to know that their conduct was offensive since they are not reasonable women? Underlying these mes-

119 See Cahn, supra note 105, at 1416.
120 See Bernstein, supra note 89, at 473; Cahn, supra note 105, at 1415.
121 See Bernstein, supra note 89, at 473; Cahn, supra note 105, at 1415. Bernstein suggests that the reasonable woman standard contains hidden normative premises, which elevates this one type of woman above others. See Bernstein, supra note 89, at 473. For more extensive discussions on essentialism and bias contained in defining the nature of “woman,” see Harris, supra note 115, at 588.
122 See Cahn, supra note 105, at 1419.
125 See Kenealy, supra note 66, at 206, 210; Bittner, supra note 123, at 135.
126 Kenealy, supra note 66, at 210.
127 See Bittner, supra note 123, at 135; Kenealy, supra note 66, at 207. Kenealy asserts that the message the courts send through the reasonable woman standard is that “[m]en, intending only to be complimentary, unknowingly sexually harass women. Because women find it so unsettling, the courts will recognize a cause of action which would otherwise go undetected by reasonable men.” Kenealy, supra note 66, at 207.
sages, opponents find a trivializing and demeaning assumption: sexual harassment is more a matter of perception than a fact of reality.128

Opponents insist that in contrast, if all of society were to condemn sexual harassment, the conduct would be more effectively eradicated than it would be by condemnation from women alone.129 Therefore, only by applying the reasonable person standard can courts send the message “that sexual harassment is as visible and recognizable to men as it is to women, and that men whose conduct rises to the level of harassment are neither ignorant nor well-intentioned.”130

Finally, other opponents of the reasonable woman standard warn that it creates a slippery slope toward an impossibly fragmented jurisprudence.131 Because Title VII bars discriminatory behavior based not only on sex, but also on race, color, religion, or national origin, some claim that the rationale for adopting a reasonable woman standard could easily be applied to adopting a separate standard for any minority group— “reasonable Haitian woman,” “reasonable African-Americans,” “reasonable Muslims.”132

3. Application Yields Unnecessary Confusion

According to those opposed to separate reasonableness standards, the reasonable woman standard injects needless confusion into the law by asking men, who make up the majority of both judges and employers, to apply it.133 Many wonder: if the true nature of sexual harassment can only be perceived through the eyes and minds of women, then how

128 Kenealy, supra note 66, at 209. Even more trivializing is the notion that “special” treatment for women is necessary because women’s reactions to workplace behavior simply do not follow the expected, normal human responses. See Lucinda M. Finley, A Break in the Silence: Including Women’s Issues in a Torts Course, 1 Yale J.L. & Feminism 41, 64 (1989).

129 Arbery, supra note 84, at 540–41.

130 Kenealy, supra note 66, at 204.


133 See Kenealy, supra note 66, at 206; Ashraf, supra note 67, at 496, 500.
can men be expected to reach the correct decision through their own faculties? For example, if a male judge or employer uses a woman he knows well as reference points, such as his wife, he risks essentializing all women based on his wife’s race, class, and sexual orientation. If, however, he employs his own perspective, then he is merely applying a male-biased view of what he thinks the reasonable woman’s perception should be. Thus, men cannot be expected to successfully apply a reasonableness standard based on a woman’s perspective. Opponents contend that this needless confusion not only subjects employers to substantial financial liability; the confusion also inhibits employers’ ability to shape the behavior of their employees by effectuating company policies to abide by legal standards.

4. Equality Goals of Title VII

Those who defend the reasonable person standard stress that Title VII prohibits employment practices that deprive individuals of equal status on the basis of group affiliation. Consequently, the equality Title VII seeks to achieve will only exist in the workplace when a reasonable person, male or female, can identify and object to harassing conduct.

Although the reasonable woman standard may seem to be a legal victory for women, its opponents claim that it threatens to do more harm than good. Instead of promoting gender equality, it entrenches essentialism and stereotyping. Instead of legitimizing sexual harassment claims, it suggests that certain conduct is actionable solely be-

134 Johnson, supra note 45, at 642.
135 Bernstein, supra note 89, at 474.
136 See id.
137 See Ashraf, supra note 67, at 500. Consequently, the reasonable woman standard fails to assure greater reliance on the female perspective than does the reasonable person standard. Unikel, supra note 107, at 369. Some opponents assert that the passage of the Civil Rights Act of 1991 negates the entire argument that the reasonable woman standard is necessary to compensate for the male-dominated judiciary because the Act allows the issue of reasonableness to be decided by a jury. See Pub. L. No. 102–166, 105 Stat. 1071 (1991). Before the 1991 Act, a trial by jury was generally denied for Title VII actions. See Johnson, supra note 45, at 667; Ashraf, supra note 67, at 496. Presumably, since the passage of the Act, there will be women on the jury who will prevent the application of a judge’s male-biased standard. See Ashraf, supra note 67, at 501.
138 See Ashraf, supra note 67, at 496.
139 42 U.S.C. § 2000e–2(a) (1) (1994); Arbery, supra note 84, at 505.
140 42 U.S.C. § 2000e–2(a) (1); Bittner, supra note 123, at 137.
141 See Arbery, supra note 84, at 506.
142 See Cahn, supra note 105, at 1416; Unikel, supra note 107, at 352; Arbery, supra note 84, at 506.
cause women are hypersensitive.\textsuperscript{143} Instead of deterring unreasonable conduct by setting clear guidelines, it confuses employers about the policies they are expected to enforce.\textsuperscript{144}

According to its opponents, the reasonable woman standard is antithetical to the most basic goal of Title VII—the elimination of discrimination in the workplace.\textsuperscript{145} Such opponents even contend that the reasonable woman standard is as inappropriate and divisive as the once-normative reasonable man standard.\textsuperscript{146} Furthermore, courts can only affirm that reasonable women are as reasonable as anyone else and that sexual harassment is recognizable by both men and women if they examine sexual harassment claims through the neutral perspective of the reasonable person.\textsuperscript{147} Defenders of the reasonable person standard maintain that equality should remain the ideal, and that the law can have no favorites.\textsuperscript{148}

III. Has She Made a Difference?

Ann Scales suggests that “bickering about rules and standards in the abstract” has led feminists to waste decades trying to create the “new, improved equality standard . . . [to finally achieve] justice in the world.”\textsuperscript{149} Similarly, some legal researchers have wondered whether this debate over semantic legal standards is a just waste of time.\textsuperscript{150} Two recent studies question whether jurors are even capable of changing their perspectives when given a different standard, thereby altering the final judgments in sexual harassment cases.\textsuperscript{151} These studies, one conducted in 1995 and the other in 2002, reached the same conclusions: (1) men are less likely than women to perceive sexual harassment in a given situation; and (2) changes in the legal standard applied yielded no impact on the final judgments of harassment.\textsuperscript{152} Both concluded that the reasonable woman standard is an ineffective remedy for the effects of

\textsuperscript{143} See Kenealy, supra note 66, at 210; Arbery, supra note 84, at 551.
\textsuperscript{144} Ashraf, supra note 67, at 484.
\textsuperscript{145} Id.
\textsuperscript{146} Bittner, supra note 123, at 137.
\textsuperscript{147} Kenealy, supra note 66, at 209–10.
\textsuperscript{148} See Keeton et al., supra note 105, at § 32; Arbery, supra note 84, at 553.
\textsuperscript{149} Scales, supra note 1, at 84.
\textsuperscript{151} See Shoenfelt et al., supra note 6, at 658; Weiner et al., supra note 150, at 276.
\textsuperscript{152} See Shoenfelt et al., supra note 6, at 667; Weiner et al., supra note 150, at 276.
the gender difference in perceptions of hostile environment sexual harassment.\footnote{See Shoenfelt et al., \textit{supra} note 6, at 669; Weiner et al., \textit{supra} note 150, at 278.}

However, it may be instructive to look at the past fifteen years of sexual harassment case law data to understand how the application of the two different reasonableness standards has actually affected outcomes for plaintiffs.\footnote{See Shoenfelt et al., \textit{supra} note 6, at 669; Weiner et al., \textit{supra} note 150, at 278.} Analyzing case law data is not an easy task. For that reason, this analysis is very narrowly focused on the reasonableness standard used to assess the hostile work environment element of a sexual harassment claim.\footnote{For a much more expansive survey, comprehensively covering the final conclusions reached in every federal appellate court opinion on sexual harassment law between 1986 and 1995, see Juliano & Schwab, \textit{supra} note 58.} By isolating this one variable from the many others that influence ultimate outcomes of hostile work environment cases, this analysis seeks to discern any possible correlation between the reasonableness standard applied and the successful establishment of an objectively hostile work environment.\footnote{See \textit{id.} at 571, 572. Other possible variables include, for example, the specific facts of the case; how sensitive the judge is to context; general regional sentiments on sexual harassment, race, and class of the victim and the harasser; and type of employment. \textit{See id.} While any of these other variables may be equally, if not more, important in any given case or jurisdiction, this study assumes \textit{ceteris paribus} in order to examine the effect of the reasonableness standard applied. \textit{See id.}}

\section{A. Reasonableness Standard Actually Employed by Circuit}

Part of what has caused the debate over standards to regenerate over the years is that some circuit courts have not followed their own precedents.\footnote{For a sampling of cases where courts have failed to follow precedent, see \textit{infra} note 158.} For example, in the First, Second, Sixth, Seventh, and Eighth Circuits, the courts have seemingly adopted the reasonable woman standard in some cases, only to follow it by years of consistent applications of the reasonable person instead.\footnote{Compare Torres v. Pisano, 116 F.3d 625, 632 & n.6 (2d Cir. 1997) (applying a reasonable woman standard), Dey v. Colt Constr. & Dev. Co., 28 F.3d 1446, 1456 (7th Cir. 1994) (applying a reasonable woman standard), Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959, 962 n.3 (8th Cir. 1993) (adopting a reasonable woman standard), \textit{and} Lipsett v. Univ. of P.R., 864 F.2d 881, 898 (1st Cir. 1988) (noting the importance of the woman’s perspective), \textit{with} Gallagher v. Delaney, 139 F.3d 338, 347 (2d Cir. 1998) (applying a reasonable person standard), Gillming v. Simmons Indus., 91 F.3d 1168, 1172 (8th Cir. 1996) (accepting a reasonable person standard); Doe v. R.R. Donnelley & Sons Co., 42 F.3d 439, 444 (7th Cir. 1994) (applying a reasonable person standard), \textit{and} Morgan v. Mass. Gen. Hosp., 901 F.2d 186, 193 (1st Cir. 1990) (applying a reasonable person’s perspective).} Therefore, in order to
analyze the effect of the reasonable woman standard, it is necessary to first determine which standard is currently being used the majority of the time in each jurisdiction.\textsuperscript{159}

In most cases to date, the Ninth and Third Circuits have applied a gender-specific reasonableness standard.\textsuperscript{160} All other circuits either apply a reasonable person standard or mention objective and subjective components but fail to apply any reasonableness test at all.\textsuperscript{161} Only the Fifth Circuit has explicitly rejected the reasonable woman standard; however, the Sixth, Eighth, and Eleventh Circuits have indirectly opted for the reasonable person over the reasonable woman.\textsuperscript{162}

B. Rates of Plaintiff Success: Establishing an Objectively Hostile Work Environment

The greatest hope of proponents of the reasonable woman standard was that the new standard would allow more female plaintiffs to meet the objective test for hostile work environment claims, thereby

\textsuperscript{159} See, e.g., Torres, 116 F.3d at 633 n.6; Watkins v. Bowden, 105 F.3d 1344, 1356 n.22 (11th Cir. 1997). Legal scholars have conducted similar analyses, reaching different conclusions based on the year conducted. Compare Shoenfelt et al., supra note 6, at 637–38 & nn.23–25 (noting that the Third and Ninth Circuits use reasonable woman, while all other circuits use either reasonable person or victim standards), with Bittner, supra note 123, at 127 nn.4 & 5 (noting that the Second, Fourth, Tenth, and Eleventh Circuits have adopted reasonable person standard, while the First, Third, Sixth, Eighth, and Ninth Circuits have adopted reasonable woman standard).

\textsuperscript{160} See, e.g., Dominguez-Curry v. Nev. Transp. Dept., 424 F.3d 1027, 1034 (9th Cir. 2005) (adopting the “reasonable woman” standard); Shramban v. Aetna, 115 F. App’x 578, 579 (3d Cir. 2004) (applying the standard of a “reasonable person of the same sex in that position”). But see, e.g., Clegg v. Falcon Plastics, Inc., 174 F. App’x 18, 24 (3d Cir. 2006) (requiring the application of the reasonable person standard); Walpole v. City of Mesa, 162 F. App’x 715, 716 (9th Cir. 2006) (requiring use of the reasonable person standard).

\textsuperscript{161} See, e.g., Valentin-Almeyda v. Municipality of Aguadilla, 447 F.3d 85, 94 (1st Cir. 2006) (applying reasonableness standard); Jennings v. Univ. of N.C., 444 F.3d 255, 269 (4th Cir. 2006) (applying reasonable person standard); Whittaker v. N. Ill. Univ., 424 F.3d 640, 645 (7th Cir. 2005) (deciding that a hostile work environment requires both subjective and objective severity or pervasiveness); Petrosino v. Bell Atl., 385 F.3d 210, 221–22 (2d Cir 2004) (considering reasonable woman, but applying reasonable person standard); Stinnett v. Safeway, Inc., 337 F.3d 1213, 1219 (10th Cir. 2003) (applying the reasonable person standard).

leading to more favorable legal outcomes. The greatest fear of objectors was that the new standard would preordain outcomes for female plaintiffs, thereby unfairly punishing employers. After fifteen years of jurisprudence, neither dream nor nightmare has become reality. This survey reviews 281 cases of hostile work environment claims that have arisen in each federal district. The review consisted of a tailored assessment of two factors: (1) which of the two reasonableness standards, if any, was articulated by the court; and (2) whether the court found that the plaintiff had successfully established that the conduct was severe or pervasive enough to create an objectively hostile work environment. However, it should be noted that this data is not concerned with any ultimate conclusions regarding overall plaintiff win rates for hostile work environment claims. These results provide only a glimpse, at best, into an overarching trend in hostile work environment judgments as they relate to the reasonableness standard used.

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See Baker, supra note 64, at 713. See Ashraf, supra note 67, at 502; Unikel, supra note 107, at 335. See infra note 170 and accompanying table and text.

The cases chosen for review were identified on the courts of appeal database in Westlaw, using the command “78K1185 & REASONABLE.” Many of the cases reviewed are not officially published.

For the purposes of this survey, see supra note 21 and accompanying text.

Simply because a plaintiff successfully established the objectively hostile prong of the claim does not suggest that the plaintiff also met the other requirements of a hostile work environment claim, such as liability, or that the harassment was based on sex. See Knabe v. Boury Corp., 114 F.3d 407, 410 (3d Cir. 1997) (“Even if a work environment is found to be hostile, a plaintiff must also show that the conduct creating the hostile work environment should be imputed to the employer.”).

See infra note 170 and accompanying table and text.
Table 1 shows that plaintiff success rates vary by circuit. In the Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits, plaintiffs only established the objective element in their hostile work environment cases in twenty-seven to thirty-eight percent of appellate cases. Meanwhile, in the First, Second, Third, and Fourth Circuits, plaintiffs established the objective element in fifty-two to sixty-nine percent of their cases on appeal.

However, the results of this data do not show that an application of the reasonable woman standard necessarily leads to significantly higher hostile work environment success rates than a strict use of the reasonable person standard, or even no reasonableness test at all.\textsuperscript{170} Moreover, it is interesting to note that all four of the circuits that have considered the reasonable woman standard and have then rejected it in favor of the reasonable person (the Fifth, Sixth, Eighth, and Eleventh Circuits) rank on the lowest end of plaintiff success rates.\textsuperscript{171} This data may reveal that there are other variables at play in these cases, which are equally, if not more significant than the reasonableness standard articulated by the court.\textsuperscript{172}

As prior studies have concluded, the reasonable woman standard does not appear to be an effective means of changing the rate of which female plaintiffs are able to establish that the harassing conduct created an objectively hostile work environment.\textsuperscript{173} However, the fact that both

\textsuperscript{170} See, e.g., Hathaway v. Multnomah County Sheriff’s Office, 123 F. App’x 806, 808 (9th Cir. 2005) (finding conduct insufficient for a reasonable woman to consider environment abusive). \textit{But see}, e.g., Valentin-Almeyda v. Municipality of Aguadilla, 447 F.3d 85, 89, 94 (1st Cir. 2006) (ruling that the plaintiff wins under the reasonable person standard); Schiano v. Quality Sys., Inc. 445 F.3d 597, 604, 606 (2d Cir. 2006) (finding that the plaintiff meets burden under hostile work environment without articulation of any reasonableness standard).

\textsuperscript{171} See, e.g., Nitsche v. CEO of Osage Valley Elec. Coop., 446 F.3d 841, 846 (8th Cir. 2006) (concluding plaintiff failed to meet high threshold under reasonable person standard); Tatt v. Atlanta Gas Light Co., 138 F. App’x 145, 148 (11th Cir. 2005) (finding plaintiff failed to establish objectively reasonable belief that defendant’s conduct constituted actionable sexual harassment); Septimus v. Univ. of Houston, 399 F.3d 601, 611, 612 (5th Cir. 2005) (finding plaintiff failed to allege harassment that a reasonable person would find hostile or abusive); Valentine-Johnson v. Roche, 386 F.3d 800, 814 (6th Cir. 2004) (finding no actionable hostile work environment because court previously rejected claims based on more sexually offensive circumstances).

\textsuperscript{172} See Juliano & Schwab, \textit{supra} note 58, at 571, 572. One such significant variable may be geography, considering the fact that the six districts with the highest plaintiff success rates represent the Northeast and both coasts; meanwhile, the six districts with the lowest plaintiff success rates represent the South and Midwest.

\textsuperscript{173} 42 U.S.C. § 2000e–2(1)(a) (1994); \textit{see} Shoenfelt et al., \textit{supra} note 6, at 669; Weiner et al., \textit{supra} note 150, at 278.
of the circuits that have adopted the gender-specific standard (the Ninth and the Third) have generated higher plaintiff success rates than all four of those that have rejected it (Fifth, Sixth, Eighth, Eleventh) may be cause for further investigation.\textsuperscript{174}

**Conclusion**

In 1990, Wendy Pollack wrote, “Women have named sexual harassment, but have lost control of the content of its definition.”\textsuperscript{175} Along the same lines, whether the court applies the gender-specific reasonableness standard or not, it fails to provide a framework or gauge by which to analyze the content of the claim.\textsuperscript{176} This might suggest that either reasonableness standard has the potential to benefit sexual harassment plaintiffs.\textsuperscript{177}

Despite strident arguments impugning the Court to reconcile the circuit court split, the reasonable woman standard does not appear to

\textsuperscript{174} See, e.g., Nitsche, 446 F.3d at 846 (concluding plaintiff failed to meet high threshold under reasonable person standard); Tatt, 138 F. App’x at 148 (finding plaintiff failed to establish objectively reasonable belief that defendant’s conduct constituted actionable sexual harassment); Dominguez-Curry v. Nev. Transp. Dept., 424 F.3d 1027, 1034–35 (9th Cir. 2005) (finding defendant’s conduct sufficiently severe or pervasive, under the reasonable woman standard, to support a hostile work environment claim); Septimus, 399 F.3d at 611, 612 (finding plaintiff failed to allege harassment that a reasonable person would find hostile or abusive); Roche, 386 F.3d at 814 (finding no actionable hostile work environment because court previously rejected claims based on more sexually offensive circumstances); Bonenberger v. Plymouth Twp., 132 F.3d 20, 25–26 (3d Cir. 1997) (finding plaintiff satisfied hostile work environment claim under reasonable person of same sex standard).

\textsuperscript{175} Pollack, \textit{supra} note 70, at 48.

\textsuperscript{176} See Kenealy, \textit{supra} note 66, at 204.

\textsuperscript{177} See King v. Hillen, 21 F.3d 1572, 1582 (Fed. Cir. 1994). Writing for the Federal Circuit in \textit{King}, Judge Pauline Newman articulated this sentiment, finding it unnecessary to enter the reasonable woman versus reasonable person debate because neither standard would alter the court’s intent to eliminate “the entire spectrum of disparate treatment of men and women” in employment. \textit{See} 21 F.3d at 1582 (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986)). As the \textit{King} court stated:

We need not enter this debate, for no principled argument supports the view that sex-based offensive behavior in the workplace is immune from remedy simply because it may be culturally tolerated outside of the workplace. The purpose of Title VII is not to import into the workplace the prejudices of the community, but through law to liberate the workplace from the demeaning influence of discrimination, and thereby to implement the goals of human dignity and economic equality in employment.

\textit{Id.} Contrarily, others might interpret this finding as proof that neither standard works because tort law is simply incompatible with the goals of Title VII. \textit{See Sexual Harassment Claims, \textit{supra} note 33, at 1465–64; Cahn, \textit{supra} note 105, at 1433 (“[C]ourts that use a reasonable woman standard can apply it in a manner that subordinates women just as easily as one that supports women.”).
be a factor determinative of hostile work environment success rates.\textsuperscript{178} Considering this lack of significant impact on outcomes, it is no wonder why the Supreme Court has refused to weigh in on this controversial issue.\textsuperscript{179}

\textsuperscript{178} See Brennan, supra note 5, at 547; Hill, supra note 1, at 172; Kerns, supra note 17, at 206–07.