ARTICLES

Eighth Amendment Challenges After Baze v. Rees: Lethal Injection, Civil Rights Lawsuits, and the Death Penalty

Harvey Gee

[pages 217–244]

Abstract: In Baze v. Rees, the U.S. Supreme Court upheld the constitutionality of Kentucky's lethal injection protocol, which utilizes a three-drug combination to execute death row inmates. To challenge a lethal injection protocol in the future, the Court stated that an inmate would have to make a showing that the protocol in question presents a “substantial risk of serious harm” or an “objectively intolerable risk of harm.” In addition, the inmate would have to show the existence of a feasible alternative that can be readily implemented and would “significantly reduce a substantial risk of severe pain.” The standard set forth in Baze makes it difficult for inmates to challenge lethal injection protocols. This Article discusses the implications of Baze in the lower courts and examines the use of state administrative procedure acts as an alternative litigation strategy.

Asylum for Former Mexican Police Officers Persecuted by the Narcos

Sergio Garcia

[pages 245–268]

Abstract: Since President Felipe Calderón declared war against Mexico’s narcotraffickers in 2006, drug violence has escalated and has claimed the lives of over 2000 Mexican police officers. To successfully petition for asylum in the United States, former Mexican police officers facing persecution by the Narcos must prove that they are members of a particular social group. In past cases, courts have refused to find that persecution by the Narcos qualifies a petitioner as a member of a particular social group. This Article argues, however, that former Mexican police officers facing persecution by the Narcos are members of a particular social group based on a shared past experience and should be granted asylum in the United States.
Transplantation and Adaptation: The Evolution of the Human Rights Ombudsman

Linda C. Reif

[pages 269–310]

Abstract: The number of human rights ombudsman institutions has increased dramatically over the past three decades. Such institutions are prevalent in Latin America and in Central and Eastern Europe, and are increasingly found in other regions of the world as well. Forces such as democratization, public institution-building, comparative law influences, limited state resources, and international human rights law continue the spread of human rights ombudsman institutions. This Article discusses the mandates and jurisdiction of human rights ombudsman institutions. It argues that all governments should endow human rights ombudsman institutions with as many additional powers as their institutional and legal systems permit to supplement the ombudsman’s core investigatory mandate. These include inspection, litigation, research, and education powers. Further, this Article argues that all human rights ombudsman institutions must institute operating practices to increase their ability to protect and promote human rights.

NOTES

Kelo Six Years Later: State Responses, Ramifications, and Solutions for the Future

Asher Alavi

[pages 311–342]

Abstract: In 2005, the U.S. Supreme Court upheld the constitutionality of eminent domain takings that benefit private developers in Kelo v. City of New London. The case led to public outcry on both the right and the left and the revision of many state eminent domain laws to curtail such takings. However, most of the new laws have been ineffective. In many states, the burden of the takings falls largely onto poor, minority communities while, in others, revitalization projects by private developers are prohibited entirely. This Note examines the negative implications of current approaches to takings on inner-city, minority communities and concludes that states should adopt an approach that allows revitalization of blighted areas by private developers but also provides effective limits such as a narrow definition of blight, enhanced compensation for the displaced, and procedural provisions such as Community Benefits Agreements.
“Expelled to Nowhere”: School Exclusion Laws in Massachusetts

Melanie Riccobene Jarboe

Abstract: Chapter 71, section 37H 1/2 of the Massachusetts General Laws allows school principals to suspend any student charged with a felony and to expel that student if he or she is convicted or found to be delinquent. Students expelled from one school in Massachusetts have no right to attend any other school in the state. Therefore, expulsion has the potential to bring a student’s educational career to an end. This Note argues that chapter 71, section 37H 1/2 of the Massachusetts General Laws is unconstitutional under both the Federal and Massachusetts Constitutions because it violates students’ right to a “minimally adequate education.” Further, this Note argues that the Massachusetts legislature should adopt House Bill 178, “An Act Relative to Students’ Access to Educational Services and Exclusion from School,” which strikes an appropriate balance between school safety and educational opportunity.

The Right to Understand Your Doctor: Protecting Language Access Rights in Healthcare

Lily Lo

Abstract: The current federal landscape governing language access in healthcare provides for inadequate enforcement and compliance. This Note examines existing language access laws to determine the legal rights of limited English proficiency (LEP) individuals to obtain healthcare services. This Note explores California’s progressive work in ensuring language access rights for LEP individuals and recommends that states model their language access legislation after California’s to guarantee language access in healthcare settings. Such legislation would remove barriers and promote greater access to healthcare for LEP patients.
Femininity and the Electric Chair: An Equal Protection Challenge to Texas’s Death Penalty Statute

Jessica Salvucci

[pages 405–438]

Abstract: Capital punishment in the United States appears to apply to only one class of citizens—men. Despite their significant proportional commission of homicides, women account for less than one percent of executions in America. This Note evaluates this trend in the context of a Fourteenth Amendment equal protection challenge to capital punishment in Texas, America’s staunchest death penalty supporter. It discusses issues of paternalism and gender theory as they relate to the Texas capital punishment statute and its application throughout the legal and political process. Finally, this Note argues that despite a series of constitutional obstacles, the Supreme Court should strike down the Texas death penalty statute based on its invidious gender discrimination.

COMMENTS

The Continued Illegalization of Compassion: United States v. Millis and Its Effects on Humanitarian Work with the Homeless

Matthew M. Cummings

[pages 439–456]

Abstract: Every year, more cities enact food sharing restrictions that punish individuals who try to feed the homeless. These laws are often part of a general scheme to solve a city’s homelessness problem by making life so unbearable for homeless men and women that they will be forced to move elsewhere. Humanitarian aid like food sharing, however, is a form of expressive conduct whereby the speaker communicates to a particular audience in need that he or she is willing to care for them. Additionally, the speaker’s conduct may inform observers about a particular humanitarian dilemma or encourage them to become involved. In United States v. Millis, the Ninth Circuit failed to recognize an act of humanitarian aid for traveling immigrants as a form of protected speech, thereby opening the door to the creation of more harmful and unfair laws that suppress humanitarian aid.
Abstract: Central American youth who refuse to join gangs are often subjected to horrific acts of retaliatory violence. Yet, the Board of Immigration Appeals’ introduction of two new requirements for asylum eligibility—visibility and particularity—have quashed the asylum hopes for members of this group. Recently, the First Circuit Court of Appeals adopted the visibility and particularity requirements and, in *Larios v. Holder*, applied them to deny asylum to youth resistant to gang recruitment. This Comment examines the development of these requirements and argues that there is no legal basis for their application. It further argues that the requirements unreasonably heighten the traditional asylum standard and ultimately concludes that the First Circuit should have rejected visibility and particularity as requirements for asylum, thereby rendering youth resistant to gang recruitment eligible for asylum.
EIGHTH AMENDMENT CHALLENGES AFTER BAZE v. REES: LETHAL INJECTION, CIVIL RIGHTS LAWSUITS, AND THE DEATH PENALTY

Harvey Gee*

Abstract: In Baze v. Rees, the U.S. Supreme Court upheld the constitutionality of Kentucky’s lethal injection protocol, which utilizes a three-drug combination to execute death row inmates. To challenge a lethal injection protocol in the future, the Court stated that an inmate would have to make a showing that the protocol in question presents a “substantial risk of serious harm” or an “objectively intolerable risk of harm.” In addition, the inmate would have to show the existence of a feasible alternative that can be readily implemented and would “significantly reduce a substantial risk of severe pain.” The standard set forth in Baze makes it difficult for inmates to challenge lethal injection protocols. This Article discusses the implications of Baze in the lower courts and examines the use of state administrative procedure acts as an alternative litigation strategy.

Introduction

Even after the U.S. Supreme Court addressed the constitutionality of lethal injection in Baze v. Rees, death row inmates continue to bring forth litigation.1 In Baze, the Court held that a prisoner cannot successfully challenge a method of execution merely by showing that it may result in pain—“either by accident or as an inescapable consequence of death”—or that a slightly safer alternative is available.2 Rather, under an Eighth Amendment analysis, it is necessary to show a “‘substantial risk of serious harm’” or an “‘objectively intolerable risk of harm.’”3

* Attorney, Office of the Federal Public Defender (Capital Habeas Unit), Western District of Pennsylvania. Former Deputy Public Defender, Colorado. LL.M., The George Washington University Law School; J.D., St. Mary’s University School of Law; B.A., Sonoma State University. The author would like to thank Melanie Riccobene Jarboe, Jonah Temple, Abigail Morrison, and the editorial staff at the Boston College Third World Law Journal for their comments, editorial suggestions, and hard work. The views expressed herein are not necessarily attributed to any past, present, or future employers.

2 Baze, 553 U.S. at 50–51.
3 Id. at 50 (quoting Farmer v. Brennan, 511 U.S. 825, 842, 846 & n.9 (1994)).
For example, this can be satisfied by showing a “series of abortive attempts at electrocution.” Despite this ruling from the Supreme Court, the issue of lethal injection is far from being resolved. Instead, the Court’s ruling in *Baze* has had a mixed effect, with lower court judges left to determine how *Baze* affects their state’s protocol.

*Baze* was not the best case for bringing a challenge against lethal injection because the challenged Kentucky procedure was somewhat less problematic than those of other states. Nevertheless, the decision has served to compel states, which may have had problems in the past with their procedures, to make corrections to fall in line with the Kentucky approach. Consequently, this allows states to better defend against focused lawsuits by making it appear as if they are making good faith efforts to improve standards and procedure. Moreover, litigation in the wake of *Baze* continues to highlight problems that plague the lethal injection process, “including the mixing of the drugs; the setting of the IV lines; the administration of the drugs; and the monitoring of their effectiveness.”

As a general matter, though establishing an Eighth Amendment violation is still possible after *Baze*, in reality, it is very difficult to do so. To satisfy the standard established by the Court in *Baze*, a plaintiff must show the existence of a feasible alternative that can be readily implemented and would “significantly reduce a substantial risk of severe pain.” Efforts to clear the *Baze* hurdle are especially difficult because of the significant deference that courts pay to the decisions of state corrections officials. As Alison Nathan warns, “Given the sad history of

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4 Id. (quoting Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 471 (1947) (Frankfurter, J., concurring)).
5 See Marceau, supra note 1, at 160.
7 See, e.g., Marceau, supra note 1, at 210 n.252 (noting Arizona’s willingness to reexamine lethal injection procedures after *Baze*).
9 See *Baze*, 553 U.S. at 52.
10 See Nathan, supra note 6; see also *Baze*, 553 U.S. at 52.
lethal injection, judicial deference to the procedural and administrative decisions of state corrections officials is unwarranted.”

This Article explores the implications of the Baze decision and examines the ongoing lethal injection litigation since Baze. Part I briefly summarizes the Supreme Court’s death penalty jurisprudence and examines the Baze decision. Part II explains why the Supreme Court ruling in Baze makes it difficult, if not impossible, for inmates to wage successful lethal injection challenges. It also examines the use of civil rights claims under 42 U.S.C. § 1983. Part III discusses the use of state administrative procedures acts as an alternative litigation approach. In particular, Part III analyzes litigation stemming from a state’s failure to make its execution protocol available for public review. Finally, Part IV reflects upon the teachings of Baze and the post-Baze litigation.

I. CAPITAL PUNISHMENT AND THE U.S. SUPREME COURT

A. SUPREME COURT DEATH PENALTY JURISPRUDENCE

The constitutionality of capital punishment was first addressed by the Court in the 1970s with the fractured decisions of Furman v. Georgia and Gregg v. Georgia. In 1972, the Court examined the question of racism in capital sentencing in Furman, ruling that the then-current laws were arbitrary and capricious. The Furman majority, however, did not determine that the death penalty in general was racially biased.

Four years later, in Gregg, the Court upheld various state death penalty laws that included the bifurcation of trials into guilt and penalty phases, the application of aggravating and mitigating factors to determine just punishment, and the use of other factors permitting jury guidelines, jury discretion, and appellate review of death sentences.

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11 See Nathan, supra note 6.
14 See Oshinsky, supra note 12, at 54.
The Court held that these practices were constitutional under Eighth Amendment standards.\textsuperscript{16}

Other legal challenges came before the Court that clarified the scope of the Eighth Amendment in the death penalty context. For instance, one year following \textit{Gregg}, the Court, in \textit{Coker v. Georgia}, ruled that the death penalty was a disproportionate punishment for the offense of rape.\textsuperscript{17} In the next decade, the Court followed this ruling in \textit{Ford v. Wainwright}, in which it held that a state may not execute a person who is insane at the time of execution.\textsuperscript{18} More recently, in 2002, the Court reversed a previous ruling by holding in \textit{Atkins v. Virginia} that imposing a death sentence on mentally retarded individuals violated the “‘evolving standards of decency’” embodied in the Eighth Amendment’s Cruel and Unusual Punishment Clause.\textsuperscript{19} Irrespective of the need to hold mentally retarded persons criminally responsible, the Court determined that “[b]ecause of their disabilities in areas of reasoning, judgment, and control of their impulses, . . . they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct.”\textsuperscript{20}

Later, in \textit{Roper v. Simmons}, the Court held that executing juveniles violated the Eighth Amendment.\textsuperscript{21} The Court noted that this framework, like that used in \textit{Atkins}, required looking to “‘the evolving standards of decency that mark the progress of a maturing society.’”\textsuperscript{22} The Court held that juveniles should be immune from execution because of the inherent differences between juveniles and adults, including a “lack of maturity and an underdeveloped sense of responsibility.”\textsuperscript{23} The Court also reasoned that juveniles are susceptible to peer pressure and that a juvenile’s character is “not as well formed as that of an adult,” thereby rendering juveniles less culpable than the worst offenders that the death penalty is intended to target.\textsuperscript{24}

During the same term that \textit{Baze} was decided, in \textit{Kennedy v. Louisiana}, the Court held that the Eighth Amendment prohibits the death penalty for the rape of a child where the crime was not intended to cause and

\textsuperscript{16} \textit{Id.}

\textsuperscript{17} \textit{See} \textit{Coker v. Georgia}, 433 U.S. 584, 599 (1977).

\textsuperscript{18} \textit{See} \textit{Ford v. Wainwright}, 477 U.S. 399, 401 (1986).


\textsuperscript{20} \textit{Id.} at 306.


\textsuperscript{22} \textit{Id.} at 561 (quoting \textit{Trop}, 356 U.S. at 100–01).

\textsuperscript{23} \textit{See id.} at 569 (quoting \textit{Johnson v. Texas}, 509 U.S. 350, 367 (1993)).

\textsuperscript{24} \textit{See id.} at 569–70.
did not result in the victim’s death.\textsuperscript{25} The Court referred to its past decisions in finding that capital punishment must “be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’”\textsuperscript{26} The \textit{Kennedy} Court cited to \textit{Baze} in dicta when it discussed the difficult tensions between general legal principles and case facts.\textsuperscript{27}

\textbf{B. Race and the Death Penalty}

In a historical context, punishment by death can be perceived as a vestige of the race-based lynchings and executions that were imposed upon young African American males accused of assaults on whites.\textsuperscript{28} Yet, the Supreme Court has held that evidence of a statistical disparity in the execution of African Americans is an unconvincing argument against the death penalty.\textsuperscript{29} In 1987, the Court in \textit{McCleskey v. Kemp} ruled that statistical evidence showing the racially disproportionate impact of Georgia’s death penalty law was insufficient to overturn a defendant’s death sentence.\textsuperscript{30} Rather, the Court held that regardless of any historical record of a disproportionate impact of death sentences imposed upon African Americans, such evidence is irrelevant absent a showing of intentional discrimination in the sentencing of the particular defendant.\textsuperscript{31}

Warren McCleskey was convicted of killing a police officer and, following the jury’s recommendation, a Georgia superior court sentenced him to death.\textsuperscript{32} McCleskey appealed the sentence to the federal court and argued that Georgia’s legal procedures were administered in a racially discriminatory manner because the death penalty was imposed more often when there was a white victim.\textsuperscript{33} McCleskey’s argument was based on David Baldus’s study focusing on death penalty data in Georgia.\textsuperscript{34} The Baldus study concluded that a defendant convicted


\textsuperscript{26} \textit{Id.} at 420 (quoting \textit{Roper}, 543 U.S. at 568).

\textsuperscript{27} \textit{Id.} at 436–37. \textit{Baze} reappeared in Justice Thomas’s dissent in \textit{Graham v. Florida}. 130 S. Ct. 2011, 2044 (2010) (Thomas, J., dissenting). In \textit{Graham}, the Court held that the Eighth Amendment prohibits the imposition of life sentences without parole on juvenile offenders in non-homicide cases. \textit{Id.} at 2034 (majority opinion). Justice Thomas referred to \textit{Baze} in his discussion of the original meaning of the Eighth Amendment. \textit{Id.} at 2044 (Thomas, J., dissenting).

\textsuperscript{28} See \textit{Oshinsky}, \textit{supra} note 12, at 10.


\textsuperscript{30} See \textit{id.} at 297.

\textsuperscript{31} See \textit{id.} at 298 n.20.

\textsuperscript{32} See \textit{id.} at 283–85.

\textsuperscript{33} See \textit{id.} at 286.

\textsuperscript{34} See \textit{McCleskey}, 481 U.S. at 286.
of murdering a white victim was 4.3 times more likely to receive the death penalty than a defendant convicted of murdering a black victim.\textsuperscript{35} Nevertheless, Justice Powell, writing for the majority, concluded that race was not an issue in McCleskey’s conviction.\textsuperscript{36} Applying a colorblind analysis, he explained that race was not a proven factor in the sentencing because the statistical evidence could not establish the requisite racial animus of the prosecutor, jurors, or judge in McCleskey’s case.\textsuperscript{37} Justice Powell reasoned that the Eighth Amendment was not violated because, though there may have been a race-based discrepancy in sentencing, it was not constitutionally significant.\textsuperscript{38} In Justice Powell’s view, McCleskey’s charge of racial bias could open the floodgates to endless litigation that relied on statistical studies of all sorts.\textsuperscript{39} He therefore concluded that the Constitution did not require a state to pursue every trivial factor related to bias in capital sentencing.\textsuperscript{40}

In contrast, Justice Brennan urged in dissent that the racial history of the death penalty must be considered.\textsuperscript{41} He argued that the Baldus study demonstrated the lingering effects of Georgia’s dual system of crime and punishment on death penalty sentencing.\textsuperscript{42} Brennan contended that unconscious racism, coupled with statistical evidence, was sufficient to demonstrate racial disparity in the application of Georgia’s death penalty statute.\textsuperscript{43} He explained,

The statistical evidence in this case thus relentlessly documents the risk that McCleskey’s sentence was influenced by racial considerations. . . . Georgia’s legacy of a race-conscious criminal justice system, as well as this Court’s own recognition of the persistent danger that racial attitudes may affect criminal proceedings, indicates that McCleskey’s claim is not a fanciful product of mere statistical artifice.\textsuperscript{44}

\textsuperscript{35} Id. at 287.
\textsuperscript{36} Id. at 313.
\textsuperscript{37} Id. at 297, 308.
\textsuperscript{38} See id. at 308.
\textsuperscript{39} See McCleskey, 481 U.S. at 308–09.
\textsuperscript{41} See McCleskey, 481 U.S. at 328–29 (Brennan, J., dissenting).
\textsuperscript{42} See id. at 322, 328–29.
\textsuperscript{43} See id. at 332–35.
\textsuperscript{44} Id. at 328–29.
Justices Blackmun and Stevens also dissented and respectively argued that the race of a defendant was determinative in his treatment by Georgia’s capital sentencing system and that Georgia’s racial history deserved consideration.\textsuperscript{45}

The Court’s decision in \textit{McCleskey} led to a great deal of criticism from legal scholars.\textsuperscript{46} For example, Professor Stephen Carter argued that \textit{McCleskey} was written in a way that skirted a more fundamental issue—that the entire criminal justice system is racially biased.\textsuperscript{47} Professor Carter explained:

\begin{quote}
[T]he majority wrote in a way that made it possible to evade a more fundamental difficulty raised by the Baldus study—that racialism might be responsible not only for the disproportionate execution of murderers who happens to be black, but for inadequate protection of murder victims who happen to be black.\textsuperscript{48}
\end{quote}

\textsuperscript{45} See id. at 345–47 (Blackmun, J., dissenting); id. at 366–67 (Stevens, J., dissenting).


\textsuperscript{48} Id. at 443. Professor Michelle Alexander argues:

[T]he \textit{McCleskey} decision was not really about the death penalty at all; rather, the Court’s opinion was driven by a desire to immunize the entire criminal justice system from claims of racial bias. The best evidence in support of this view can be found at the end of the majority opinion where the Court states that discretion plays a necessary role in the implementation of the criminal justice system, and that discrimination is an inevitable by-product of discretion. Race discrimination, the Court seemed to suggest, was something that simply must be tolerated in the criminal justice system, provided no one admits to racial bias.

In another critique of *McCleskey*, Professor Sheri Lynn Johnson criticized the shortcomings of traditional equal protection analysis, which requires purposeful discriminatory intent. Professor Johnson suggests that data showing “higher conviction rates of other-race defendants; the race-of-victim effect in capital sentencing [and] the overwhelming propensity of prosecutors to strike black jurors from cases with black defendants” together with “verified indicia of unconscious racism” such as racial insults, avoidance of racial minorities, and the application of defense mechanisms, should be sufficient to show racial discrimination. According to Professor Johnson, such a methodology would not require a complete abandonment of current doctrine, but merely modest incremental changes.

Some scholars go even further and offer ambitious claims beyond the realm of capital punishment, focusing instead on the relationship between race and the criminal justice system in this country. For example, Professor Michelle Alexander in her book, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, argues that the current criminal justice system is a racial caste system. She contends that black men are targeted for incarceration through tough sentencing laws and racist police practices. The end result, Professor Alexander claims, is a new Jim Crow era, creating social controls that disenfranchise African American felons who simultaneously face discrimination in employment, housing, education, voting, and jury service.

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49 See Johnson, *supra* note 40, at 1019.
50 See id. at 1032–34 (footnotes omitted).
51 *Id.* at 1032. Professor Scott Howe also advocates the consideration of unconscious racial discrimination in developing new ways to analyze capital punishment but, unlike Professor Johnson, he emphasizes an Eighth Amendment-centered approach. See Scott W. Howe, *The Futile Quest for Racial Neutrality in Capital Selection and the Eighth Amendment Argument for Abolition Based on Unconscious Racial Discrimination*, 45 WM. & MARY L. REV. 2083, 2145–49 (2004).
53 *Alexander, supra* note 48, at 11–12.
54 *Id.* at 14–17.
55 *Id.* at 185–89.
forcefully argue that capital punishment’s roots may be traced to slavery, Jim Crow, and the preservation of white supremacy. Against this backdrop, Professor Charles Ogletree asserts, “The belief that ‘justice is blind’ will yield to the reality that, in fact, blind justice is injustice.’ The strongly-held view that in order to become colorblind we must first be color-conscious must be adopted by the criminal justice system, and reflected in our national crime policy.” Given the stark racial disparity of death penalty statistics, it is difficult to reconcile the ideals of a colorblind constitution and formal equality with the actual disparate impact on racial minorities in death penalty cases.

Scholars have reasonably concluded that the death penalty has been used in a racially biased manner. Indeed, there are numerous empirical studies that support the assertion of racial bias in death penalty cases. Recent research supports the original findings of the


60 See, e.g., Staff of Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary, 103d Cong., Racial Disparities in Federal Death Penalty Prosecutions 1988–94, reprinted in 140 CONG. REC. S9588, 9588 (May 6, 1994) (‘‘Race continues to plague the application of the death penalty in the United States. On the state level, racial disparities are most obvious in the predominant selection of cases involving white vic-
Baldus study that the race of the victim also matters in the determination of a death sentence.\textsuperscript{61} For instance, a study on the death penalty in North Carolina revealed that a defendant who is suspected of killing a white victim is three times more likely to receive the death penalty than if the victim is black.\textsuperscript{62} Moreover, there is ample evidence demonstrating that race plays a central role in the prosecution of capital cases, which are commonly tried by white prosecutors.\textsuperscript{63} In response to these criticisms, Kentucky and North Carolina have implemented Racial Justice Acts that allow defendants to use statistics and other evidence in proving racial bias in the application of death penalty laws; there have been attempts made to pass similar acts in Congress and Georgia.\textsuperscript{64}

Finally, it is important to note that the discussion over race and the death penalty cannot be neatly divided into categories of black and
white. Although rarely discussed, as a historical matter, the first person in the United States executed in a gas chamber was an Asian defendant. In 1923, Gee Jon, a Chinese gang member, was executed by lethal gas at Nevada State Prison. Currently, there are approximately forty Asian inmates on death row in the United States, including the infamous Charles Ng, a former U.S. Marine, who was convicted of eleven murders and suspected of being involved in fourteen others. More recently, Thavirak Sam was convicted of three counts of first-degree murder and received three consecutive death sentences for the killing of his mother-in-law, brother-in-law, and niece. During his post conviction appeal proceedings, Sam was found to be incompetent to proceed. The Supreme Court of Pennsylvania, however, reversed the lower court’s determination and held that Sam’s best interests justified the involuntary administration of antipsychotic medication.

C. Lethal Injection Protocols

In 1977, Oklahoma created the first lethal injection protocol; soon thereafter many states followed Oklahoma’s lead with their own three-drug lethal injection protocol. As Alison Nathan points out, one significant issue with these state protocols is the manner in which states have adopted an unnecessary paralytic drug as part of the protocol. She explains,
The nature of this drug is to *mask* the realities of the execution from meaningful public scrutiny. A paralyzed inmate suffering pain during the execution will be physically unable to express his suffering. As a result, witnesses, including members of the media . . . see only a sanitized version. Unaware of the painful suffering endured by inmates, the public has assumed wrongly that states always execute inmates in a humane and painless manner.\(^74\)

Problems occur with the application of lethal injection protocols in several states.\(^75\) For example, there have been botched attempts to find suitable veins, with some administrations lasting as long as two hours.\(^76\) Additionally, execution team members have administered lethal injection drugs without any knowledge of their purpose or risks.\(^77\) As Professor Deborah Denno states, “‘Lethal injection, which has the veneer of medical acceptability, has far greater risks of cruelty [than death by a firing squad] to a condemned person.’”\(^78\)

D. *The Supreme Court Decision in Baze v. Rees*

In *Baze*, a Kentucky death row inmate claimed that the state’s three-drug lethal injection method was cruel and unusual punishment under the Eighth Amendment.\(^79\) He argued that the state’s protocol created an unacceptable risk of significant pain.\(^80\) In denying the inmate’s claim, the Justices expressed conflicting rationales in a series of divergent opinions.

Chief Justice Roberts, writing for the plurality, refused to apply an “unnecessary risk of pain” standard of review, holding that such a standard would “transform courts into boards of inquiry,” creating endless litigation.\(^81\) Instead, Chief Justice Roberts explained that an execution method constitutes cruel and unusual punishment only if it presents a “substantial risk of serious harm” or an “objectively intolerable risk of

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\(^74\) *Id.* at 316.

\(^75\) *See* Alper, *supra* note 6, at 5–6; Shah, *supra* note 6, at 1106–08.

\(^76\) Shah, *supra* note 6, at 1106–07; *see also* Richard Klein, *Supreme Court Criminal Law Jurisprudence—October 2008 Term*, 26 Touro L. Rev. 545, 571 (2010) (noting an instance where an execution needed to be rescheduled after eighteen failed attempts to inject the drugs).

\(^77\) *See* Morales v. Tilton, 465 F. Supp. 2d 972, 979 (N.D. Cal. 2006).


\(^80\) *Id.*

\(^81\) *Id.* at 51.
As a result, a state’s refusal to implement alternative execution procedures will not violate the Eighth Amendment unless the alternative procedure is “feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.”

The Court held that the risk of improper administration of the initial drug did not render the three-drug protocol cruel and unusual. Chief Justice Roberts further explained that the state’s failure to adopt proposed, allegedly more humane alternatives to the three-drug protocol did not constitute cruel and unusual punishment. Paying deference to the states, Chief Justice Roberts acknowledged that the “Court has never invalidated a State’s chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment.”

The Court was not persuaded by the “petitioners[‘] claim that there is a significant risk that the procedures will not be properly followed—in particular, that the sodium thiopental will not be properly administered to achieve its intended effect—resulting in severe pain when the other chemicals are administered.” Likewise, the Court did not accept the argument that Kentucky could switch from a three-drug protocol to a single-drug protocol. Rather, Chief Justice Roberts reasoned that “a condemned prisoner cannot successfully challenge a State’s method of execution merely by showing a slightly or marginally safer alternative.” Chief Justice Roberts declared that Kentucky cannot be viewed as wantonly inflicting pain under the Eighth Amendment simply because it uses an injection method for which it simultaneously adopts safeguards.

Justices Stevens, Scalia, Thomas, and Breyer each filed an opinion concurring in the judgment. In particular, Justice Thomas argued that

82 Id. at 50 (quoting Farmer v. Brennan, 511 U.S. 825, 842, 846 & n.9 (1994)).
83 Id. at 52.
84 Baze, 553 U.S. at 56.
85 Id.
86 See id. at 48.
87 See id. at 49.
88 See id. at 56–57.
89 Baze, 553 U.S. at 51.
90 See id. at 62.
91 Id. at 71 (Stevens, J., concurring in the judgment); id. at 87 (Scalia, J., concurring in the judgment); id. at 94 (Thomas, J., concurring in the judgment); id. at 107 (Breyer, J., concurring in the judgment). Justice Stevens expressed concern that the drug used could “mask[] any outward sign of distress” despite an inmate’s “excruciating pain before death occurs.” Id. at 71 (Stevens, J., concurring in the judgment). He also declared that he believed the death penalty was unconstitutional. Id. at 86–87. Yet, constrained by precedent, Stevens determined that Kentucky’s method of lethal injection met the tests proposed by
a form of capital punishment “violates the Eighth Amendment only if it is deliberately designed to inflict pain . . . .” He concluded that Baze was “an easy case” and that the defendants’ challenge should fail “[b]ecause Kentucky’s lethal injection protocol is designed to eliminate pain rather than to inflict it . . . .” Justice Thomas also criticized the Court for failing to provide states with any clear guidelines moving forward. He warned that the reasoning offered by the plurality would lead to litigation and burden courts because Kentucky’s lethal injection protocol was not intended to inflict pain. Thomas explained,

[F]ar from putting an end to abusive litigation in this area, . . . today’s decision is sure to engender more litigation. At what point does a risk become “substantial”? Which alternative procedures are “feasible” and “readily implemented”? When is a reduction in risk “significant”? What penological justifications are “legitimate”? Such are the questions the lower courts will have to grapple with in the wake of today’s decision. Needless to say, we have left the States with nothing resembling a bright-line rule.

In contrast, Justice Ruth Bader Ginsburg argued in her dissent that it was undisputed that Kentucky’s method would cause an inmate to suffer excruciating pain. Justices Ginsburg and Stevens were both mindful of the potential pain felt by the inmate and thus argued that “Kentucky’s protocol lacks basic safeguards used by other States to confirm that an inmate is unconscious before injection of the second and third drugs.” Justice Ginsburg advocated a lesser standard that would require petitioners to demonstrate only “an untoward, readily avoidable risk of inflicting severe and unnecessary pain.” She suggested that three factors should be considered: the degree of risk, the magnitude of pain, and the availability of alternatives. Justice Ginsburg argued that if a petitioner demonstrated a high level of one factor, then the

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Id. at 87.
92 Id. at 94 (Thomas, J., concurring in the judgment).
93 Id. at 107.
94 See Baze, 553 U.S. at 105 (Thomas, J., concurring in the judgment).
95 See id. at 94, 105.
96 Id. at 105.
97 See id. at 113 (Ginsburg, J., dissenting).
98 See id. at 114.
99 Baze, 553 U.S. at 114 (Ginsburg, J., dissenting).
100 Id. at 116.
petitioner would not need to make a significant showing on the other factors.\textsuperscript{101}

After \textit{Baze}, establishing an Eighth Amendment violation is an uphill battle for those challenging lethal injection protocols.\textsuperscript{102} Challengers throughout the country are discovering that it is difficult to meet the \textit{Baze} standard of “‘a substantial risk of serious harm.’”\textsuperscript{103} Inmates must now show the existence of a feasible alternative that would “significantly reduce a substantial risk of severe pain.”\textsuperscript{104} It is possible that this high threshold may be too exacting and too difficult for any challenger to meet.\textsuperscript{105} At the same time, placing the burden on states to provide an alternative that would significantly reduce a substantial risk of severe pain could also be a herculean task.\textsuperscript{106}

Ultimately, major issues concerning litigation over lethal injection remain open and uncertainties persist.\textsuperscript{107} \textit{Baze} leaves many questions unresolved.\textsuperscript{108} First, it is unclear what factors are necessary to demonstrate that a state protocol would create a risk under the \textit{Baze} standard.\textsuperscript{109} Second, \textit{Baze} does not indicate when such a risk is “substantial” or “significant.”\textsuperscript{110} Finally, the question of whether a single drug protocol is ever appropriate is still unanswered.\textsuperscript{111} Moving forward, \textit{Baze} has left the doors open for future lethal injection challenges.\textsuperscript{112} As Justice Stevens predicted, “When we granted certiorari in this case, I assumed

\textsuperscript{101} See \textit{id.}

\textsuperscript{102} See \textit{id.} at 50–52 (plurality opinion); \textit{id.} at 105 (Thomas, J., concurring in the judgment).

\textsuperscript{103} See \textit{id.} at 50 (plurality opinion) (quoting \textit{Farmer}, 511 U.S. at 842, 846 & n.9).

\textsuperscript{104} See \textit{Baze}, 553 U.S. at 52.

\textsuperscript{105} See \textit{id.} at 105 (Thomas, J., concurring in the judgment).

\textsuperscript{106} See \textit{id.} at 47–48 (plurality opinion) (holding that requiring states to adopt procedures with the lowest risk would put states’ methods in perpetual doubt); \textit{id.} at 67 (Alito, J., concurring) (noting that purported hazards and advantages are unreliable); \textit{id.} at 105 (Thomas, J., concurring in the judgment) (highlighting the absence of a clear standard going forward).

\textsuperscript{107} See \textit{id.} at 105 (Thomas, J., concurring in the judgment).

\textsuperscript{108} See Marceau, \textit{supra} note 1, at 210–11.

\textsuperscript{109} See \textit{Baze}, 553 U.S. at 116–17 (Ginsburg, J., dissenting) (outlining the differences between the plurality’s view and her view of the important factors); see also \textit{id.} at 107–08 (Breyer, J., concurring in the judgment) (indicating agreement with the factors Justice Ginsburg listed).

\textsuperscript{110} See \textit{id.} at 105 (Thomas, J., concurring in the judgment).

\textsuperscript{111} See \textit{id.} at 61 (plurality opinion) (‘‘A State with a lethal injection protocol substantially similar to the protocol we uphold today would [be upheld as constitutional].’

\textsuperscript{112} See \textit{id.} at 71 (Stevens, J., concurring in the judgment).
that our decision would bring the debate about lethal injection as a method of execution to a close. It now seems clear that it will not.\footnote{113}{Id. Since retiring, Justice Stevens has become more outspoken about his opposition to the death penalty. See John Paul Stevens, On the Death Sentence, N.Y. REV. BOOKS (Dec. 23, 2010), http://www.nybooks.com/articles/archives/2010/dec/23/death-sentence/ (reviewing David Garland, Peculiar Institution: America’s Death Penalty in an Age of Abolition (2010)).}

II. THE AFTERSHOCKS: LETHAL INJECTION LITIGATION IN THE LOWER COURTS

A. § 1983 CIVIL RIGHTS COMPLAINTS CHALLENGING LETHAL INJECTION PROCEDURES

The majority of lethal injection lawsuits after Baze have been filed under 42 U.S.C. § 1983, which has historically been a means for a prisoner to challenge conditions of confinement.\footnote{114}{See Richard C. Dieter, Methods of Execution and Their Effect on the Use of the Death Penalty in the United States, 35 FORDHAM URB. L.J. 789, 800 (2008); Ellen Kreitzberg & David Richter, But Can It Be Fixed? A Look At Constitutional Challenges to Lethal Injection Executions, 47 SANTA CLARA L. REV. 445, 467–69 (2007).} Unlike claims challenging the death penalty in general, claims against specific procedures do not require a writ of habeas corpus.\footnote{115}{See Dieter, supra note 114, at 799–800.} For example, in Nelson v. Campbell, the Supreme Court held that an Alabama death row inmate could use § 1983 to challenge the rarely used “cut-down” method of legal injection, and that such actions were not subject to habeas corpus’s more rigorous procedural gate-keeping requirements.\footnote{116}{See Nelson v. Campbell, 541 U.S. 637, 639, 646–47 (2004). The cut-down method of execution is used when an inmate has compromised veins, making traditional injection procedures impossible. See id. at 640–41. In such a case, prison personnel make an incision and catheterize a vein, through which the lethal drugs are delivered. See id.} Likewise, in Hill v. McDonough, the Court held that cases challenging a method of execution were generally grounded in civil rights jurisprudence.\footnote{117}{See Hill v. McDonough, 547 U.S. 573, 579, 583–85 (2006).} Because the complaint challenged the particular method that was likely to be used for execution rather than directly challenging the death sentence itself, the Court reasoned that the challenge could proceed as a civil rights action rather than as a habeas action.\footnote{118}{See id. at 580–81; see also Beardslee v. Woodford, 395 F.3d 1064, 1068–69 (9th Cir. 2005) (acknowledging that a § 1983 action is the proper vehicle to challenge a method of execution); Jackson v. United States, 638 F. Supp. 2d 514, 615 (W.D.N.C. 2009) ("A motion pursuant to § 2255 is not the appropriate procedural mechanism for placing this issue before a court."); Emmett v. Johnson, 489 F. Supp. 2d 543, 547 (E.D. Va. 2007) ("The permissible scope of a constitutional challenge to execution procedures brought under 42 U.S.C. § 1983 is narrow. A civil rights action is not an appropriate vehicle to contest either an inmate’s sentence of death or the constitutionality of the death penalty generally.").}
Civil litigation under § 1883 is preferable to filing a petition for a writ of habeas corpus, in part because document requests and interrogatories may be made as a matter of course. Inmates need discovery to determine if there is a substantial risk of severe pain due to maladministration of the injection protocol. In litigation, the onus remains on inmates to educate the courts about death penalty protocols because courts may not be knowledgeable about them. As such, it is important for inmates to gather as much information as possible about the protocol through civil rights suits.

B. Baze as Applied

In the wake of Baze, challenges to lethal injection procedures face major difficulties. Meeting the Baze legal standard requires a showing that a state’s lethal injection protocol poses a substantial risk of severe pain as written. Many cases highlight the undue deference that courts give to execution protocols. In general, courts tend to defer to states that refuse to adopt alternative methods because of a legitimate penological justification for adhering to the present method. In addition, courts misapply the Baze standard, treating the Baze decision as a rigid safe harbor.

Indeed, the Baze decision has created a safe harbor for states. If a state’s lethal injection protocol is similar to the Kentucky protocol that was upheld in Baze, then it will not violate the Eighth Amendment. For example, in Harbison v. Little, the Sixth Circuit vacated a district court decision holding that Tennessee’s lethal injection proto-

\[120\] See, e.g., Harbison v. Little, 571 F.3d 531, 540–41 (6th Cir. 2009) (Clay, J., dissenting).
\[121\] See Kreitzberg & Richter, supra note 114, at 509.
\[122\] See id.
\[125\] See Berger, supra note 123, at 260–62.
\[126\] See id. at 262 (“Courts, in other words, are adopting a blanket deference that makes it more difficult for even the strongest cases to get a fair hearing.”); Oldenkamp, supra note 119, at 997–99.
\[128\] See, e.g., Harbison, 571 F.3d at 536.
\[129\] See Baze, 553 U.S. at 61.
col violated the Eighth Amendment. The Sixth Circuit upheld the protocol, concluding that it did not create a substantial risk of severe pain. In the case itself, the petitioner argued that Tennessee’s lethal injection protocol “violate[d] his Eighth Amendment rights because it involve[d] the unnecessary and wanton infliction of pain.” Harbison’s claims focused on the protocol’s failure to require a check for consciousness, the inadequate selection and training of personnel, the failure to provide for tactile monitoring of the IV lines, and the state’s refusal to adopt alternative procedures.

The Harbison court relied heavily on Baze. It reasoned that Tennessee’s protocol was substantially similar to the Kentucky protocol that was at issue in Baze and thus did not create a risk of a constitutional violation. The court explained, “Tennessee’s protocol must be upheld because Baze addressed the same risks identified by the trial court, but reached the conclusion that they did not rise to the level of a constitutional violation.” The court also looked at the training of medical personnel and execution procedures required by the Tennessee protocol and determined that they were similar to those found to be adequate and constitutional in Baze.

In dissent, Judge Eric Lee Clay criticized the court’s heavy reliance on the “substantially similar” Kentucky protocol at issue in Baze. He argued that the majority’s reasoning was legally and analytically flawed. Judge Clay explained,

The majority recasts the district court’s evidentiary findings in light of criteria that the [district] court never considered, presuming findings under Baze that the district court never made. It does so in a cursory manner, with minimal attention to the Baze plurality’s fact-specific analysis, summarily concluding at

130 Harbison, 571 F.3d at 533. The court also vacated the lower court’s injunction that had barred Tennessee from executing any state prisoners on death row who brought a § 1983 action challenging the state’s lethal injection protocol. Id. at 539.
131 Id. at 539.
132 Id. at 534.
133 See id. at 534–35.
134 See id.
135 See Harbison, 571 F.3d at 536.
136 Id.
137 See id. at 537–39.
138 See id. at 540–41 (Clay, J., dissenting).
139 See id. at 540.
each juncture that any deficiencies in Tennessee’s execution protocol had already been considered but rejected in *Baze*. Of particular concern for Judge Clay was the district court’s lack of opportunity to consider the evidence and to apply the *Baze* standard because the district court issued its opinion before the *Baze* ruling. Judge Clay insisted that the district court should have been given the full opportunity to conduct extensive fact-finding to determine whether the state’s protocol was properly implemented. He argued, “It is not unforeseeable that a three-drug protocol that is, at first glance, similar to Kentucky’s protocol, could fail to meet the standard set forth in *Baze*.” Accordingly, Judge Clay concluded that the majority should have remanded the case back to the district court instead of making its own determination on the merits.

Similarly, in Arizona, the federal district court has held that the state’s lethal injection protocol does not subject inmates to substantial risk of serious harm in violation of the Eighth Amendment. The court based its holding on the fact that the Arizona protocol was substantially similar to the lethal injection protocol approved in *Baze* and provided even more safeguards than the Kentucky protocol. Likewise, when determining the constitutionality of state protocols, the Fourth Circuit asks whether the execution protocol in question is “substantially similar to the protocol upheld in *Baze*."

Because of the difficulty that challengers face in showing that state protocols create a substantial risk of severe pain as written, a potential alternative is to demonstrate that the protocol, constitutional as written, would be applied in an unconstitutional manner. Under this approach, a challenge may be successful if there is a sufficient risk that the written protocol would not be followed or performed as expected.

140 Harbison, 571 F.3d at 540 (Clay, J., dissenting).
141 See id. at 540–41.
142 See id.
143 Id. at 540.
144 See id. at 540–41.
145 See Dickens, 2009 WL 1904294, at *38.
146 See id. at *30, *38.
147 See Emmett v. Johnson, 532 F.3d 291, 299 (4th Cir. 2008). In *Emmett v. Johnson*, the Fourth Circuit concluded that Virginia’s protocol was substantially similar to the *Baze* protocol, and held that the inmate failed to meet the heightened standard set forth in *Baze*. See id. at 300, 305; see also Walker v. Johnson, 328 F. App’x 237, 238 (4th Cir. 2009); Jackson v. Johnson, 570 F. Supp. 2d 833, 835 (E.D. Va. 2008).
148 See, e.g., Clemons v. Crawford, 585 F.3d 1119, 1124–25 (8th Cir. 2009).
149 See *Baze*, 553 U.S. at 41.
Again, this is a difficult showing to make.\footnote{See, e.g., Clemons, 585 F.3d at 1126–28; Jackson v. Danberg, 601 F. Supp. 2d 589, 598–99 (D. Del. 2009).} For instance, inmates may complain that there is a significant risk that physicians, nurses, or other medical personnel will not follow the lethal injection procedures, but may struggle to prove that a member of the execution team would intentionally or negligently deviate from or disregard the protocol.\footnote{See Clemons, 585 F.3d at 1126–28.}

Moreover, in this context, courts continue to use \textit{Baze} as a safe harbor.\footnote{See id. at 1125.} For example, in \textit{Clemons v. Crawford}, a group of death row inmates challenged Missouri’s written lethal injection protocol.\footnote{See \textit{id.} at 1124–25.} The inmates claimed that the protocol violated the Eighth Amendment because of the substantial risk that the protocol could be administered improperly.\footnote{See \textit{id.} at 1125.} The inmates based their claim on evidence of previous improper preparation and administration of lethal chemicals by state medical personnel.\footnote{See \textit{id.}} The U.S. District Court for the Western District of Missouri, however, held that the inmates failed to state a viable Eighth Amendment claim.\footnote{See Clemons v. Crawford, No. 07-4129-CV-C-FJG, 2008 WL 2783233, at *1–2 (W.D. Mo. July 15, 2008), \textit{aff’d}, 585 F.3d 1119.} The Eighth Circuit affirmed the district court decision, concluding that the challengers did not allege a sufficiently substantial risk of serious harm or a sufficiently imminent danger to support an Eighth Amendment claim.\footnote{See Clemons, 585 F.3d at 1126–28.} The court repeatedly referred to similarities between the facts in the case and those in \textit{Baze}, concluding that the Missouri protocol safeguarded against the risk of maladministration in ways similar to or more stringent than the Kentucky protocol.\footnote{See \textit{id.}}

In general, courts require more than a showing of previous instances of deviations from protocol before invalidating lethal injection procedures.\footnote{See \textit{id.} at 1127.} For instance, in \textit{Jackson v. Danberg}, the U.S. District Court of Delaware held that the state’s previous casualness in following lethal injection procedures did not by itself create a risk of inability to carry out revised protocol.\footnote{See Jackson, 601 F. Supp. 2d at 598–99.} The court also concluded that the risk of giving an insufficient dose of sodium thiopental at the first stage of the state’s revised protocol did not give rise to an objectively intolerable risk of
harm. Likewise, the Fifth Circuit, in *Raby v. Livingston*, held that the potential problems associated with intravenous insertions did not render Texas’s lethal injection protocol in violation of the Eighth Amendment. The plaintiff’s argument in *Raby* was based “entirely on the hypothetical possibilities of human error or failure to follow protocol.” The Fifth Circuit affirmed the lower court’s finding that “[t]hese hypotheticals are insufficient to remove the Texas procedure from the safe harbor created by *Baze.*”

The cases that have followed *Baze* demonstrate that it is unlikely courts will find that a protocol subjects inmates to a substantial risk of serious harm so long as the protocol is similar to Kentucky’s. Indeed, without a showing that the execution protocol subjects inmates to a substantial risk of serious harm, plaintiffs will not succeed in their claim, especially if the state’s protocol provides more procedural safeguards than the Kentucky protocol. The cases suggest that an alternative strategy for inmates is to demonstrate that the state is not consistently following its own procedures or that there is a pattern of unsuccessful executions. Yet, moving forward, inmates will be hard-pressed to demonstrate that a state’s protocol gives rise to an objectively intolerable risk of harm and that there is evidence that the execution would be carried out in a cruel and unusual fashion.

**C. Extreme Deference to State Lethal Injection Protocols**

Based on a small sampling of post-*Baze* § 1983 lethal injection challenge cases, it appears that the courts have given too much deference to state lethal injection procedures. There is no consensus that the protocols of each state guarantee that executions are free from unnecessary pain and suffering. These protocols have been the target of

161 See id.
162 See *Raby* v. *Livingston* (*Raby II*), 600 F.3d 552, 558 (5th Cir. 2010).
164 *Raby I*, 2008 WL 4763677, at *3; see *Raby II*, 600 F.3d at 560.
165 See, e.g., *Harbison*, 571 F.3d at 536; *Emmett*, 532 F.3d at 299.
166 See *Baze*, 553 U.S. at 49–50; e.g., *Dickens*, 2009 WL 1904294, at *30, *38.
167 See *Harbison*, 571 F.3d at 536 (showing that attacking procedures on the basis that they might cause substantial harm is an ineffective strategy).
168 See *Jackson*, 601 F. Supp. 2d at 598–99 (holding that arguments related to past mistakes in executions are insufficient to create a substantial risk of serious harm).
much criticism, even though very little information is available to the public. As one academic remarked, these protocols are descriptions of “hypothetical rituals” that are unlike criminal laws or civil regulations, given their lack of definitions for penalties for improper behavior and any establishment of duty and responsibly. Indeed, Alison Nathan asserts that these procedures “are often exempt from state administrative law notice-and-comment requirements or have been treated as exempt by prison personnel.” As such, critical information such as the type of drugs to be used, dosage amounts, and other administrative procedures are not publicly disclosed. This unfortunately precludes the public from learning about flawed procedures, incompetent administration, and execution errors.

So little is known about the execution protocols, in part because some states maintain a confidential manual that details the specific lethal injection proceedings followed. For example, in Pennsylvania, state law requires that an inmate be injected with “a continuous intravenous administration of a lethal quantity of an ultrashort-acting barbiturate in combination with chemical paralytic agents approved by the department until death is pronounced by the coroner.” Accordingly, sodium thiopental, an “ultrashort-acting barbiturate,” is administered to anesthetize individuals being executed. The lethal injection statute, however, offers no information about the actual method of execution, including the drugs to be used, how the drugs are to be obtained and stored, and the dosage amount. These questions seemingly negate the precautions and safeguards that typically surround the use of con-

172 See id.
173 See id.
174 See Wong, supra note 170, at 271.
175 See § 4304; see also Wong, supra note 170, at 272.
trolled substances and devices. Any reliable evaluation of Pennsylvania lethal injection process, therefore, depends on knowledge of how the Pennsylvania Department of Corrections carries out executions. Yet, the Department of Corrections maintains this information in secrecy.

Plaintiffs recently raised such concerns in Chester v. Beard. In this ongoing litigation, plaintiffs allege that there is no information available that explains how the quantity of sodium thiopental is determined. Plaintiffs also allege that there is no information concerning the selection and training given to the paramedics, nurses, or other health care professionals on the lethal injection team concerning the proper administration of the drug. These allegations raise valid concerns about the proper injection and administration of the two other drugs—pancuronium bromide and potassium chloride—by members of the lethal injection team whose qualifications, licensure, and medical training remain a mystery. Further, there is no information available concerning the procedures for checking consciousness, alternative procedures, or adequate facilities.

In December 2010, Ohio became the first state to execute an inmate with a single drug protocol. Washington has also adopted a single drug protocol. Florida, Kentucky, South Carolina, Texas, and Virginia are all monitoring the implementation of Ohio’s method.

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181 See Wong, supra note 170, at 272.
184 See id.
185 See id.
186 See id.
187 See Marceau, supra note 1, at 211.
189 See Kamika Dunlap, Lethal Injection: WA Adopts Single Shot Protocol, FINDLAW BLOTTER (Mar. 4, 2010, 12:15 PM), http://blogs.findlaw.com/blotter/2010/03/lethal-injection-wa-adopts-single-shot-protocol.html. Washington revised its protocol in response to a pending legal challenge before the Washington Supreme Court. See id. After an evidentiary hearing in the case but before oral arguments, the Department of Corrections changed from a three-drug protocol to a single drug protocol based on the procedures in place in Ohio. See id. The Washington Supreme Court found that, given the amendment, the constitutional challenge to the three-drug procedure was moot. See id.
180 See id.; see also Elliot Garvey, Comment, A Needle in the Haystack: Finding a Solution to Ohio’s Lethal Injection Problems, 38 Cap. U. L. Rev. 609, 640 (2010) (noting that Ohio’s exe-
While some states have switched from a three-drug protocol to a single drug protocol, risks remain.\(^{191}\) One physician has cautioned that single drug protocols using sodium thiopental demand scrutiny.\(^{192}\) One major concern about the single drug protocol is that an inmate’s death or sense of pain does not immediately become apparent.\(^{193}\) In the ongoing debate over a three-drug protocol versus a single drug protocol, it is unlikely that states will reach a consensus anytime in the near future.

### III. An Alternative Strategy: Challenging Administrative Procedures Acts

A plaintiff will not succeed in challenging a particular execution protocol without a showing that the protocol subjects inmates to a substantial risk of serious harm, especially if the state’s protocol provides more procedural safeguards than the Kentucky protocol upheld in *Baze*.*\(^{194}\) Inmates will have difficulty demonstrating that the protocol gives rise to an objectively intolerable risk of harm or that there is evidence the execution would be carried out in a cruel and unusual fashion.\(^{195}\) The difficulty in overcoming the *Baze* standard calls for an alternative strategy to challenge lethal injections. Plaintiffs must seek creative ways to fight lethal injection instead of, or in addition to, direct Eighth Amendment claims.\(^{196}\) Indeed, there are indications that this is already happening.\(^{197}\)

After *Baze*, plaintiffs have brought challenges to state death penalty protocols based on claims that the protocols violate state administrative procedures acts.\(^{198}\) These plaintiffs argued that the state protocols promulgated by the departments of corrections circumvented legal

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191 See Garvey, *supra* note 190, at 640; Dunlap, *supra* note 189.
195 See id.
196 See id. at 228.
197 See id.
administrative requirements. In some cases, information obtained through discovery has caused states to make changes to their protocols. The results, however, have been mixed.

The Tennessee Supreme Court in *Abdur’Rahman v. Bredesen* found that the public notice and hearing requirements of the Tennessee Uniform Administrative Procedures Act were not applicable to the Department of Corrections and that the lethal injection protocols concerned only inmates of a correctional facility as an internal matter. Likewise, in Missouri, an inmate claimed that the Department of Corrections’s adoption of the lethal injection protocol violated the Missouri Administrative Procedure Act. The Missouri Supreme Court held that the protocol was not a “rule” within the scope of the Procedure Act and therefore there was no notice-and-comment requirement.

In other cases, challenges under administrative procedure acts have been successful. For example, in *Evans v. State*, the Maryland Court of Appeals held that the state’s injection protocols were within the scope of the state Administrative Procedure Act and thus subject to its notice-and-comment rulemaking requirement. The court determined that the Administrative Procedure Act required Maryland’s lethal injection protocol to be adopted as a regulation. It reasoned that the legislative intent was to allow public review and oversight and that the state protocols for administration as set forth in the directives were ineffective unless properly adopted. The court further concluded that decisions concerning the administration of execution drugs affect inmates, corrections personnel, witnesses who observe the execution, and the general public.

In *Morales v. Tilton*, the U.S. District Court for the Northern District of California held that the state’s protocol, as implemented, violated the Eighth Amendment. Central to the decision was the court’s finding.

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199 See *Bowling*, 301 S.W.3d at 492; *Middleton*, 278 S.W.3d at 196; *Power*, 992 So. 2d at 220; *Evans*, 914 A.2d at 77–81; *Abdur’Rahman*, 181 S.W.3d at 312; *Morales*, 85 Cal. Rptr. 3d at 732.

200 See *Bowling*, 301 S.W.3d at 492; *Evans*, 914 A.2d at 77–81; *Morales*, 85 Cal. Rptr. 3d at 732.

201 See *Abdur’Rahman*, 181 S.W. 3d at 312. Similarly, the Florida Supreme Court held that the Administrative Procedures Act did not improperly provide the Department of Corrections “unfettered discretion” to create lethal injection protocol. See *Power*, 992 So. 2d at 220.

202 See *Middleton*, 278 S.W.3d at 196.

203 See *id*.

204 See *Evans*, 914 A.2d at 77–81.

205 See *id*.

206 See *id*.

207 See *id* at 80.

that there were systemic flaws in the implementation of the protocol, which prevented execution teams from determining the consciousness of the inmates and resulted in the unreliable screening of execution team members, inconsistent record keeping, and the use of inadequate facilities.\textsuperscript{209} Two years later, the California Court of Appeal affirmed the lower court’s finding in \textit{Morales v. California Department of Corrections} that the state’s lethal injection protocol was adopted without complying with the requirements of the Administrative Procedures Act.\textsuperscript{210}

After \textit{Morales v. Tilton}, and in light of renewed attention to the state prison system, California began building a new death chamber and revising its lethal injection guidelines.\textsuperscript{211} Yet, in 2010, the proposed new death penalty procedures were rejected by the Office of Administrative Law on the basis that some of the language conflicted with current state law or was ambiguous, thereby further delaying the restructuring of California’s lethal injection procedures.\textsuperscript{212}

Similarly, in \textit{Bowling v. Kentucky Department of Corrections} (also known as “\textit{Baze/Bowling II}”), a group of death row inmates successfully brought an action against the Kentucky Department of Corrections alleging that Kentucky’s lethal injection protocol was unenforceable because it was not properly adopted as an administrative regulation under the Administrative Procedure Act.\textsuperscript{213} The Kentucky Supreme Court held that the Department of Corrections was required to promulgate the state’s lethal injection protocol as an administrative regulation.\textsuperscript{214} As such, the specific execution procedures were not confidential, but subject to public disclosure.\textsuperscript{215}

\textbf{IV. Lessons From Baze and Subsequent Litigation}

After \textit{Baze}, the burden is on the plaintiff to show evidence of a substantial risk of serious harm and to attack procedures using information from past executions.\textsuperscript{216} In order to be successful, a plaintiff must estab--

\textsuperscript{209} See id. at 979–80.

\textsuperscript{210} See Morales, 85 Cal. Rptr. 3d at 732.


\textsuperscript{212} See Paul Elias, \textit{Regulators Reject New Death Penalty Procedures}, TAHOE DAILY TRIB. (June 10, 2010), http://www.tahoedailytribune.com/article/20100610/NEWS/100619969 (discussing how lethal injection legal challenges have stalled the execution of condemned prisoners in California).

\textsuperscript{213} See Bowling, 301 S.W.3d at 492.

\textsuperscript{214} See id.

\textsuperscript{215} See id.

lish that a feasible alternative procedure, which is supported by existing medical information and new research and advances, exists.\textsuperscript{217} It is also beneficial for plaintiffs to obtain additional discovery, including disclosure through the state’s administrative procedure act, to support an argument that the written protocol is flawed or unlikely to be followed.\textsuperscript{218}

Additionally, as executions by lethal injection continue, litigants should consider crafting equal protection claims. The \textit{McCleskey} decision and the subsequent legal discourse on race and the death penalty make it clear that racial discrimination is a central issue in death penalty challenges.\textsuperscript{219} After \textit{McCleskey}, a race-based challenge to execution by lethal injection should include studies of the racial history of the state and studies of conviction rates of all races in the state, as well as an examination of pre-trial charges and plea bargaining terms in capital cases and a review of jury compositions in the state.\textsuperscript{220} Given the changing demographics in this country since \textit{McCleskey} and in an effort to move beyond the traditional black and white dichotomy of analyzing racial discrimination within the context of capital punishment, consideration should also be given to the impact of the death penalty on other races, such as Asian Americans.\textsuperscript{221}

\textbf{Conclusion}

Although the rate of executions has slowed down tremendously since 2000, those challenging the death penalty must still overcome the high hurdle created by the Supreme Court in \textit{Baze}.\textsuperscript{222} Even with growing publicity concerning wrongful convictions and the considerable litigation costs associated with capital cases, the stringent \textit{Baze} standard makes it very difficult for inmates on death row to successfully challenge their sentences. Moreover, the increasingly conservative Supreme Court will make challenges to the death penalty even less likely to succeed.\textsuperscript{223} Nev-

\begin{thebibliography}{99}
\bibitem{217}See id.
\bibitem{218}See Bowling v. Ky. Dep’t of Corr., 301 S.W.3d 478, 492 (Ky. 2009).
\bibitem{220}See Amsterdam, supra note 59, at 49–51; Gohara, supra note 219, at 140–41.
\bibitem{221}See Amsterdam, supra note 59, at 49–51; Gohara, supra note 219, at 140–41.
\bibitem{222}See \textit{Baze v. Rees}, 553 U.S. 35, 51–52 (2008); Oshinsky, supra note 12, at 120.
\end{thebibliography}
ertheless, inmates continue active litigation against the lethal injection process. One can hope that with a growing concern over increased and costly constitutional challenges, states will move toward more humane measures that are consistent with evolving standards of decency.
ASYLUM FOR FORMER MEXICAN POLICE OFFICERS PERSECUTED BY THE NARCOS

SERGIO GARCIA*

Abstract: Since President Felipe Calderón declared war against Mexico’s narcotraffickers in 2006, drug violence has escalated and has claimed the lives of over 2000 Mexican police officers. To successfully petition for asylum in the United States, former Mexican police officers facing persecution by the Narcos must prove that they are members of a particular social group. In past cases, courts have refused to find that persecution by the Narcos qualifies a petitioner as a member of a particular social group. This Article argues, however, that former Mexican police officers facing persecution by the Narcos are members of a particular social group based on a shared past experience and should be granted asylum in the United States.

Introduction

In December 2006, shortly after taking office, Mexican President Felipe Calderón launched a campaign to combat narcotraffickers (“the Narcos”). 1 Since that time, Mexico has suffered more than 28,000 casualties in its war against the Narcos. 2 Mexican law enforcement, in particular, has increasingly been the target of violence. 3 Among those killed

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* J.D., Indiana University–Bloomington, 1998. The author recently clerked for the Hon. Arthur L. Alarcón, U.S. Circuit Judge for the Ninth Circuit. The author wishes to thank Jayne Garcia for all her intellectual contributions and support in writing this article. The author also wishes to thank Judge Alarcón for his support in producing this article.

1 See Nicholas Casey, Mexico Under Siege: Business Heads Plead As Drug Gangs Terrorize Wealthy City, WALL ST. J., Aug. 19, 2010, at A1; 6 Abducted Police Found Slain in Mexican State, BOSTON.COM (Sept. 19, 2010), http://www.boston.com/news/world/latinamerica/articles/2010/09/19/6_abducted_police_found_slain_in_mexican_state/. The term “narcotraffickers,” or “Narcos” as used in this paper, refers to members of the Mexican cartels. Both are misnomers, however, because narcotics trafficking is not necessarily the sole business enterprise of the cartels. Edgardo Buscaglia, México Pierde la Guerra, ESQUIRE MEX., Mar. 2010, at 99, 100–05.

2 See Casey, supra note 1.

were 2,076 Mexican police officers. In 2009 alone, close to 500 police officers were killed as a result of the country’s drug violence.

In response to the government crackdown, the Narcos are attacking police officers in cities throughout Mexico in an effort to “destabilize the police force.” The violence against police officers is persistent and bloody. In June 2010, the Narcos murdered ten federal police officers near a high school in the state of Michoacán. The Michoacán cartel, responsible for this attack, was also responsible for murdering twelve federal police officers, whose bloodied and tortured bodies were found dumped along a highway the previous year. In September 2010, newspapers reported the deaths of fourteen Mexican police officers at the hands of the Narcos—eight in the Pacific Coast State of Guerrero and six in the Gulf Coast State of Tamaulipas. On a single day in October 2010, the Narcos, using grenades and assault rifles, ambushed and killed nine police officers in the State of Jalisco.

The town of Ciudad Juárez has been one of many brutal battle-grounds for law enforcement. As of September 2010, the Narcos had killed 102 police officers in Ciudad Juárez since the beginning of the year. One Mexican police officer was found dismembered.


6 Drug Lords Go After Mexican Police Officers, supra note 3 (quoting Mayor José Reyes Ferriz).


9 Id.

10 See 6 Abducted Police Found Slain in Mexican State, supra note 1; Al Menos Seis Policías Muertos, supra note 7.

11 See 9 Policemen Killed in Ambush in Western Mexico, supra note 7.

12 See Number of Officers Killed in Mexico Border City Tops 100 as Drug War Drags On, FOX NEWS (Oct. 2, 2010), http://www.foxnews.com/world/2010/10/02/number-officers-killed-mexico-border-city-tops-drug-war-drags/.

13 Id.
lice officer’s hands, feet, head, legs, and arms had been “pulled off” and his severely mutilated body was found outside a strip mall.\textsuperscript{15} Earlier in 2010, two police cars in Ciudad Juárez were ambushed and at least seven police officers were killed in a midday attack.\textsuperscript{16} Also in early 2010, Mexican drug lord Teodoro García Simental was captured; this Narco, along with another Narco known as Muletar, was responsible for the murders of forty-five officers.\textsuperscript{17} Newspapers report similar incidents daily.\textsuperscript{18}

The Narcos’ attacks on police officers are forcing the resignation of many police officers who do not want to participate in Narco activities.\textsuperscript{19} For these former police officers, asylum in the United States could represent their only possibility of survival. This Article will discuss how former Mexican police officers who are facing persecution from the Narcos qualify for asylum protection as members of a particular social group based on a shared past experience. Part I will briefly discuss asylum law in general and address how the federal courts define “persecution” and “particular social group” in asylum law. Part II will look at how the federal courts have historically dealt with asylum claims involving the Narcos. Part III will examine the current Narco problem in Mexico, the Mexican government’s lack of success fighting the Narcos, and how that lack of success is endangering law enforcement officers. Finally, Part IV will argue that former law enforcement officers fit within the definition of a particular social group based on a shared past experience, qualifying them for asylum protection.

I. ASYLUM LAW IN GENERAL

A. Defining “Persecution”

To qualify for asylum in the United States, applicants must show that they have been persecuted or have a well-founded fear of persecu-

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\textsuperscript{15} Id.


\textsuperscript{18} See, e.g., Mexican Police Officer Found Dismembered in Ciudad Juárez, supra note 14; Number of Officers Killed in Mexico Border City Tops 100 as Drug War Drags On, supra note 12.

\textsuperscript{19} Drug Lords Go After Mexican Police Officers, supra note 3 (“More than 100 of [Ciudad Juárez’s] 1,700-member force have resigned or retired since January [2010].”).
tion in their home country. The Immigration and Naturalization Act (INA) explains that granting asylum is appropriate when an applicant can prove that he or she “is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .”

The INA does not define “persecution.” Courts, however, agree that the level of harm experienced by the applicant must be severe in order to constitute persecution. To show persecution, “a person’s experience must rise above unpleasantness, harassment, and even basic suffering.”

An applicant may also qualify for asylum by demonstrating a well-founded fear of persecution. This standard contains both a subjective and an objective component. To satisfy these components, “an alien must actually fear that he will be persecuted upon return to his country, and he must present evidence establishing an ‘objective situation’ under which his fear can be deemed reasonable.”

When an applicant has shown past persecution, then a well-founded fear of future persecution is presumed on the basis of the original claim. That presumption, however, may be rebutted if “[t]here has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution” in his or her country. The government bears the burden of establishing a fundamental change in country conditions by a preponderance of the evidence.

In asylum claims, “[t]he persecutor must be a government official or persons the government is unable or unwilling to control.”

21 8 U.S.C. § 1101(a)(42); see id. § 1158(b)(1)(A); 8 C.F.R. § 1208.13(b).
22 See Japarkulova, 615 F.3d at 699.
23 See, e.g., Oroh v. Holder, 561 F.3d 62, 68 (1st Cir. 2009); Prela v. Ashcroft, 394 F.3d 515, 518 (7th Cir. 2005); Fatin v. INS, 12 F.3d 1233, 1243 (3d Cir. 1993).
24 See Oroh, 561 F.3d at 68 (quoting Nelson v. INS, 232 F.3d 258, 263 (1st Cir. 2000)).
26 See Pilica v. Ashcroft, 388 F.3d 941, 950 (6th Cir. 2004); Dobrican v. INS, 77 F.3d 164, 167 (7th Cir. 1996); Castillo v. INS, 951 F.2d 1117, 1121 (9th Cir. 1991).
27 Pilica, 388 F.3d at 950 (quoting Perkovic v. INS, 33 F.3d 615, 620–21 (6th Cir. 1994)).
29 Id. § 1208.13(b)(1)(i)(A).
30 Id. § 1208.13(b)(1)(ii).
31 Ochao v. Gonzales, 406 F.3d 1166, 1170 (9th Cir. 2005).
however, is not available to victims of indiscriminate violence, unless they are singled out on account of a protected ground, such as membership in a particular social group.\textsuperscript{32}

B. Defining a “Particular Social Group”

The INA also does not define a “particular social group.”\textsuperscript{33} The Board of Immigration Appeals (BIA) has interpreted the term to mean a group with members who “share a common, immutable characteristic.”\textsuperscript{34} As the BIA explained in the case of In re Acosta,

The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. . . . However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences. Only when this is the case does the mere fact of group membership become something comparable to the other four grounds of persecution under the Act, namely, something that either is beyond the power of an individual to change or that is so fundamental to his identity or conscience that it ought not be required to be changed.\textsuperscript{35}

The BIA also has stated that a group must have “social visibility” and adequate “particularity” to constitute a protected social group.\textsuperscript{36}

Although the circuit courts essentially defer to the Acosta formulation, each circuit emphasizes different factors when deciding what constitutes a particular social group.\textsuperscript{37} The Ninth Circuit, for example, requires a “voluntary association” or an “innate characteristic that is so fundamental to the identities or consciences of its members that mem-

\begin{footnotesize}
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\item[\textsuperscript{32}] Ochave v. INS, 254 F.3d 859, 865 (9th Cir. 2001).
\item[\textsuperscript{33}] See Fatin, 12 F.3d at 1238–39.
\item[\textsuperscript{34}] In re C-A-, 25 I. & N. Dec. 951, 955 (B.I.A. 2006) (quoting In re Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985)).
\item[\textsuperscript{35}] See Acosta, 19 I. & N. Dec. at 233 (emphasis added).
\item[\textsuperscript{36}] In re A-M-E, 24 I. & N. Dec. 69, 74–76 (B.I.A. 2007).
\item[\textsuperscript{37}] See Niang v. Gonzales, 422 F.3d 1187, 1198–99 (10th Cir. 2005); Castellano-Chacon v. INS, 341 F.3d 533, 546–47 (6th Cir. 2003); Lwin v. INS, 144 F.3d 505, 511–12 (7th Cir. 1998); Fatin, 12 F.3d at 1239–40; Ananeh-Firempong v. INS, 766 F.2d 621, 626 (1st Cir. 1985).
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bers either cannot or should not be required to change it.”

The Second Circuit, meanwhile, emphasizes the requirement of having a “characteristic in common which serves to distinguish them in the eyes of a persecutor—or in the eyes of the outside world in general.”

The main inquiry for all courts, however, is whether the applicant establishes membership in a group that shares a common, immutable characteristic. In other words, a particular social group is one united either by voluntary association or “by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it.”

II. Asylum Claims Involving the Narcos

In the context of asylum petitions based on claims of persecution by the Narcos, the courts have refused to find that petitioners qualify as a particular social group. For example, the courts have rejected the claim that a business person is a member of a particular social group. In *Ochoa v. Gonzales*, the Ninth Circuit held that business owners in Colombia who had rejected demands by Narcos to participate in illegal narcotics activity did not qualify as a particular social group. Germán Ochoa, the owner of a clothing store, had borrowed $20,000 to purchase merchandise to sell in his store. Ochoa later found out that the

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38 *Ochoa*, 406 F.3d at 1170 (quoting *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000)).

39 *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991). The Seventh Circuit, however, has explicitly rejected the notion that a particular social group must be socially visible. *See Gati- timi v. Holder*, 578 F.3d 611, 615–16 (7th Cir. 2009).

40 *See Ochoa*, 406 F.3d at 1170; *Castellano-Chacon*, 341 F.3d at 546; *Lwin*, 144 F.3d at 511; *Fatin*, 12 F.3d at 1239; *Avarez-Flores v. INS*, 909 F.2d 1, 7 (1st Cir. 1990).

41 *Hernandez-Montiel*, 225 F.3d at 1093; *see also* *Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010) (“[T]he size and breath of a group alone does not preclude a group from qualifying as such a social group.”); *Donche v. Mukasey*, 553 F.3d 1206, 1220 (9th Cir. 2009) (considering factors “such as immutability, cohesiveness, homogeneity, and visibility”); *Arteaga v. Mukasey*, 511 F.3d 940, 944 (9th Cir. 2007) (considering “whether a group’s shared characteristic gives members social visibility and whether the group can be defined with sufficient particularity to delimit its membership”).

42 *See, e.g.*, *Delgado-Ortiz v. Holder*, 600 F.3d 1148, 1150 (9th Cir. 2010) (finding that a characterization such as “returning Mexicans from the United States” is too broad to qualify as a cognizable social group); *Castillo-Arias v. U.S. Attorney Gen.*, 446 F.3d 1190, 1198 (11th Cir. 2006) (holding that noncriminal informants are not members of a particular social group); *Ochoa v. Gonzales*, 406 F.3d 1166, 1172 (9th Cir. 2005) (rejecting the claim that a business person is a member of a particular social group).

43 *See Ochoa*, 406 F.3d at 1171.

44 *Id.*

45 *Id.* at 1168.
lender was a Narco.\textsuperscript{46} The Narco then pressured Ochoa “to participate in a narco-trafficking money laundering scheme.”\textsuperscript{47} Ochoa refused to participate in the scheme and, after receiving threats from the Narcos, Ochoa and his wife fled to the United States.\textsuperscript{48}

The Ninth Circuit found that Ochoa was not a member of a particular social group.\textsuperscript{49} The \textit{Ochoa} court stated,

A social group of business persons in Ochoa’s circumstances is too broad to qualify as a particularized social group. There is neither a voluntary relationship nor an innate characteristic to bond its members. . . . There is no unifying relationship or characteristic to narrow this diverse and disconnected group. This category is too broad to qualify as a particularized social group for the purposes of asylum and withholding of removal.\textsuperscript{50}

The courts have also determined that noncriminal informants persecuted by the Narcos are not entitled to asylum because they are not members of a particular social group.\textsuperscript{51} In \textit{Castillo-Arias v. U.S. Attorney General}, the Eleventh Circuit considered the asylum claim of Diego Castillo-Arias, who disclosed information he obtained from an acquaintance that worked for the Colombian Cali cartel to another acquaintance that prosecuted Narcos.\textsuperscript{52} In retaliation, the cartel attempted to kidnap Castillo-Arias and threatened him and his family.\textsuperscript{53} Castillo-Arias ultimately left Colombia to come to the United States.\textsuperscript{54} The Eleventh Circuit remanded the case to the BIA to determine whether Castillo-Arias’s association with a particular social group was the motivating factor behind the threat.\textsuperscript{55} On remand, the BIA found that “noncriminal informants did not constitute a ‘particular social group.’”\textsuperscript{56}

In affirming the BIA, the Eleventh Circuit explained, “Narcotics traffickers, such as the cartel, threaten ‘anyone and everyone perceived to have interfered with, or who might present a threat to, their criminal

\textsuperscript{46} Id. at 1169.
\textsuperscript{47} Id.
\textsuperscript{48} Ochoa, 406 F.3d at 1169.
\textsuperscript{49} Id. at 1171.
\textsuperscript{50} Id.
\textsuperscript{51} See Castillo-Arias, 446 F.3d at 1198.
\textsuperscript{52} Id. at 1191.
\textsuperscript{53} Id. at 1191–92.
\textsuperscript{54} Id. at 1192.
\textsuperscript{55} Id. at 1193.
\textsuperscript{56} Castillo-Arias, 446 F.3d at 1193.
enterprises.’” Accordingly, the court determined that Castillo-Arias was persecuted by the cartel not because of his membership in a particular social group, but because he had interfered with their criminal enterprise.58

The court also focused on the fact that anonymous informants are not visible enough to be considered a particular social group because “the very nature of the activity prevents them from being recognized by society at large.”59 Citing to the Ninth Circuit’s decision in Ochoa, the court stated that “a group of informants are, for purposes of the INA, both not visible enough, and, at the same time, potentially too numerous or inchoate.”60 The court explained, “The fact that a characteristic or association is shared by a large number of people does not mean that either society at large, let alone other members within that same group, will recognize that characteristic or association. This is especially so when the characteristic or association is inherently secretive.”61 Accordingly, the Eleventh Circuit denied Castillo-Arias’s petition.62 The court, however, voiced its dissatisfaction in having to defer to the BIA’s interpretation of the INA.63 The court suggested that Congress should craft legislation to protect those individuals “who risked their lives and the safety of their families to assist our nation’s allies in the ‘war on drugs,’ [and who] have been ignored by our nation.”64

Recently, in Delgado-Ortiz v. Holder, the Ninth Circuit denied review of a petition from Mexican citizens who claimed to be the victims of crime associated with Mexican Narcos.65 The petitioners claimed to be members of a particular social group that encompassed “returning Mexicans from the United States.”66 In rejecting the petitioners’ claim, the Ninth Circuit stated that the proposed group was “too broad to qualify as a cognizable social group.”67

57 Id. at 1197 (quoting the administrative record).
58 See id.
59 Id.
60 Id. at 1198.
61 Castillo-Arias, 446 F.3d at 1198.
62 Id. at 1199.
63 See id.
64 Id. (“We regret that Congress has not deemed it appropriate to craft some legislative relief for these individuals and those similarly situated. Perhaps the compelling facts in this case and its troublesome resolution might be the impetus for such relief.”).
65 See Delgado-Ortiz, 600 F.3d at 1151.
66 See id.
67 Id. at 1152.
Federal courts of appeal have not ruled on asylum claims filed by former Mexican police officers who are persecuted by the Narcos.68 The escalating Narco-affiliated violence in Mexico, however, may force law enforcement officers who refuse to join the Narcos to seek asylum in the United States.69 Thus, federal courts are likely to see these claims in the near future. While past asylum petitions based on claims of persecution by Narcos have been unsuccessful, claims for asylum by former Mexican police officers differ from the previous petitions and present a stronger argument for finding a particular social group that deserves protection.

III. THE ESCALATING NARCO PROBLEM IN MEXICO

A. The Mexican Narcos

Mexican Narcos, the major suppliers of illegal drugs in the United States, have grown more powerful recently because of the demise of the Colombian cartels.70 The U.S. Drug Enforcement Administration believes that the Mexican cartels are beginning to show the features of organized crime.71 Besides drug trafficking, the cartels have been tied to human trafficking, arms trafficking, auto theft, and kidnapping.72

Currently, there are six major Narco cartels operating in Mexico: Sinaloa, Gulf, Beltrán Leyva, Tijuana, Juárez, and Los Zetas.73 The Sinaloa cartel is a powerful cartel based in the State of Sinaloa and is a major smuggler of cocaine from South America to the United States.74 It is led by billionaire Joaquín “Chapo” Guzmán, one of Mexico’s most wanted fugitives.75 The Gulf cartel is a major cartel with its center of operations in the State of Tamaulipas, which borders Texas.76 The third

68 See, e.g., Delgado-Ortiz, 600 F.3d at 1150 (determining that “returning Mexicans from the United States” is too broad to qualify as a cognizable social group); Castillo-Arias, 446 F.3d at 1198 (holding that noncriminal informants are not members of a particular social group); Ochoa, 406 F.3d at 1170 (rejecting the claim that a business person is a member of a particular social group).
71 See id. at 4–5.
72 See id. at 6.
74 See id.
76 See Beittel, supra note 73, at 4.
major cartel, Beltrán Leyva, was formerly a part of the Sinaloa cartel.77
The fourth major cartel, the Tijuana cartel, has been weakened in recent years, but still exerts significant control over the Tijuana-San Diego corridor and is located in the Mexican State of Baja California.78 The Juárez cartel is based in Ciudad Juárez, just across the U.S. border from El Paso, Texas.79 The sixth cartel, Los Zetas, separated from the Gulf cartel and now operates along Mexico’s eastern coast, through Veracruz and Tabasco, and into the Yucatán peninsula.80 Finally, a smaller but important cartel, La Familia Michoacana, is based in the central State of Michoacán and is involved in drug trafficking along the Mexican Pacific coast.81

Thirty years ago, the Mexican Narco cartels were not so divided.82 Instead, they worked together as part of a loose alliance of organizations and there was little competition.83 The Institutional Revolutionary Party (PRI), which held power in Mexico from 1929 to 2000, maintained a “centralization of power and pervasive corruption” that contributed to the “relative harmony and success of the Mexican [Narcos].”84 In 2000, however, the PRI lost the presidential elections to the Partido Acción Nacional (PAN), which “was unwilling to continue the corrupt relationship with the cartels.”85 Consequently, the mutual relationship between the cartels and the Mexican government “fractured.”86 The PAN refused to mediate cartel disputes and, as a result, “the cartels turned to a retail strategy, buying protection from law enforcement agents and officials across all parties at the local level . . . .”87 The change of power has contributed to the increase in Narco violence in Mexico.88

77 See id. ("[The Beltrán Leyva cartel’s] attempt to take territory from their former Sinaloa partners reportedly unleashed a wave of violence.").
78 See id. at 4, 7.
79 See id.
80 See id. at 5, 7; Sam Logan, The Evolution of ‘Los Zetas,’ a Mexican Crime Organization, MEXIDATA (Mar. 16, 2009), http://mexidata.info/id2194.html.
81 See Beittel, supra note 73, at 5–7.
82 See Shirk, supra note 5, at 5.
83 See id. at 10.
84 See id. at 10–11.
87 See id.
88 See id.; Livesey, supra note 85.
B. The Mexican Government’s Declaration of War Against the Narcos

In December 2006, President Felipe Calderón, head of the new ruling political party, PAN, publicly announced an attack against the Narcos. Since 2006, he has sent over 45,000 soldiers into the cities and towns of Mexico to combat the Narcos. Despite this new offensive, the Narcos continue to thrive and the violence persists. In the first four years that President Calderón held office, more than 28,000 people died in the war against the Narcos.

The Narco problem in Mexico continues to escalate. Recently, the Los Angeles Times reported that “the cartels are smuggling more narcotics into the United States [and] amassing bigger fortunes” since President Calderón’s declaration of war against the Narcos. It also reported that the Narcos were “[u]ndeterred by the [estimated] 80,000 troops and federal police officers arrayed against them . . . .” The government offensive has been unsuccessful and there is speculation that President Calderón’s administration is now strategically favoring the Sinaloa cartel—“the oldest and mightiest of the narco-empires”—in order to consolidate all of the cartels into a single cartel. Indeed, disparities in arrests and prosecutions of people working for the Sinaloa cartel suggest that the Mexican government is favoring this cartel.

Political protection for the Sinaloa cartel also suggests that the Mexican government may be attempting to consolidate power strategically amongst the cartels. Favoring the Sinaloa cartel could potentially allow the Mexican government to manage its war against the Narcos more effectively. The hope is that allowing one cartel to win would

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91 See id.
92 Wilkinson & Ellingwood, supra note 89.
93 Id.
94 Id.
95 See id. (noting that of 53,000 drug-trafficking arrests, less than 1000 “involved people working for the Sinaloa cartel”); Tracy Wilkinson, Mexico Under Siege: Calderon Takes on Favoritism Claim, L.A. TIMES, Feb. 26, 2010, at A15. The Montreal Gazette also reported that “of 2,604 cartel members prosecuted since Calderon became president in 2006, less than 12 per cent were from the Sinaloa cartel—despite it being the largest and most powerful cartel in Mexico.” Livesey, supra note 85.
96 See Livesey, supra note 85 (discussing connections between the Sinaloa cartel and the Mexican army, federal prosecutors, and police).
97 See id.
98 See id.
lead to a reduction in violence. There would be “less competition among the organized crime groups,” and “[i]nstead of fighting seven or eight organized crime groups [the Mexican government] will be fighting one or two.”

It is unlikely, however, that Mexico’s current Narco problem will be eliminated by consolidating the cartels into one large organized crime group. In order to succeed in its war against the Narcos, the Mexican government must better understand the extent of the Narco problem. First, the government should recognize that Narco activity extends far beyond drug trafficking. The Narcos derive income from many illegal enterprises including fraud, extortion, piracy, child pornography, and human and arms trafficking. Edgardo Buscaglia, an expert in international organized crime, opines that the Mexican government fails to recognize that only forty-five to forty-eight percent of the Narcos’ income is comprised of drug business. Second, the government needs to recognize that the Mexican Narcos are active in many other countries, not just in Mexico. According to Buscaglia, Mexican cartels are present in Argentina, Spain, and Chile to launder money; in Bolivia, Peru, and China to obtain supplies for their drug business; and in Ecuador, Guatemala, and Honduras to work out logistics for transportation.

Finally, the Mexican government must recognize that it is handicapped in its fight against the Narcos by the inability of various gov-

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99 See Wilkinson & Ellingwood, supra note 89; see also Livesey, supra note 85.
100 Livesey, supra note 85 (quoting law professor, economist, and U.N. adviser Edgardo Buscaglia).
101 See Buscaglia, supra note 1, at 100–05.
102 See id. at 100–01.
103 See id.
104 See id. The government’s failure to recognize that the Narcos’ illicit enterprises comprehend more than just drugs is reflected in its recent failure to prevent Narcos, dealing in the trafficking of people, from murdering seventy-two Central and South American migrants. See David Luhnow, Mexico Killings Show Migrants’ Plight, WALL ST. J., Aug. 27, 2010, at A13. The migrants were ninety miles from the U.S. border when they were captured, “bound, blindfolded, lined up against a wall and executed” by the Narcos. Id.
105 See Buscaglia, supra note 1, at 100. Edgardo Buscaglia was a research fellow at the Hoover Institution at Stanford University until 2008. See Fellows: Edgardo Buscaglia, HOOVER INSTITUTION, STAN. U., http://www.hoover.org/fellows/9883 (last visited May 8, 2011). He also served as the director of the International Law and Economic Development Center at the University of Virginia School of Law and as a senior adviser to several international organizations in the United States and Europe. See id.
106 See Buscaglia, supra note 1, at 100–01.
107 See id. at 100.
ernment agencies to work together.108 Currently, Mexican governmental agencies, such as the Mexican revenue service, the judicial system, the penal system, and the police forces, are all failing to work cooperatively; instead, they are competing with one another.109 This competition is facilitating Narco infiltration of many government entities, resulting in widespread government corruption.110 The Narcos have infiltrated the Mexican government by financing campaigns and manipulating elections, thereby placing those individuals that they control in power.111 The Mexican government and its institutions must work together to coordinate their efforts to dismantle entities that provide funding for the Narcos, including those that appear to be legitimate but have a link to the Narcos.112 The government must also fight internal corruption, especially among high ranking politicians.113

C. The Effect of Narco Violence on Mexican Police Officers

The rise of Narco violence and corruption is increasingly threatening the safety of Mexican law enforcement members.114 According to Mexico’s Public Safety Secretariat, since President Calderón declared war against the Narcos, approximately 915 municipal police officers, 698 state police, and 463 federal agents have been killed by the Narcos.115 In 2009 alone, “an estimated 35 soldiers and nearly 500 police died as casualties of Mexico’s drug violence.”116 “Overall, hundreds of law enforcement agents have been slain since the late 2006 sharpening of the confrontation between [Narcos] and the state.”117

108 See id. at 101–02.
109 See id.
110 See id. at 100–01.
111 See Buscaglia, supra note 1, at 102.
112 See id.
113 See id. at 101–05. The implementation of the above-mentioned solutions helped reduce organized crime in countries like Colombia. See id. at 102–03.
114 See Wilkinson & Ellingwood, supra note 89; Livesey, supra note 85.
116 SHIRK, supra note 5, at 8.
117 Francisco E. González, Countries at the Crossroads: Mexico, FREEDOM HOUSE, 9 (Apr. 2010), http://www.freedomhouse.org/uploads/ccr/country-7876-9.pdf. Furthermore, the risk to the Mexican police has been exasperated by the rumor that the Calderón administration is strategically favoring the Sinaloa cartel. See Drug War’s Death Toll in Mexico: 28,000 Killed Since 2006, CLEVELAND.COM (Aug. 3, 2010), http://www.cleveland.com/world/index.ssf/2010/08drug_wars_death_toll_in_mexico.html. The rumor “ha[s] increasingly provoked violence against government security forces, including a July 15 car bomb that killed a federal police officer and two other people in Ciudad Juárez.” Id. A rival cartel took re-
Narco infiltration of the police force, in particular, hampers the government’s efforts to respond to the problem.\textsuperscript{118} Recently, 3200 federal police officers were fired because of their association with the Narcos.\textsuperscript{119} Indeed, the news is replete with accounts of corruption within Mexican law enforcement. The Associated Press reported in August 2010 that four Mexican federal police commanders in Ciudad Juárez were suspended following complaints of corruption and drug links.\textsuperscript{120} In July 2010, the Associated Press reported that Mexican marines arrested the captain of the Port of Manzanillo on drug trafficking charges.\textsuperscript{121} In May 2010, the Los Angeles Times reported that an ex-Cancún mayor was extradited on drug charges.\textsuperscript{122} Also in May 2010, the Montreal Gazette reported that documents obtained by Mexican authorities from a suspected associate of the leader of the Sinaloa cartel indicated that top police officers were on the cartel’s payroll.\textsuperscript{123}

This infiltration into the Mexican police force not only prevents Mexico’s success in its fight against the Narcos, but also endangers police officers who refuse to cooperate with the Narcos.\textsuperscript{124} Recently, for example, the entire police force in the border town of Los Ramones, in the State of Nuevo León, refused to cooperate with the Narcos.\textsuperscript{125} The Associated Press reported that the entire force quit after gunmen attacked their headquarters.\textsuperscript{126} In another instance, a police commander in Ciudad Juárez was arrested for coercing some of his officers into extorting and planting drugs on honest officers who refused to partici-
pate in corrupt dealings. The Narcos send a clear message to honest law enforcement officers: either join us or we will kill you.

Joining the Narcos can be a lucrative option for many Mexican police officers. Local police officers in Mexico earn minimal salaries and are susceptible to corruption. “Municipal Police . . . [are] subject to a choice by drug gangs—‘plomo’ or ‘plata’—e”ither take a ‘lead’ bullet or accept a payoff in ‘silver’ to look the other way.” The majority of municipal police officers earn $400 or less per month. Corrupt municipal officers on the Narcos’ payroll may double their monthly salary. According to Mexico’s Public Safety Secretary Genaro García Luna, the Narcos pay approximately twenty million dollars each month in “bribes to municipal police officers across Mexico, ensuring that their activities [go] undisturbed.”

Refusing to join the Narcos is a dangerous alternative for honest police officers. Due to the Narcos’ infiltration of police forces, the Narcos know which law enforcement officers have refused to respond to their demands. Conversely, honest police officers do not necessarily know which of their fellow officers are affiliated with the Narcos. As the husband of a murdered journalist explained, when a person deals with Mexican law enforcement, he does not know if he is dealing with an honest officer or a cartel member. The Narcos also know which officers possess incriminating information. The Narcos will go to extreme measures to prevent the dissemination of this information.

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128 See Wilkinson & Ellingwood, supra note 89.
129 See Every Officer in Small Mexican Town Quits After HQ Attacked, supra note 124.
130 See Johnson, supra note 115.
131 See id.
132 Id.
133 Castillo & García, supra note 4.
134 Id.
135 Johnson, supra note 115; see Castillo & García, supra note 4.
136 See Silence or Death in Mexico’s Press: Crime, Violence, and Corruption Are Destroying the Country’s Journalism, COMMITTEE TO PROTECT JOURNALISTS, 5–6 (Sept. 2010), http://www.cpj.org/reports/cpj_mexico_english.pdf [hereinafter Silence or Death in Mexico’s Press].
137 See id.
138 See id.
139 Id.
140 Id.
141 Silence or Death in Mexico’s Press, supra note 136, at 5–6.
only for what you say but also for what they think you might know.\textsuperscript{142} Even the family of an officer who refuses to comply with the Narcos’ demands is in danger.\textsuperscript{143} The Associated Press reported, “In December [2009], hit men gunned downed the mother, aunt and siblings of a marine killed in a raid that took out kingpin Arturo Beltrán Leyva.”\textsuperscript{144}

It is equally dangerous for police officers to leave their jobs when faced with the decision to participate in the corruption or be identified as an enemy of the Narcos.\textsuperscript{145} Quitting the force and hiding from the Narcos is impractical for Mexican police officers.\textsuperscript{146} Recently, the U.S. State Department issued a warning stating that drug violence is present almost everywhere in Mexico.\textsuperscript{147} The report specifically warned U.S. citizens to stay away from many cities including Ciudad Juárez, Tijuana, Chihuahua City, Nogales, Nuevo Laredo, Piedras Negras, Reynosa, Matamoros, Monterrey, Nayarit, Jalisco, and Colima.\textsuperscript{148} Given the presence of the Narcos throughout the entire country, former police officers who refuse to comply with the Narcos’ demands are in danger even when they attempt to hide.\textsuperscript{149}

Narco violence is not limited to local police officers who refuse to cooperate.\textsuperscript{150} Prominent political figures and law enforcement officials are also targeted by the Narcos.\textsuperscript{151} For example, in August 2010, the mayor of Guadalupe Distrito Bravos in the state of Chihuahua was shot to death in front of his family after receiving threats.\textsuperscript{152} In February 2009, the general in command of law enforcement in Cancún was kidnapped and brutally murdered.\textsuperscript{153} Also in February 2009, the Narcos left written warnings on the bodies of a murdered police officer and prison guard that they would kill one officer every forty-eight hours

\textsuperscript{142}See id. at 5 (“The criminals may kill you not for what you publish, but for what they think you know.”).
\textsuperscript{143}See Olson, supra note 121.
\textsuperscript{144}Id.
\textsuperscript{145}See Drug War’s Death Toll in Mexico: 28,000 Killed Since 2006, supra note 117.
\textsuperscript{146}See U.S. Dep’t of State, Bureau of Consular Affairs, Travel Warning: Mexico, Consulate Gen. of the U.S.: Monterrey, Mex. (July 15, 2010), http://monterrey.usconsulate.gov/acs_trawarn07162010.html (describing the presence of violence “throughout the country”).
\textsuperscript{147}See id.
\textsuperscript{148}See id.
\textsuperscript{149}See Every Officer in Small Mexican Town Quits After HQ Attacked, supra note 124; U.S. Dep’t of State, Bureau of Consular Affairs, supra note 146.
\textsuperscript{150}See Gonzáles, supra note 117, at 9.
\textsuperscript{151}See id.
\textsuperscript{152}See Mayor of Mexican Town Shot Dead After Death Threats, BBC News (June 19, 2010), http://www.bbc.co.uk/news/10359259.
\textsuperscript{153}Gonzáles, supra note 117, at 9.
until the police chief of Juárez resigned from his position. In 2008, the acting chief of Mexico’s federal police was also assassinated by gunmen while entering an apartment.

It is evident that the Mexican government has been unable to control the Narcos and protect law enforcement officers. President Calderón himself acknowledged that the Mexican government has been unable to combat Narco violence successfully “with brute force alone.” When speaking of the cartel violence, President Calderón stated, “In the short run, we have to admit it, it’s likely that the violence will persist and even increase before it begins to fall dramatically.” Mexico’s lack of control over the Narcos has already prompted the U.S. State Department to remove all children of its diplomatic personnel from Mexico’s business capital of Monterrey, a city in Northern Mexico. Considering the high murder rate of former police officers, the comments of President Calderón, and the actions of the U.S. State Department, it is clear that the Mexican government is unable to control the Narcos and protect its law enforcement officers.

Given Mexico’s lack of control over the Narcos, it is likely that former police officers facing persecution by the Narcos will seek asylum in other countries in order to survive. Asylum in the United States is available to applicants persecuted by persons that a government is unable or unwilling to control.

154 Beittel, supra note 73, at 13.
155 Gonzáles, supra note 117, at 9 (“The assassination was widely interpreted as retribution for the arrest [of] Alfredo Beltrán Leyva, one of the leaders of the Beltrán Leyva cartel, an offshoot of the Sinaloa cartel.”).
156 See Wilkinson & Ellingwood, supra note 89; Johnson, supra note 115.
157 See Casey, supra note 1.
159 See id. (“Monterrey joins a short list of postings where the State Department allows only adult family members to accompany their diplomats, which includes Chad, Lebanon, Sudan and Yemen.”).
161 See Avetova-Elisseva v. INS, 213 F.3d 1192, 1196 (9th Cir. 2000) (explaining the conditions under which a persecuted group may seek asylum); Luhnow & de Cordoba, supra note 158.
162 See Avetova-Elisseva, 213 F.3d at 1196.
ability to control Narco persecution provides a basis for former law enforcement officers to receive asylum in the United States.\textsuperscript{163}

IV. THE POTENTIAL FOR ASYLUM BENEFITS BASED ON MEMBERSHIP IN A PARTICULAR SOCIAL GROUP

There is a strong argument that former Mexican police officers facing persecution from the Narcos qualify for asylum protection in the United States. Federal appellate courts have determined that asylum benefits are available to applicants facing persecution, or who have a well-founded fear of persecution, on account of membership in a particular social group based on a “shared past experience.”\textsuperscript{164} Arguably, former Mexican law enforcement officers fit within the definition of a particular social group based on their shared past experience.\textsuperscript{165}

A. Asylum Cases Based on a “Shared Past Experience”

In \textit{Cruz-Navarro v. Immigration and Naturalization Service}, applicant Miguel Cruz-Navarro, a native and citizen of Peru, was a member of the Peruvian Civil Guard, which later became the National Police.\textsuperscript{166} During his tenure with the National Police, Cruz-Navarro arrested and searched the homes of members of the terrorist group Sendero Luminoso, an anti-government guerilla organization.\textsuperscript{167} Consequently, Cruz-Navarro was persecuted by members of the terrorist group.\textsuperscript{168} Cruz-Navarro sought protection from his own government, but the government told him that he “would have to protect [his] own life.”\textsuperscript{169} Although Cruz-Navarro did not “contend . . . that former members of the National Police [were] a social group subject to persecution,” the Ninth Circuit observed, “Persons who are persecuted because of their status as a former police or military officer . . . may constitute a cognizable social group under the INA.”\textsuperscript{170}

In \textit{Tapiero de Orejuela v. Gonzales}, the applicant applied for asylum based on her membership in the educated, wealthy, landowning class in Colombia that opposed the guerillas of the Revolutionary Armed Forces

\textsuperscript{163} See 8 U.S.C. § 1101(a)(42) (2006); \textit{id.} § 1158(b)(1); Wilkinson & Ellingwood, \textit{supra} note 89; Johnson, \textit{supra} note 115.

\textsuperscript{164} See \textit{Tapiero de Orejuela v. Gonzales}, 423 F.3d 666, 673 (7th Cir. 2005).

\textsuperscript{165} See \textit{id.}

\textsuperscript{166} See \textit{Cruz-Navarro v. INS}, 232 F.3d 1024, 1026 (9th Cir. 2000).

\textsuperscript{167} See \textit{id.} at 1027.

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

\textsuperscript{169} See \textit{id.} (alteration in original).

\textsuperscript{170} \textit{Id.} at 1029 & n.7.
of Colombia (FARC).\textsuperscript{171} The applicant’s husband was killed by the FARC after he refused to give money to the guerillas.\textsuperscript{172} The applicant asked the government to investigate the murder, but a local judge informed her “that pursuing the matter could endanger her children.”\textsuperscript{173} At the time, the FARC was engaging in a campaign of widespread intimidation of local authorities “to further undermine State authority and destabilize the government.”\textsuperscript{174} The Seventh Circuit observed that over 300 mayors had received threats and that “a total of sixty mayors (that is to say, one per month on average) have been killed in Colombia during the past five years.”\textsuperscript{175} The Seventh Circuit concluded that the applicant and her children were persecuted based on their membership in the distinct social group of “the educated, landowning class of cattle farmers targeted by FARC.”\textsuperscript{176} The court explained,

In Acosta, the Board recognized that “shared past experiences” including land ownership and past military service may constitute a characteristic that is a basis for a social group designation. . . . [E]ven if the family were to give up its land, its cattle farming, and even its educational opportunities, there is no reason to believe that they would escape persecution. . . . They have shown that their suffering was differentiated from the rest of the population and that FARC targeted them because of their particular social group identity.\textsuperscript{177}

Another example of a social group based on a shared past experience can be found in Sepulveda v. Gonzales.\textsuperscript{178} Victor Sepulveda, a native and citizen of Colombia, worked for the Colombian Attorney General’s Office.\textsuperscript{179} Through his work, Sepulveda had access to confidential information regarding names of witnesses and government investigators

\textsuperscript{171} See Tapiero de Orejuela, 423 F.3d at 668.
\textsuperscript{172} Id. at 669.
\textsuperscript{173} Id.
\textsuperscript{175} Id. at 669.
\textsuperscript{176} Tapiero de Orejuela, 423 F.3d at 672.
\textsuperscript{177} Id. at 672–73.
\textsuperscript{178} See generally Sepulveda v. Gonzales, 464 F.3d 770 (7th Cir. 2006) (holding that former employees of the Colombian Attorney General’s Office shared an immutable characteristic and therefore constituted a particular social group).
\textsuperscript{179} See id. at 771.
fighting against the Colombian government.\textsuperscript{180} Approximately one hundred of Sepulveda’s co-workers had been killed and thirty-six had been kidnapped by insurgents.\textsuperscript{181} Sepulveda applied for asylum on the ground that he faced persecution as a former employee of the Attorney General’s Office.\textsuperscript{182} The BIA rejected Sepulveda’s asylum claim.\textsuperscript{183} The Seventh Circuit, however, vacating the BIA’s decision, recognized that a shared past experience is one type of immutable characteristic.\textsuperscript{184} In his opinion, Judge Richard Posner stated that this characteristic “is easily satisfied by a group of former employees of a particular institution.”\textsuperscript{185} He explained, “The social group to which Sepulveda belongs consists of former, not present, employees of the Attorney General’s Office. From that group he cannot resign.”\textsuperscript{186} Judge Posner indicated that Sepulveda could be eligible for asylum benefits if it were determined that other former employees of the Attorney General’s Office were similarly targeted and if the “Colombia government is unwilling or incapable of protecting persons in Sepulveda’s position from insurgents.”\textsuperscript{187}

A Second Circuit case, Koudriachova v. Gonzales, is also instructive.\textsuperscript{188} The applicant, a native and citizen of the former Soviet Union, defected from the KGB Intelligence Service and fled to the United States.\textsuperscript{189} Before his departure, the applicant was attacked by KGB agents.\textsuperscript{190} The BIA denied the asylum claim because it determined that the petitioner failed to establish persecution on account of any protected ground.\textsuperscript{191} The Second Circuit remanded the case to the BIA, concluding that the applicant could be eligible for asylum “on account of his membership in the particular social group of defected KGB intelligence agents . . . .”\textsuperscript{192} The Court noted that the BIA had previously indicated that “an individual who is targeted due to [his or her] status

\begin{footnotes}
\item[180] See id.
\item[181] See id.
\item[182] See id.
\item[183] See Sepulveda, 464 F.3d at 771.
\item[184] See id.
\item[185] Id. at 772.
\item[186] Id.
\item[187] See id. at 772–73.
\item[188] See generally Koudriachova v. Gonzales, 490 F.3d 255 (2d Cir. 2007) (finding that a native of the former Soviet Union was not disqualified from refugee status because the social group in question, defected KGB agents, did not maintain a voluntary associational relationship).
\item[189] See id. at 258–59.
\item[190] See id. at 259.
\item[191] See id.
\item[192] See id. at 260, 263.
\end{footnotes}
as a former police officer may be eligible for asylum as a member of the particular social group of former police officers.” 193 The Second Circuit reasoned that being a former KGB agent was a shared past experience, like prior military service, that sufficiently constituted an immutable characteristic because it could not be undone. 194

Recently, in Urbina-Mejia v. Holder, the Sixth Circuit held that a former gang member belonged to a particular social group. 195 José Luís Urbina-Mejia, a native and citizen of Honduras, applied for asylum based on membership in a particular social group. 196 Finding that the BIA erred in determining that Urbina-Mejia was not a member of a particular social group, the Sixth Circuit noted that “being a former member of a group is a characteristic impossible to change, except perhaps by rejoining the group.” 197 The court stated that “being a former member of a group ‘is an immutable characteristic and that mistreatment because of such status could be found to be persecution on account of . . . membership in a particular social group.’” 198

B. Former Mexican Police Officers Constitute a Particular Social Group Based on a “Shared Past Experience”

The holdings in Cruz-Navarro, Tapiero de Orejuela, Sepulveda, Koudriachova, and Urbina-Mejia demonstrate that being a former member of a group constitutes a past shared experience because it is an immutable characteristic distinguishing a particular social group. 199 Pursuant to these cases, former Mexican police officers facing persecution from the Narcos should qualify for asylum protection as members of a particular social group because they share a common, immutable characteristic. 200 This immutable characteristic is their shared past experience as law enforcement officials, which cannot be changed. 201 They belong to

193 Koudriachova, 490 F.3d at 261.
194 See id. at 261, 263.
196 See id. at 362.
197 See id. at 366–67 (quoting Benitez Ramos v. Holder, 589 F.3d 426, 429 (7th Cir. 2009)).
198 Id. (quoting Velasquez-Velasquez v. INS, 53 Fed. App’x 359, 364 (6th Cir. 2002)).
199 See Urbina-Mejia, 597 F.3d at 362; Koudriachova, 490 F.3d at 261; Sepulveda, 464 F.3d at 771; Tapiero de Orejuela, 423 F.3d at 672–73; Cruz-Navarro, 232 F.3d at 1029.
200 See Urbina-Mejia, 597 F.3d at 362; Koudriachova, 490 F.3d at 261; Sepulveda, 464 F.3d at 771; Tapiero de Orejuela, 423 F.3d at 672–73; Cruz-Navarro, 232 F.3d at 1029.
201 See Sepulveda, 464 F.3d at 771; Cruz-Navarro, 232 F.3d at 1029.
a social group of former, not present, police officers and “[f]rom that group [they] cannot resign.”

It is unlikely that former police officers who refuse to comply with the Narcos’ demands can escape persecution. In Tapiero de Orejuela, the Seventh Circuit noted that there was no reason to believe that the petitioners who refused to cooperate with Narco guerillas would escape persecution, given the fact that the Narco guerillas had recently killed sixty Colombian mayors. Similarly, Mexican police officers can point to the extremely dangerous environment in Mexico and high murder rate of law enforcement officials to show that former police officers cannot escape Narco persecution. Because the Narcos have already killed over 2000 police officers, there is little hope that a former Mexican police officer who refuses to cooperate with the Narcos will escape persecution. As the Wall Street Journal reported, these violent attacks raise concerns that “Mexico is struggling to protect the very people in charge of trying to attack powerful [Narcos] . . . . Nearly every week, a federal police officer is killed by [the Narcos].”

Relocation within Mexico is an unrealistic option for former police officers facing persecution. First, Narcos are present throughout the country. Second, corrupt law enforcement officials who work for the Narcos know the identities of former police officers. Therefore, due to widespread corruption within the Mexican police forces, Narcos can easily identify and locate former police officers.

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202 See Sepulveda, 464 F.3d at 772. Arguably, the only way for former police officers to change this common characteristic is by rejoining the police force, thereby ending their shared past experience of being former law enforcement officials. See Urbina-Mejia, 597 F.3d at 366.

203 See Tapiero de Orejuela, 423 F.3d at 672–73.

204 See id. at 668.

205 See id.; Luhnow & de Cordoba, supra note 158.

206 See Tapiero de Orejuela, 423 F.3d at 668; Johnson, supra note 115.

207 Luhnow & de Cordoba, supra note 158.

208 See Drug Lords Go After Mexican Police Officers, supra note 3.

209 See id. (“These are attacks directed at the top commanders of the city police, and it is not just happening in Ciudad Juarez . . . . It is happening in Nuevo Laredo, in Tijuana, in this entire region.”) (quoting Mayor Jose Ferriz); Silence or Death in Mexico’s Press, supra note 136, at 6 (“A decade ago, drug violence was concentrated along the U.S.-Mexico border, but it has now spread from one end of the country to the other, particularly in the last three years.”).

210 See Silence or Death in Mexico’s Press, supra note 136, at 6–7; see also Ellingwood, supra note 118.

211 See Silence or Death in Mexico’s Press, supra note 136, at 6–7.
Former police officers who refuse to work for the Narcos and leave law enforcement cannot avoid the risk of persecution.\textsuperscript{212} These law enforcement officers should be eligible for asylum in the United States because they are persecuted on the basis of their particular social group identity by way of their shared past experience as former police officers.\textsuperscript{213}

**Conclusion**

It is evident that the Mexican government is unable to control the Narcos or protect law enforcement officers. Police officers are dying every day and, unless conditions change, the number of police officers killed by the Narcos will continue to grow. Former Mexican police officers who face persecution because they refuse to comply with the demands of the Narcos are in imminent danger. It is impossible for former police officers to escape the threat of Narco persecution. Hiding is not a viable option because of the presence of the Narcos throughout the entire country. The Narcos have infiltrated all levels of the Mexican government and can readily identify those officers who may compromise their illicit operations. The Narcos will not allow individuals who refuse to participate in the Narcos’ lucrative enterprises to live normal lives. For these former law enforcement officers, asylum in the United States represents the only possibility of survival. Case law concerning a “shared past experience” indicates that former Mexican police officers who face persecution from the Narcos will qualify for asylum protection as members of a particular social group.

\textsuperscript{212} See id.

\textsuperscript{213} See Urbina-Mejia, 597 F.3d at 362; Koudriachova, 490 F.3d at 261; Sepulveda, 464 F.3d at 771; Tapiero de Orejuela, 423 F.3d at 672–73; Cruz-Navarro, 232 F.3d at 1029.
TRANSPLANTATION AND ADAPTATION: 
THE EVOLUTION OF THE HUMAN RIGHTS OMBUDSMAN

LINDA C. REIF

Abstract: The number of human rights ombudsman institutions has increased dramatically over the past three decades. Such institutions are prevalent in Latin America and in Central and Eastern Europe, and are increasingly found in other regions of the world as well. Forces such as democratization, public institution-building, comparative law influences, limited state resources, and international human rights law continue the spread of human rights ombudsman institutions. This Article discusses the mandates and jurisdiction of human rights ombudsman institutions. It argues that all governments should endow human rights ombudsman institutions with as many additional powers as their institutional and legal systems permit to supplement the ombudsman’s core investigatory mandate. These include inspection, litigation, research, and education powers. Further, this Article argues that all human rights ombudsman institutions must institute operating practices to increase their ability to protect and promote human rights.

Introduction

In 1809, Sweden established the justitieombudsman, the predecessor of the modern institution of the ombudsman. The Swedish legislature appointed the ombudsman to supervise the conduct of the government administration and the judiciary. It had the power not only to prosecute public officials, but also to pursue investigations and make recommendations to the government. Until the early 1960s, the ombudsman institution could only be found in a few Scandinavian states.

* Associate Dean (Graduate Studies), Faculty of Law, University of Alberta. Special thanks to Shannon Mather (LL.B., 2010) for her valuable research assistance.

1 See Linda C. Reif, The Ombudsman, Good Governance and the International Human Rights System 4–6 (2004). “Ombudsman” is the Swedish word for “representative.” Id. at 12. Because both women and men hold the office, the pronouns are neutrally used to reflect this fact. See id. at 1 n.2.

2 Id. at 5–6.

3 See id. at 4.

4 See id. at 1.
Nevertheless, early in its history, the ombudsman’s mandates diverged.\textsuperscript{5} While in Sweden and Finland the ombudsman had both prosecutorial powers and jurisdiction over the judiciary, the Danish ombudsman had neither of these functions.\textsuperscript{6} It was the Danish model that became popular in other jurisdictions around the world, particularly in Commonwealth nations and some Western European states.\textsuperscript{7} The core function of this popular Scandinavian ombudsman model—the so-called “classical” ombudsman—is to investigate administrative conduct impartially based either on a complaint or the ombudsman’s own motion, to make recommendations, to rectify any illegal or unfair conduct uncovered, and to issue annual and special reports.\textsuperscript{8} The classical ombudsman is an institution that uses “soft powers” of persuasion and cooperation to control conduct rather than coercive or adjudicative means.\textsuperscript{9}

Some schools of thought regarding common law and administrative law refer to the ombudsman as a non-judicial alternative for overseeing public administration.\textsuperscript{10} Similarly, comparative law scholars occasionally reference the ombudsman in discussions of comparative administrative law, essentially using it as an example of a public sector institution that has been successfully transplanted in different legal systems around the world.\textsuperscript{11} Despite the changing face of ombudsman

\begin{thebibliography}{11}
\bibitem{5} See id. at 25.
\bibitem{6} See Reif, \textit{supra} note 1, at 2, 138.
\bibitem{7} See id. at 6.
\bibitem{8} See id. at 2–4. Even within the family of classical ombudsmen, there are variations between institutions. See id. at 3. For example, some ombudsmen do not have own-motion powers, some can inspect facilities such as prisons where persons are involuntarily detained, and other ombudsmen are appointed by the executive rather than the legislative branch. See id. at 3–4, 406.
\end{thebibliography}
institutions around the globe, the relevant legal literature primarily discusses only the Scandinavian or classical ombudsman model.12

Since the 1970s, governments around the world, on both national and sub-national levels, have established hybrid versions of the ombudsman institution by giving one institution multiple mandates.13 These additional mandates include protecting human rights, fighting corruption, ensuring ethical conduct by elected public officials, and protecting the environment.14 Even classical ombudsmen are being given “second hats” of differing scope with respect to freedom of information, protecting privacy, child protection, and health system oversight.15 This Article specifically addresses the human rights ombudsman phenomenon—in other words, ombudsman-type institutions that are given express mandates to protect and promote human rights.16

By 2003, about half of the approximately 110 national-level ombudsman institutions worldwide had human rights mandates.17 Many ombudsman institutions established since that time have also been given human rights-related duties, and classical ombudsman institu-

12 See European Ombudsman-Institutions, supra note 10, at 59–62; Reif, supra note 1, at 2–4; Barbara von Tigerstrom, The Role of the Ombudsman in Protecting Economic, Social and Cultural Rights, in 2 The International Ombudsman Yearbook, supra note 9, at 3, 4–8.
13 See Reif, supra note 1, at 8.
14 See e.g., id. at 7–11. Some Asian-Pacific and African states have given their ombudsman institutions anti-corruption or public official ethics enforcement mandates. See id. at 10 (listing Vanuatu, Papua New Guinea, Philippines, Macao (China), Taiwan, Indonesia, East Timor, South Africa, Namibia, Uganda, Mauritius, Lesotho, Seychelles, and Rwanda as examples). A few states have given their institutions numerous mandates. See id. at 9. For example, the ombudsmen in Namibia and Lesotho are responsible for human rights protection, anti-corruption, and environmental protection. See id. at 8–11.
16 See Reif, supra note 1, at 87–88. Human rights ombudsman institutions are also often given powers beyond those typically given to classical ombudsmen such as the powers to launch or intervene in constitutional court actions, prosecute public officials, and engage in human rights research and education. See id. at 8, 88, 193.
17 See id. at 11, 393. On a sub-national level, there are numerous human rights ombudsman institutions, such as those in Spain and Argentina. See id. at 11.
tions are increasingly being transformed through the conferral of constitutional or legislative mandates to protect human rights.\(^\text{18}\)

This Article examines the proliferation of human rights ombudsman institutions over the past three decades and argues that their numbers will continue to grow relative to their classical predecessors. The forces responsible for the growth of human rights ombudsmen include democratization, public institution building, comparative law influences, limited state resources, international and regional movements to establish national human rights institutions (NHRIs), and the recent adoption of human rights treaties, along with other initiatives that rely on NHRIs, for domestic implementation of international human rights obligations.\(^\text{19}\) Although some mixed jurisdictions and a few common law states have adopted the human rights ombudsman model, they are primarily found in civil law jurisdictions.\(^\text{20}\)

Additionally, this Article reviews the core powers of human rights ombudsman institutions in various jurisdictions. Although a human rights ombudsman endowed with limited, classical powers may be effective, governments should endow their human rights ombudsmen with as many additional functions and powers as their institutional and legal systems permit to support the institution’s human rights mandate. Finally, all human rights ombudsmen should engage in appropriate institutional practices to maximize their ability to protect and promote human rights.

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18 See id. at 393.


20 See Reif, supra note 1, at 8–9. These forces may also cause an increase in the number of human rights ombudsman institutions in common law jurisdictions. See id. at 8–9. See generally Common Law Systems and Mixed Systems with a Common Law Tradition, supra note 19 (providing a list of common law and mixed systems worldwide); Directory 2008, supra note 19 (listing contact information for ombudsman offices internationally).
I. The Historical Development and Current Use of Human Rights Ombudsman Institutions

A. The Evolution of the Human Rights Ombudsman: The Classical Ombudsman and Human Rights Commissions

Since the 1960s, as government bureaucracies have grown in size, nations have steadily perceived the ombudsman as a useful mechanism for controlling administrative misconduct.\(^{21}\) Specifically, governments began adopting Scandinavia’s classical ombudsman model.\(^{22}\) Commonwealth countries in particular, many of which obtained their independence following World War II, followed this trend.\(^{23}\) Western European nations, among others, caught up with this trend a few years later and began establishing classical ombudsman institutions in the 1970s.\(^{24}\)

Born from the rubble of World War II, human rights commissions appeared as non-judicial mechanisms for protecting individuals from governments or private actors violating their rights.\(^{25}\) At first, only a few human rights commissions existed, primarily in European and Commonwealth states.\(^{26}\) Since the 1990s, however, many more have been created.\(^{27}\) Human rights commissions are multiple-member bodies with numerous human rights protection and promotion functions, including human rights research and education, advocating for the implementation of human rights treaties, and monitoring the state’s compliance with its international and domestic human rights obligations.\(^{28}\) While some commissions have a limited advisory or research role, many have investigatory powers and may recommend or conciliate resolutions to complaints; some may even refer complaints to tribunals or to courts for binding resolution, intervene in court actions, act as amici curiae, and

\(^{21}\) See Reif, supra note 1, at 6–7; Wade & Forsyth, supra note 10, at 73–75.

\(^{22}\) See Reif, supra note 1, at 2.

\(^{23}\) See id. at 6–7. In 1962, New Zealand became the first Commonwealth state to establish a classical ombudsman, followed by countries in Africa, the Caribbean, Asia and the Pacific region, the United Kingdom, and most Canadian provinces. See id. at 6 & n.30 (listing countries that established a classical ombudsman chronologically by date).

\(^{24}\) See id. at 6–7. For example, France’s Médiateur was copied by Francophone African states, Italian regions and provinces, Austria, Netherlands, Ireland, Belgium, a few U.S. states, most Canadian provinces and territories, and many Commonwealth Caribbean nations. See id. at 6 & n.30, 7 & n.31, 11–12, 86–87.

\(^{25}\) See id. at 6.

\(^{26}\) See id. at 8–9, 83 n.8.

\(^{27}\) Reif, supra note 1, at 83–85.

\(^{28}\) Id.
conduct public inquiries.\textsuperscript{29} By the 1970s and 1980s, as the public consciousness of the human rights abuses being committed by authoritarian or military dictatorships expanded, the number of international human rights laws increased.\textsuperscript{30} At the same time, democratization flourished, first in Southern Europe, then in Latin America as well as in Central and Eastern Europe.\textsuperscript{31}

In these countries, public sector reform was on the agenda as framers built—or in some cases rebuilt—constitutional, legal, and institutional frameworks.\textsuperscript{32} Faced with the challenge of both ensuring administrative justice and guarding against further human rights violations, many nations considered establishing horizontal accountability mechanisms in their new governments.\textsuperscript{33} To build this public architecture, these new governments could draw on the existing models of ombudsman institutions and human rights commissions.\textsuperscript{34} Nevertheless, rather than establishing separate accountability mechanisms, many of these nations created hybrid institutions reflecting each of the two institutional models.\textsuperscript{35} Although the contours of each human rights om-

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\textsuperscript{31} See Samuel P. Huntington, The Third Wave: Democratization in the Late Twentieth Century 21–26 (1991). This development has been uneven and, as a result, some nations have experienced setbacks. See John Peeler, Building Democracy in Latin America 26–28, 182–85 (3d ed. 2009).

\textsuperscript{32} See Huntington, supra note 31, at 21–25.


\textsuperscript{34} See Reif, supra note 1, at 393–95.

\textsuperscript{35} See id. at 8–9. While the generic term “human rights ombudsman” will be used, the actual titles given to these hybrids vary, including “commissioner for civil rights protection,” “defender of the people,” “attorney for the defense of human rights,” and “ombudsman.” See id. at 12. For example, Poland uses the “commissioner for civil rights protection” designation. Id. “Defender of the people” is used in Spain and parts of Latin Amer-
budsman vary, nearly all are single office-holders and the institution always has the power to investigate public complaints, make recommendations, and report its findings.36

The distinguishing characteristics of these institutions are their specific mandates with respect to human rights.37 Many mix administrative justice duties with responsibilities for protecting and promoting human rights; nevertheless, there can be considerable differences in emphasis depending on an institution’s particular constitutional or legislative mandate and its unique political and economic context.38 Some single office-holder institutions have mandates similar to those of a human rights commission, which focuses on the protection and promotion of human rights and lacks an express ability to oversee administrative justice.39 While a few institutions have only investigation, reporting, and recommendation functions, many have stronger powers like the right to inspect closed facilities, to bring abstract or concrete review actions before constitutional courts, to participate in administrative court proceedings, or to prosecute or recommend the prosecution of public officials.40 Furthermore, some human rights ombudsman institutions have jurisdiction over aspects of private sector conduct in addition to public sector jurisdiction.41

As they transitioned to democracy in the mid-1970s, Portugal and Spain became the first countries to establish human rights ombudsmen.42 In 1975, Portugal established the Provedor de Justiça.43 Spain enshrined its Defensor del Pueblo in the country’s 1978 Constitution as well as in a legislative enactment.44 The Spanish institution was tasked with defending constitutional human rights guarantees by supervising government administration; additional legislation added an ombudsman-
like element to the mix.\textsuperscript{45} Beyond the powers to investigate, recommend, and report, both the Portuguese and Spanish institutions could bring actions before their respective constitutional courts.\textsuperscript{46}

In Sweden, legislation passed in 1986 established an express, albeit more subtle, duty for the ombudsman to protect human rights: “The Ombudsmen are to ensure in particular . . . that the fundamental rights and freedoms of citizens are not encroached upon in public administration.”\textsuperscript{47}

After the collapse of the Soviet Union and the Eastern Bloc and their turn toward democracy in the late 1980s, similar desires both to improve bureaucratic performance and halt human rights abuses by the government led many Central and Eastern European governments to establish human rights ombudsman institutions.\textsuperscript{48} Hybrid institutions also began to appear in some African, Asian, Caribbean, Pacific, and Western European nations.\textsuperscript{49}

B. Mapping the Human Rights Ombudsman and Classical Ombudsman Institutions

Today, the human rights ombudsman is an institution found in many nations around the world. Most Latin American countries have a


\textsuperscript{46} See European Ombudsman-Institutions, supra note 10, at 354–55; Reif, supra note 1, at 147–49.


\textsuperscript{48} See Reif, supra note 1, at 8, 155–60.

\textsuperscript{49} See id. at 125, 171, 215.
national human rights ombudsman. For example, Argentina, Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, Peru, and Venezuela all have human rights ombudsmen. In the broader Caribbean region, the ombudsmen of Belize, Guyana, Jamaica, and Haiti all have human rights mandates to differing degrees. Additionally, human rights ombudsmen or commissioners are found widely throughout Central and Eastern Europe.

While many of these institutions have dual human rights and administrative justice functions, a few focus exclusively on protecting human rights. Increasingly, some ombudsman institutions in other European


53 See id. at 157–60; see also European Ombudsman-Institutions, supra note 10, at 503. Countries with human rights ombudsman institutions include Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Georgia, Hungary, Kazakhstan, Kosovo, Kyrgyz Republic, Latvia, Lithuania, Macedonia, Moldova, Montenegro, Poland, Romania, Russia, Serbia, Slovak Republic, Slovenia, Ukraine, and Uzbekistan. See Reif, supra note 1, at 157–60; see also European Ombudsman-Institutions, supra note 10, at 503. See generally Directory 2008, supra note 19 (listing contact information for ombudsman offices internationally). In Estonia, the Legal Chancellor is responsible for protecting human rights. See European Ombudsman-Institutions, supra note 10, at 6, 51.

54 See European Ombudsman-Institutions, supra note 10, at 502. For example, institutions in Azerbaijan, Georgia, Kazakhstan, Ukraine, and Uzbekistan use only human rights standards in investigations. See id. The institutions in Argentina, Peru, Costa Rica,
regions have taken on human rights-related functions either at their inception or through legal reform.55 France’s 2008 constitutional reforms provided for a new human rights state institution, the Défenseur des Droits.56 In Australia, the ombudsman of the State of Victoria handles complaints with respect to alleged breaches of the State’s Charter of Human Rights and Responsibilities by public authorities.57 Further, Denmark and Luxembourg have given their classical ombudsman institutions human rights monitoring responsibilities under the Optional Protocol to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.58

African nations with human rights ombudsman institutions include Angola, Ethiopia, Gambia, Lesotho, Malawi, Namibia, and Sey-

and Venezuela have dual mandates, while others in Latin America are focused predominately on human rights. See Reif, supra note 1, at 187–91, 188 n.116, 190 n.125, 197, 201.  

55 See Reif, supra note 1, at 137–69 (surveying the ombudsman’s institutional development in various European countries). Human rights ombudsmen are also found in Spain, Portugal, Sweden, Finland, Norway, Greece, Andorra, and Cyprus. See European Ombudsman-Institutions, supra note 10, at 502. Finland’s ombudsman was given an additional human rights mandate in 1995, which entered into force in 1999. See Ulla-Majia Lindström, Compensation for Violations of Fundamental Rights—Decisions and Opinions by the Parliamentary Ombudsman, in Parliamentary Ombudsman: 90 Years 77, 79 (Greg Coogan & Arttu Tolonen trans., 2010), available at http://www.oikeusasiamies.fi/Resource.phpx/eoa/english/publications/jubilee-book.htx; Pasi Pölönen, Monitoring Fundamental and Human Rights as the Parliamentary Ombudsman’s Duty, in Parliamentary Ombudsman: 90 Years, supra, at 51, 54. In 2007, Norway’s ombudsman was given a dual ombudsman-human rights mandate in amendments to the institution’s legislation. See Arne Fliflet, Parliamentary Ombudsman of Norway Annual Report 2007: Summary in English, Sivilombudsmannen, 13–14 (May 2008), http://www.sivilombudsmannen.no/getfile.php/Filer/%C3%85rsmelding/kortmelding%20ENGLISH.pdf. A majority of Spain’s autonomous communities also established their own human rights ombudsman institutions, albeit without the power to bring actions before the constitutional court. See Reif, supra note 1, at 149–51. These communities include Andalusia, Aragon, Asturias, the Basque region, the Canary Islands, Castile-La Mancha, Castile and Leon, Catalonia, Galicia, Navarra, and the Valencian Community. See id. at 150. Sub-national hybrids also exist in some other European states. See id. at 126. 

56 See 1958 Const. 71-1, available at http://www.assemblee-nationale.fr/English/8ab.asp (last visited May 8, 2011) (English translation). Article 71-1 states that “[t]he Defender of Rights shall ensure the due respect of rights and freedoms by state administrations, territorial communities, public legal entities, as well as by all bodies carrying out a public service mission” by taking complaints from persons contending that their rights have been infringed. See id. 


58 See European Ombudsman-Institutions, supra note 10, at 159, 295.
chelles. Human rights ombudsmen are far less common in Asia and the Pacific regions, but East Timor, Fiji, and Papua New Guinea are examples of states that have institutions with human rights mandates of varying scope.

In sum, while human rights ombudsmen are found in most global regions, they are predominantly established in Latin America and in Central and Eastern Europe. While many countries choose to have one unified human rights overseer, a human rights ombudsman sometimes exists alongside another, general-purpose human rights institution, often a research or advisory human rights commission. Most of the jurisdictions with human rights ombudsman institutions are civil law systems, although the ombudsman is present in some common law or mixed legal systems. Furthermore, those civil law countries with a constitutional court may have a more powerful human rights ombudsman. The quantity and quality of powers given to


60 See Reif, supra note 1, at 245, 249.

61 See id. at 9.


63 See generally Common Law Systems and Mixed Systems with a Common Law Tradition, supra note 19 (providing a list of common law and mixed systems worldwide); Directory 2008, supra note 19 (listing contact information for ombudsman offices internationally). Examples of states with common law systems using human rights ombudsmen include Jamaica, Victoria (Australia), and Belize. See Common Law Systems and Mixed Systems with a Common Law Tradition, supra note 19; Directory 2008, supra note 19, at 7–9, 12, 34. Mixed systems with human rights ombudsmen are found in Malawi and Papua New Guinea. See Common Law Systems and Mixed Systems with a Common Law Tradition, supra note 19; Directory 2008, supra note 19, at 37, 51. Lesotho, Gambia, Seychelles, and Namibia have mixed systems with hybrid institutions. See Common Law Systems and Mixed Systems with a Common Law Tradition, supra note 19; Directory 2008, supra note 19, at 22, 35, 46, 54; see also Reif, supra note 1, at 9, 11.

64 See Reif, supra note 1, at 252. Many civil law states with constitutional courts have established human rights ombudsmen who are typically authorized to launch actions in constitutional courts. See id. at 9, 11. See generally Common Law Systems and Mixed Systems with a Common Law Tradition, supra note 19 (providing a list of common law and mixed systems worldwide); CONSTITUTIONAL COURTS (LINKS), COUNCIL EUR. VENICE COMMISSION, http://www. venice.coe.int/site/dynamics/N_court_links_ef.asp (last visited May 8, 2011) (providing
human rights ombudsmen in countries without constitutional courts varies.65

On the contrary, the classical ombudsman is now found predominantly in North America, Commonwealth Caribbean nations and overseas territories, parts of Western Europe, and in a number of African, Asian, and Pacific states.66 Some of the jurisdictions with classical ombudsmen, particularly Commonwealth nations, also have separate human rights commissions.67 Thus, classical ombudsman institutions are found across common law, civil law, and mixed legal systems.68

The concept of a modern human rights ombudsman is not alien to or irreconcilable with the classical ombudsman model. A testament to the compatibility of these two concepts is the substantial number of human rights ombudsman institutions that have been established and maintained since the 1970s using the ombudsman model.69 At its core, the ombudsman is an institution designed to monitor illegality, unfairness, and injustice in public administration.70 In this sense, breaches of human rights laws, whether domestic or international obligations, have

website information for constitutional courts and equivalent bodies worldwide); Directory 2008, supra note 19 (listing contact information for ombudsman offices internationally). On the contrary, Finland, Norway, Sweden, Denmark, and Argentina are civil law systems without constitutional courts that have human rights ombudsmen. See Reif, supra note 1, at 9, 11; Common Law Systems and Mixed Systems with a Common Law Tradition, supra note 19; Constitutional Courts (Links), supra note 19; Directory 2008, supra note 19, at 2–7, 19, 21–22, 49, 59; The Supreme Court, Högsta Domstolen, http://www.hogstadomstolen.se/Funktioner/English/The-Swedish-courts/The-Supreme-Court/ (last visited May 8, 2011) (providing information about the Swedish Supreme Court).

65 See Constitutional Courts (Links), supra note 64. See generally Reif, supra note 1, at 13–15, 137–41 (outlining the powers of the legislative ombudsmen of Scandinavian countries without constitutional courts). For example, Argentina’s Defensor del Pueblo can launch amparo court actions, while the human rights ombudsman institutions in Sweden and Finland can prosecute public officials, but do not have the mandate to launch constitutional human rights court actions. See Allan R. Brewer-Carías, Constitutional Protection of Human Rights in Latin America: A Comparative Study of Amparo Proceedings 77 (2009); Reif, supra note 1, at 37–38.

66 See generally Directory 2008, supra note 19 (listing contact information for ombudsman offices internationally).

67 See Reif, supra note 1, at 102.

68 See generally Common Law Systems and Mixed Systems with a Common Law Tradition, supra note 19 (providing a list of common law and mixed systems worldwide); Directory 2008, supra note 19 (listing contact information for ombudsman offices internationally). Saint Lucia, Quebec, Malta, Botswana, and Pakistan are examples of countries with mixed systems and a classical ombudsman. See Common Law Systems and Mixed Systems with a Common Law Tradition, supra note 19; Directory 2008, supra note 19, at 13, 17, 38, 49–50, 53.

69 See Reif, supra note 1, at 6 n.30.

70 See Marten Oosting, The Ombudsman and His Environment: A Global View, in The International Ombudsman Anthology: Selected Writings from the International Ombudsman Institute, supra note 10, at 1, 1.
always been part of the ombudsman’s mission. It has long been recognized that even the classical ombudsman plays a role both in human rights protection and in the implementation of a state’s domestic and international human rights obligations.\(^71\) Thus, one way of looking at the human rights ombudsman is as a workable adaptation of the classical ombudsman concept.

II. Forces Compelling the Growth of the Human Rights Ombudsman Phenomenon

A variety of forces, both legal and non-legal, have compelled the growth of human rights ombudsman institutions around the world, both in absolute terms and relative to the number of classical ombudsman institutions.\(^72\) These forces include democratization and public institution-building initiatives; comparative law influences in particular regions or sub-regions; the need to conserve government resources; international initiatives to establish NHRIs; and pressure resulting from regional standards, U.N. standards, and treaty initiatives to establish domestic institutions for human rights protection.\(^73\) It is likely that these forces will continue to influence governments to establish some form of human rights ombudsman. These same forces have led other states to establish human rights commissions.\(^74\) While common law jurisdictions tended to create separate, classical ombudsman institutions and human rights commissions, these forces may also induce common law states to establish human rights ombudsman institutions.\(^75\)

A. Democratization, Public Institution-Building, and the Influence of Comparative Law

Beginning in the 1970s, as a number of European and Latin American countries transitioned from authoritarian regimes to democ-
racies, they sought to rebuild their public institutions with checks to avoid the human rights abuses and bureaucratic ineptitude of the prior regimes. These countries saw methods of horizontal accountability in public institutions, including human rights commissions and the ombudsman, as important models for their own use.

Thomas Pegram has explored the diffusion of NHRI s, including the human rights ombudsman, around the world. He argues that the mechanisms of diffusion by acculturation and persuasion have led to the spread of NHRI s and that the acculturation process has resulted in a “general conformity, or isomorphism, across models within regional referent groups.” With democratic transitions occurring throughout some regions in a relatively short period of time and the associated need for new institutional models, the acculturation process can help to explain the spread of the human rights ombudsman institution throughout Latin America and in Central and Eastern Europe. As argued below, however, U.N.-level pressure to create human rights ombudsman institutions was weak in the early 1990s, so the acculturation process would likely have been spurred on in that period predominantly by regional organizational and institutional influences.

Pegram also concludes that the human rights ombudsman and human rights commission models are found most often in countries with hybrid or “partly free” democratic regimes, while “the classical ombudsman continues to predominate in ‘free’ regimes, increasingly operating in conjunction with a human rights commission model.” This may be due in part to the novelty and related allure of the human rights ombudsman model in the late 1980s and early 1990s, which coincides with the period of democratic transition for several countries in Latin America and in Central and Eastern Europe.

More recently, however, an increasing number of “fully free,” democratic nations have adopted the human rights ombudsman model.

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76 See Oosting, supra note 70, at 4.
77 See Commonwealth Secretariat, supra note 10, at 18.
79 Id. at 749.
80 See id. at 760.
81 See Reif, supra note 1, at 258–87 (discussing U.N. involvement in post-conflict peace-building processes that established human rights ombudsman institutions).
82 Pegram, supra note 78, at 755.
83 See id. at 748–49.
mainly in Western and Southern Europe. This development may be traceable to the diffusion process. Moreover, it is likely that regional influences have played an important role. The growth of human rights ombudsman institutions in these states—including those that have transitioned from a classical to a human rights ombudsman model—along with the presence of classical, or anti-corruption, ombudsman institutions in states at varying points along the political spectrum, will likely increase the proportion of human rights ombudsman institutions in the free or partly free sector of the political spectrum. This tendency will become more pronounced if the classical ombudsman institutions in free states with monitoring responsibilities pursuant to the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) are reclassified as human rights ombudsman institutions.

Comparative law influences are also instructive as a distinct force in the human rights ombudsman evolution. In particular, the legal transplant and adaptation concepts are useful in understanding the institution’s development. The diffusion by acculturation process posed by Pegram collapses comparative law aspects of the process into the broader theory of diffusion. As noted above, most countries with human rights ombudsman institutions—and all countries with such institutions in Europe and Latin America—have civil law systems, so the transplantation of the human rights ombudsman has been predominantly into other civil law systems. As discussed below, in many cases lawyer elites, government officials, and civil society groups regard the

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84 See Reif, supra note 1, at 83. A majority of these states are European Union members. See id. at 137, 141, 368.
85 See id. at 84; Pegram, supra note 78, at 755.
86 See Reif, supra note 1, at 84.
88 See Pegram, supra note 78, at 747–50.
89 See Reif, supra note 1, at 2, 8–9.
ombudsman concept, whether in its original or adapted form, as a prestigious or superior model.  

Adaptation or hybridization, the next step in the evolution of the ombudsman, first occurred on the Iberian Peninsula. Reacting to the immediate political past, the newly democratic governments of Spain and Portugal modified the classic ombudsman model by adding a mandate that the ombudsman protect human rights. In other words, they adapted the legal transplant of the Scandinavian model by adding an express duty to protect human rights. As Buades stated with respect to the establishment of Spain’s Defensor del Pueblo,

[W]hen shaping the figure of the Ombudsman, Spanish constitutionalists had the characteristics of the Scandinavian model very much in mind in terms of independence, parliamentary links and control of the administration, in order to avoid abuses and errors in the omnipresent public administration . . . . With the intention of consolidating and strengthening the recently conquered freedoms, a further step was taken by entrusting the Ombudsman with the task of defending fundamental rights . . . .

The Spanish legal heritage of Latin America made the Spanish Defensor del Pueblo an attractive legal transplant for Latin American countries transitioning to democracy. Spain and Latin America have civil law

90 See Graziadei, supra note 87, at 457–58. In both Latin America and Europe, many of the legal experts and drafters involved in the process appear to have been familiar with the Scandinavian ombudsman concept and the Iberian hybrid human rights ombudsman. See Reif, supra note 1, at 8–9, 25. Where post-conflict peace-building agreements establish a human rights ombudsman, the particular ombudsman model chosen for the transitioning jurisdiction will likely have been influenced by the preferences of the international organization personnel of diverse nationalities involved in the drafting process. See id. at 284–87.

91 See Reif, supra note 1, at 8.

92 See id. at 141, 146.

93 See id.


95 See Reif, supra note 1, at 188. Brazil, however, has a Portuguese legal heritage. See id. at 191 (indicating that Brazil has ombudsman institutions in some states and municipalities); Jan Kleinheisterkamp, Development of Comparative Law in Latin America, in THE OXFORD HANDBOOK OF COMPARATIVE LAW, supra note 11, at 261, 266–67, 276–78; see also Aspásia Camargo, Federalism and National Identity, in BRAZIL: A CENTURY OF CHANGE 216, 247–49 (Ignacy Sachs et al. eds., 2009) (noting that Brazil’s 1988 Constitution “recovered very old traditions of Portuguese municipalism” which led to “the strengthening of the power and legitimacy of local governments”).
legal systems. In its 1978 Constitution, Spain established a constitutional court outside the judicial branch for the adjudication of constitutional matters—including human rights—and adopted the amparo action, whereby persons can use litigation to protect their human rights. Most Latin American nations also have constitutional courts and the amparo or equivalent actions. Accordingly, the Spanish version of the human rights ombudsman, and its integral relationship with a constitutional court and the amparo action, was seen to be a natural fit for many Latin American states.

Guatemala was the first Latin American state to establish a human rights accountability institution, with its Procurador de los Derechos Humanos. One early Procurador who helped formulate Guatemala’s constitution in 1985 described both the Swedish ombudsman and Spanish Defensor del Pueblo as the institutions that inspired the Guatemalan Procurador’s legal framework. Following Guatemala’s lead, in the early 1990s a number of other Latin American states created Defensor del Pueblo, Procurador, and human rights commissioner institutions with varying emphasis on human rights protection and promotion. For example, Argentina and Peru followed the Spanish Defensor del Pueblo

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96 See M.C. Mirow, LATIN AMERICAN LAW: A HISTORY OF PRIVATE LAW AND INSTITUTIONS IN SPANISH AMERICA 15, 45–47, 51–52, 104 (2004). Indeed, Spanish law was applied in the latter territories during the colonial period until local laws were developed, and Spanish law and doctrine remained influential in Latin America. See id. at 15.

97 See EUROPEAN OMBUDSMAN-INSTITUTIONS, supra note 10, at 401. Curiously, while the amparo action originated in nineteenth-century Latin America, Spain did not adopt the action until the twentieth century. See BREWER-CARIÁS, supra note 65, at 1, 4–6, 73–76.

98 See BREWER-CARIÁS, supra note 65, at 163; MIROW, supra note 96, at 178, 180.

99 See, e.g., Lorena González Volio, The Institution of the Ombudsman: The Latin American Experience, 37 REVISTA IIDH 219, 223 (2003). Mexico, however, has a civil law system and the amparo action, but does not have a constitutional court and has adopted the human rights commission model. See MIROW, supra note 96, at 173, 178.


101 See de León Carpio, supra note 100, at 115; see also Antecedentes, PROCURADURÍA DE LOS DERECHOS HUMANOS, 1 (July 27, 2010), http://www.pdh.org.gt/index.php?option=com_content&view=category&layout=blog&id=25&Itemid=9 (follow hyperlink to pdf document under “Antecedentes” heading). Members of the Guatemalan College of Lawyers and Notaries met informally in the lead-up to the elections for the constitutional assembly and came up with ideas that included the Procurador model; in turn, some of these legal experts were elected to the constitutional assembly and lobbied successfully for the inclusion of the Procurador institution in Guatemala’s new constitution. See de León Carpio, supra note 100, at 113–14.

102 See Reif, supra note 1, at 172, 187–91.
model by establishing clearly defined human rights and administrative justice mandates; the Swedish ombudsman institution provided more general inspiration.103

In the late 1980s, as communist regimes imploded, Central and Eastern European nations began the process of nation-building.104 Western European, U.S., and indigenous models all influenced the shape and substance of their new constitutions and public institutions.105 Many adopted variants of the human rights ombudsman, albeit with differing powers and names. Poland was the first nation in the region to establish a human rights ombudsman.106 Polish law scholars and organized civil society first discussed creating an ombudsman institution in the early 1980s.107 Poland’s communist regime actually created the country’s Commissioner for Civil Rights Protection in 1987 prior to its collapse; it was “apparently conjured up by high state officials to prove that reforms undertaken by the communist government were not merely empty words.”108 The Commissioner was established to safeguard citizens’ rights and freedoms found in the constitution and other normative acts infringed upon by public authorities.109 Addition-


104 See Iván Bizjak, The Role and Experience of an Ombudsman in a New Democracy, in 2 THE INTERNATIONAL OMBUDSMAN YEARBOOK, supra note 9, at 57, 57–58.


106 See Reif, supra note 1, at 160.


108 Klich, supra note 107, at 38.

ally, it had the power to bring actions before Poland’s constitutional court and its administrative courts. The first Polish Commissioner stated, “Poland’s ombudsman’s office is modeled after the Scandinavian version which was vigorously promoted by Polish scholars acquainted with West European institutions. Communist officials, largely ignorant of the nature of this institution, agreed to establish [the] ombudsman without realizing the potential consequences.” One publicist stated that the Polish institution was also modeled on the classical ombudsman offices in France and the United Kingdom.

In Hungary, a legislative proposal for an ombudsman was first put forth in 1988. It appears that the Swedish and Polish models were influential in the subsequent development of the Hungarian commissioners for human rights. The Slovenian Human Rights Ombudsman legislation was passed in late 1993 and “modelled the duties and authorities of the ombudsman on a classical Scandinavian type of ombudsman, combining it with some provisions of the legislation in those European countries, which recently established such institutions (e.g. Netherlands, Spain).” The drafters of federal constitutional law on the commissioner for human rights in Russia also looked to the ombudsman institutions of Sweden and Great Britain. The Russians were particularly influenced by ombudsman institutions in countries that had experienced or were experiencing a political transition; therefore “[s]pecial attention was paid to the experience of Poland, Slovenia, and post-Franco Spain,” although the Russian model was adapted to fit its own particular environment.

Thus, Central and Eastern European nations looked not only to classical ombudsman institutions for inspiration but also to hybrid mod-

110 See European Ombudsman-Institutions, supra note 10, at 345–47, 521.
114 See id. at 167–69.
els like the Spanish Defensor del Pueblo and the Polish Commissioner for Civil Rights Protection.118 Unlike the Swedish ombudsman, both the Defensor del Pueblo and the Polish Commissioner had the power to bring human rights-related actions in a constitutional court, a power subsequently included in other human rights ombudsman institutional structures in Eastern and Central Europe.119 On the other hand, Scandinavian models—in particular the Swedish variant—along with the Defensor del Pueblo, were more influential in Latin America.120 In both regions, however, adopting a human rights ombudsman model was not the end of the story: the structures of subsequent institutions were also shaped by other early intra-regional institutions in jurisdictions with political and legal environments similar to those of the copying state.121

Tracing the influence of comparative law on human rights ombudsmen created in other parts of the world is more difficult. Colonial legal histories likely play a role. For example, East Timor’s past colonial legal ties to the Portuguese Provedor de Justiça model helped shape its own human rights ombudsman, which was enshrined in the nation’s 2002 independence constitution and was given an additional corruption-fighting role.122 An institution’s date of establishment, any relationship with a post-conflict peace agreement or transitional independence plan, and local conditions also influence the shape of these institutions.123

118 See id. However, it is difficult to demonstrate any substantial influence exerted by the ombudsmen in France and Great Britain because these institutions did not have express human rights mandates.

119 See, e.g., EUROPEAN OMBUDSMAN-INSTITUTIONS, supra note 10, at 517–21. While the Swedish ombudsman had an express human rights mandate by 1987 and had the power to prosecute public officials, none of the Scandinavian nations have separate constitutional courts. See id. at 412–16, 460, 515–21. Additionally, none of the Scandinavian ombudsman institutions have mandates to bring court actions to determine the compatibility of legislation or treaties with constitutional human rights provisions. See id.

120 See REIF, supra note 1, at 187–88.

121 See Linda C. Reif, Introduction to THE INTERNATIONAL OMBUDSMAN ANTHOLOGY: SELECTED WRITINGS FROM THE INTERNATIONAL OMBUDSMAN INSTITUTE, supra note 10, at xxiii–xxvi; see also Elcock, supra note 112, at 362.


123 See Reif, supra note 121, at xxiii–xxvi. In particular, African and Asian governments are more likely to give an anti-corruption mandate to an ombudsman institution. See REIF, supra note 1, at 9–10, 215.
In Africa, Uganda and Namibia established the first human rights ombudsman institutions.\textsuperscript{124} Uganda’s Inspector-General of Government, as established in 1987, had human rights protection and anti-corruption mandates but only classical ombudsman-type powers.\textsuperscript{125} Namibia’s ombudsman—established in the 1990 Constitution after the U.N.-assisted transition to independence from South African control—has multiple mandates, including administrative oversight and human rights, anti-corruption, and environmental protection.\textsuperscript{126} The Namibian ombudsman was also given stronger powers to refer matters to other public officials for prosecution, bring court proceedings to halt government action and challenge the validity of laws, and provide legal assistance to persons engaged in constitutional human rights litigation.\textsuperscript{127} For these first human rights ombudsman institutions in Africa, no colonial links influenced the particular hybrid model they chose, and few hybrids were found elsewhere in the world at the time.\textsuperscript{128}

\section*{B. Limited State Resources}

Industrialized, transitional, and developing countries engage in government budget-cutting exercises for various reasons. Localized or widespread economic crises occur on a regular basis.\textsuperscript{129} Some governments are ideologically predisposed to limit government action and spending or wish to reign in the spending of a prior administration.\textsuperscript{130} Consequently, giving multiple mandates to a new institution, or adding additional oversight mandates to an existing institution, are attractive alternatives for governments seeking to cut public expenditures. Low levels of state resources, and sometimes a desire to devote minimal resources to the operation of good governance and human rights institutions, are factors leading to the establishment of the multiple mandate,

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{124} See Reif, \textit{supra} note 1, at 221–23.
\item \textsuperscript{125} See id. at 232. The human rights mandate of Uganda’s Inspector General was transferred to a human rights commission in 1995. \textit{Id}.
\item \textsuperscript{126} See id. at 234–37.
\item \textsuperscript{127} See id. at 235–36.
\item \textsuperscript{128} See id. at 224, 231, 234 (noting the hybrid models of Namibia and Uganda and the political history underlying the founding of these institutions).
\item \textsuperscript{129} See Jorge Madrazo Cuellar, \textit{The Ombudsman and His Relationship with Human Rights, Poverty and Development}, in 2 \textit{The International Ombudsman Yearbook}, \textit{supra} note 9, at 129, 132 (noting that neo-liberal economic policies contributed to economic problems in places such as Latin America).
\item \textsuperscript{130} See id.
\end{itemize}
\end{footnotesize}
single office-holder ombudsman in developing countries, especially in Africa and Asia.\footnote{131}{See Reif, supra note 1, at 88; Oliveira & Ximenes, supra note 122, at 1 n.2.}

The shape of human rights ombudsman institutions in developed countries is also changing because of the additional financial resources inherent in establishing separate horizontal accountability institutions.\footnote{132}{See Reif, supra note 1, at 406 (noting the financial impact of retaining an independent ombudsman capable of performing its functions).} The cost-saving rationale may also be a reason for merging separate institutions. These considerations may result in the transformation of a classical ombudsman into a human rights ombudsman, an expansion of the mandates of an existing human rights ombudsman, or the creation of a new hybrid institution.\footnote{133}{See id. at 88 (“One factor [for establishing hybrid institutions] is that fewer financial and human resources are needed to operate one office rather than two separate institutions.”).} For example, a 2009 government report recommended that the Children’s Ombudsman in Ireland be merged into the general ombudsman institution.\footnote{134}{See Barry O’Halloran & Ruadhán MacCormaic, Merger of State Bodies Would Save €83m, Irish Times, July 17, 2009, at 9.} If it had been implemented, this change would have turned Ireland’s classical ombudsman into a human rights ombudsman.\footnote{135}{See Reif, supra note 1, at 8 (noting that a human rights ombudsman “combines both the ombudsman and human rights commission roles”).} In France, 2011 legislation will eliminate the country’s independent Défenseur des Enfants and entrust its child protection functions to a deputy within a larger Defender of Rights institution.\footnote{136}{See Loi organique 2011-334 du 29 mars 2011 relative au Défenseur des droits [Law 334 of March 29, 2011 Relative to the Defender of Rights] (in force April 1, 2011), available at http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000023781252&dateTexte=. See generally Le Défenseur des Enfants, http://www.defenseurdesenfants.fr/ (last visited May 8, 2011) (detailing recent developments).}

C. International Initiatives to Establish National Human Rights Institutions

Over the past twenty-five years, the international community has placed greater emphasis on the implementation of states’ international human rights obligations at the domestic level through the establishment and strengthening of NHRI\textsubscript{s}.\footnote{137}{See Reif, supra note 50, at 275 (“The United Nations has recently affirmed the significance of national human rights institutions for the protection and promotion of human rights . . . .”).} The U.N. standards for NHRI\textsubscript{s}, popularly called the “Paris Principles,” were drafted in the early 1990s.\footnote{138}{See G.A. Res. 48/134, ¶¶ 1–13, U.N. Doc. A/RES/48/134 (Dec. 20, 1993).} Although not legally binding, the Paris Principles are consid-
ered to be the core standards for independent and effective NHRIIs.\textsuperscript{139} Although the Paris Principles suggest a human rights commission as the model NHRI, the U.N. began to accept human rights ombudsmen as NHRIIs later in the 1990s.\textsuperscript{140} In 1994, an International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights was established under the auspices of the U.N.’s High Commissioner for Human Rights, and later created a NHRI accreditation process that, in effect, grants its highest accreditation only to human rights commissions and human rights ombudsman institutions.\textsuperscript{141} Paralleling this move, U.N. human rights treaty committees have issued general comments that call on contracting state parties in major U.N. human rights treaties to establish or strengthen NHRIIs and have also made recommendations to states on the establishment and strengthening of NHRIIs in concluding observations to periodic state reports.\textsuperscript{142}

On a regional basis, both the Council of Europe (COE) and the Organization of American States (OAS) have strongly supported the human rights ombudsman model.\textsuperscript{143} In particular, the mandate of the COE’s Commissioner for Human Rights includes facilitating the activities of national ombudsmen or similar institutions in the human rights field in COE member states.\textsuperscript{144} This is unsurprising because the human

\textsuperscript{139} See Reif, supra note 1, at 95–96.


\textsuperscript{141} See Rachel Murray, \textit{The Role of National Human Rights Institutions at the International and Regional Levels: The Experience of Africa} 30–31 (2007). For full accreditation, commissions and human rights ombudsmen must comply with the Paris Principles as fleshed out by ICC General Observations. See id. at 42.

\textsuperscript{142} See id. at 31; Reif, supra note 1, at 116–21.

\textsuperscript{143} See Reif, supra note 140.

rights ombudsman format originated in Europe and quickly became the predominant model in both Europe and Latin America.145

Some NHRI s have been externally imposed by international actors.146 In particular, post-conflict peace-building processes undertaken by the U.N. and regional organizations resulted in the establishment or strengthening of NHRI s, most often employing human rights ombudsmen during the peace processes in Latin American and Central and Eastern European nations.147 As part of the good governance initiatives launched in the late 1990s, international financial institutions and donor states pressured other nations to establish or strengthen NHRI s.148 Pegram argues, however, that the concept of diffusion of NHRI s by coercion is of limited use in explaining their increased popularity during this period.149

Given the Paris Principles’ focus on the human rights commission, the large number of human rights ombudsmen established during the first half of the 1990s must have been due to the influence of factors other than these standards.150 These influences were likely regional rather than international in nature. In Europe and Latin America, inter- and intra-regional legal transplantation was probably the initial cause, and the support of regional organizations such as the COE and later the OAS likely continued the trend.151 Nevertheless, as the U.N. increasingly acknowledged human rights ombudsmen as NHRI s, U.N.

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145 See Reif, supra note 1, at 172.
146 See id. at 260–84.
147 See id. (discussing the post-conflict peace-building processes in El Salvador, Bosnia and Herzegovina, Kosovo, and East Timor).
148 See id. at 77.
149 See Pegram, supra note 78, at 760.
151 See id. at 89–93; see also Beth A. Simmons, Mobilizing for Human Rights: International Law in Domestic Politics 110–11 (2009) (discussing empirical research finding that governments are influenced by other governments in the same region in decisions whether to and to what extent to make commitments under the core U.N. human rights treaties).
standards, interpretations, recommendations, and accreditation rules inevitably would have exerted more influence on the establishment of human rights ombudsmen.

D. Treaties and Other International Initiatives that Use NHRIs for Domestic Implementation

A growing number of recent U.N. human rights treaties and initiatives call on nation states to establish or use existing NHRIs to implement their treaty obligations and improve human rights protections.\(^{152}\) States have reacted by creating NHRIs—including human rights ombudsmen—or by adding a human rights protection mandate to the duties of their existing ombudsman.\(^{153}\) The following section discusses the impact of developments in the areas of children’s rights; the prevention of torture and other cruel, inhuman or degrading treatment or punishment; and multinational corporations and human rights on these institutions.\(^{154}\)


The U.N. Convention on the Rights of the Child (CRC), ratified by nearly every nation state, contains civil, political, economic, social, cultural, and protective rights for children and youth.\(^{155}\) In 2002, the U.N. Committee on the Rights of the Child issued General Comment Number Two, which stated that CRC parties should establish independent NHRIs, children’s ombudsmen, or children’s commissioners to promote and monitor the implementation of the CRC, using a thematic institution in states with enough resources or a “broad-based NHRI that includes a specific focus on children” in states with limited resources.\(^{156}\)

\(^{152}\) See Reif, supra note 1, at 97–99, 116–23.

\(^{153}\) See id. at 82–83.


\(^{156}\) Comm. on the Rights of the Child, The Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child, ¶ 6, U.N. Doc. CRC/GC/2002/2 (Nov. 15, 2002). The General Comment also states that if a broad-
Unfortunately, a relatively small number of parties to the CRC have established children’s ombudsman institutions to date, and there is little uniformity.\textsuperscript{157} Rather than create a separate office or institution, states are more likely to use their human rights ombudsman or commission to address children’s rights and to implement the CRC. For example, in Latin American and European countries, some human rights ombudsmen have developed internal departments for children’s rights protection that place a special focus on investigations involving children.\textsuperscript{158} The Greek government responded to the U.N. Committee on the Rights of the Child recommendations in 2003.\textsuperscript{159} Greece’s legislation expanded the mandate of its human rights ombudsman to include the defense and promotion of children’s rights, established a Deputy Ombudsman for Children, and gave the institution jurisdiction over both the public and private sectors in matters concerning children.\textsuperscript{160} In 1995, Finland’s Parliamentary Ombudsman was transformed into a human rights ombudsman, and in 1998 the parliament requested that the ombudsman place a special focus on children’s rights.\textsuperscript{161} Regardless of their form, human rights ombudsman institutions worldwide are increasingly addressing children’s rights issues through the performance of their duties.


\textsuperscript{158} See Linda C. Reif, \textit{The Ombudsman and the Protection of Children’s Rights}, \textit{17 Asia Pac. L. Rev.} 27, 38–48 (2009) (discussing such developments in Finland, Spain, and Greece).

\textsuperscript{159} See id. at 46–48.

\textsuperscript{160} See id. at 46–47.

2. Designation of the Human Rights Ombudsman as a National Preventive Mechanism Under OPCAT

On June 22, 2006, OPCAT entered into force. OPCAT is designed to enhance the implementation of state obligations in the Convention Against Torture, one of the U.N.’s core human rights treaties. Article One of OPCAT creates a system for independent international and domestic bodies to conduct regular visits to facilities where persons are “deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.” State parties are required to establish, designate, or maintain one or more independent domestic visiting bodies, called national preventive mechanisms (NPMs), that give due consideration to the Paris Principles in conducting these visits. Moreover, states must allow regular visits by the NPMs to facilities where persons are deprived of their liberty. The purpose of these visits is to strengthen the protection of persons detained in these facilities. The NPMs must be given powers to examine detained persons, make recommendations to the government with respect to relevant obligations of international law, and submit observations and proposals concerning extant or proposed legislation.

Some OPCAT states have established a new institution as their NPM; others utilize an existing human rights commission. A pre-existing human rights ombudsman is often well-suited to this task: some ombudsman institutions, particularly those in Europe, already have the power to inspect facilities where persons are involuntarily detained and, thus, a number of OPCAT state parties have designated their human

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163 See OPCAT, supra note 162, preamble.

164 Id. The international body is the U.N. Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the U.N. Committee Against Torture, which has powers similar to the NPMs. See id. art. 2.

165 Id. arts. 2, 3.

166 Id. art. 4.

167 Id.

168 See OPCAT, supra note 162, art. 19.

169 See generally Global Status of Ratifications, Signatures and NPM Designations, Ass’n for the Prevention of Torture (Nov. 2010), http://www.apl.ch/npm/OPCAT1110.pdf (listing fifty-seven states parties, thirty-four of which had designated an NPM as of November 2010).
rights ombudsman as an OPCAT NPM.\textsuperscript{170} A few nations, such as Denmark, New Zealand, and Luxembourg, have even designated their classical ombudsman as their NPM or as one of a number of NPMs.\textsuperscript{171} These designations demonstrate that European nations are the most predisposed to designate their human rights or classical ombudsman institutions as OPCAT NPMs.\textsuperscript{172} Designating human rights ombudsmen as OPCAT NPMs adds another important human rights protection function to the institution and increases the institution’s ties to the international human rights community.

3. Multinational Corporations, Human Rights, and NHRIs

In recent years, the U.N. human rights overseers have turned their gaze to the behavior of multinational corporations (MNCs) and their role in human rights breaches. In April 2008, John Ruggie, the U.N. Secretary-General’s Special Representative on Business and Human Rights, issued a report entitled “Protect, Respect and Remedy; a Framework for Business and Human Rights” (“Ruggie Report”).\textsuperscript{173} One of the core principles of the Ruggie Report is the need for more effective judi-

\textsuperscript{170} See \textit{European Ombudsman-Institutions}, supra note 10, at 491–92 (providing list of ombudsmen in Europe with inspection powers). As of November 2010, the human rights ombudsman institutions in Albania, Armenia, Azerbaijan, Costa Rica, Cyprus, Czech Republic, Estonia, Georgia, Macedonia, Moldova (with NGOs), Peru, Poland, Slovenia (with NGOs), Spain, and Sweden (with the Chancellor of Justice) have been designated as NPMs. See \textit{Global Status of Ratifications, Signatures and NPM Designations}, supra note 169, at 1–4. The human rights ombudsman institutions in Croatia, Finland, Kazakhstan, Montenegro, Nicaragua, and Ukraine are under consideration for designation as NPMs. See \textit{id.; Summary of the Annual Report 2007, PARLIAMENTARY OMBUDSMAN OF FIN.}, 24 (Feb. 25, 2008), http://www.oikeusasiamies.fi/dman/Document.phx?documentId=vl22108104517482&cmd=download.

\textsuperscript{171} See \textit{Changes to Jurisdiction of the New Zealand Ombudsmen Institution}, IOI NEWSLETTER (Int’l Ombudsman Inst.), Dec. 2008, at 7, http://www.theioi.com/publications/i-o-i-newsletter (follow “IOI Newsletter_200812_English” hyperlink) [hereinafter I.O.I. Newsletter] (noting that the Human Rights Commission is the central NPM); \textit{Global Status of Ratifications, Signatures and NPM Designations}, supra note 169, at 2, 3; \textit{The OPCAT Tasks: General Principles, DANISH PARLIAMENTARY OMBUDSMAN} (Aug. 28, 2009), http://en.ombudsmanden.dk/opcat/. One might argue that giving an OPCAT NPM designation to a classical ombudsman pushes the institution into the human rights ombudsman category because the institution acquires an express and ongoing role in implementing the state’s human rights treaty obligations. See \textit{Reif}, supra note 1, at 82–83. Consequently, this position would increase the number of human rights ombudsmen relative to classical ombudsman institutions.

\textsuperscript{172} See \textit{Global Status of Ratifications, Signatures and NPM Designations}, supra note 169, at 2–4.

cial and non-judicial remedies for victims of corporate human rights violations; NHRIs are specifically included as non-judicial remedies to investigate and punish human rights breaches by companies.\(^{174}\) The Ruggie Report states, “The actual and potential importance of these institutions cannot be overstated. Where NHRIs are able to address grievances involving companies, they can provide a means to hold business accountable. NHRIs are particularly well-positioned to provide processes—whether adjudicative or mediation-based—that are culturally appropriate, accessible, and expeditious.”\(^{175}\) The Ruggie Report was accompanied by research on eighty-five NHRIs, finding that at least forty of these can handle complaints related to the human rights activities of companies.\(^{176}\) While this research is incomplete, the institutions listed are predominantly human rights commissions and human rights ombudsman institutions.\(^{177}\)

In June 2008, the U.N. Human Rights Council welcomed the Ruggie Report and extended Ruggie’s mandate for three more years so he could “operationalize” his report.\(^{178}\) Regarding non-judicial remedies, Ruggie has indicated that his “focus is on how to strengthen existing mechanisms, and identifying where new ones might be required.”\(^{179}\) Consequently, there will likely be an increasing U.N. and state interest in the use of human rights ombudsman institutions and commissions in the investigation of human rights breaches by corporate actors. Classical ombudsmen, lacking an express human rights protection mandate and with a limited, public sector jurisdiction, will probably not have the same attraction.\(^{180}\) This may also provide the impetus for some states to transition their classical ombudsman to a human rights ombudsman. The jurisdiction of human rights ombudsmen, however, remains as a potential stumbling block: most MNC conduct occurs in the private sector, and the authority of many human rights ombudsmen is limited

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\(^{174}\) See id. ¶¶ 84–85.

\(^{175}\) Id. ¶ 97.

\(^{176}\) Id. ¶ 96.


\(^{179}\) Id.

\(^{180}\) See Reif, supra note 1, at 2–3, 8–9.
to the public sector.\footnote{See id. at 3; Reif, supra note 158, at 47.} Accordingly, the jurisdiction and authority of human rights ombudsmen would have to be extended to private sector activity before they could investigate MNCs.\footnote{See Ruggie Report, supra note 173, ¶¶ 84–85.}

III. HUMAN RIGHTS OMBUDSMAN MANDATES: CORE POWERS AND OPERATING PRACTICES

There is no uniform model for a human rights ombudsman. Human rights ombudsman institutions vary considerably in their structure, functions, and powers, and these differences are often seen both intra- and inter-regionally. For example, except for Spain and Portugal, most Western European human rights ombudsman institutions more closely reflect the classical ombudsman model of investigation, recommendation, and reporting.\footnote{See European Ombudsman-Institutions, supra note 10, at 79 (noting that Andorra’s Citizen’s Advocate reflects the classical model discussed); The Parliamentary Ombudsmen—JO, Parliamentary Ombudsman (Swed.), http://www.jo.se/Page.aspx?MenuId=12&ObjectClass=DynamX_Documents&Language=en (last visited May 8, 2011) (investigations on complaint or own-motion, recommendations, reporting, inspections, power to prosecute public officials, power to initiate disciplinary procedures, OPCAT NPM); The Tasks of the Ombudsman, Parliamentary Ombudsman of Fin., http://www.oikeusasiamies.fi/Resource.phx/koa/english/ombudsman/tasks/index.hlx (last visited May 8, 2011); What is the Greek Ombudsman, Greek Ombudsman, http://www.synigoros.gr/en_what_is.htm (last visited May 8, 2011) (investigations on complaint or own-motion, recommendations, reporting, private sector jurisdiction over children’s rights matters).} In contrast, human rights ombudsman institutions in Latin America and Central and Eastern Europe typically have more extensive powers.\footnote{See Reif, supra note 1, at 191.} Hybrid ombudsman institutions with human rights mandates in other parts of the world vary widely: some are limited to the classical powers, while others have expanded authority.\footnote{See id. at 209–12, 222, 234–37, 282–84 (noting that institutions in Namibia, Seychelles, East Timor, and Jamaica have more expansive powers).} From the perspective of comparative law, the functional suc-
cess—or lack thereof—of ombudsman transplants is also beyond the scope of this Article given that many, if not all, of the same factors come into play in individual jurisdictions in determining this question. Instead, the following section engages in a more limited undertaking: it examines a selection of the core legal powers granted to, and operating practices instituted by, human rights ombudsman institutions. In doing so, it highlights those that should be regarded as essential for all human rights ombudsman institutions.

A. Specialized Ombudsman Institutions, Deputy Ombudsmen, and Designated Units or Departments

When a government adopts the human rights ombudsman model, it must decide whether to create one institution or several, depending on the human rights needs of the state or territory. Furthermore, a government can create multiple human rights ombudsman institutions. For example, Hungary has separate parliamentary commissioners for civil rights, national and ethnic minority rights, environmental protection (“future generations”), and data protection and freedom of information, although they are all housed in the same building. Due to the forces described above, it is far more common for jurisdictions to establish one human rights ombudsman institution rather than multiple thematic institutions. Moreover, institutions tend to create sub-specialties where human rights and general administrative oversight functions are separated. Sometimes there is even specialization in particular areas of human rights.
Specialization can be accomplished through a variety of legal provisions and operating practices. These include the appointment of deputy ombudsmen for specific human rights areas by the legislature, or a more informal appointment by the ombudsman without an express legislative mandate.\footnote{See id. Legislative provisions are less common but do exist. For example, legislation created the Deputy Ombudsman for Children of Greece and a legislative enactment will place a deputy Défenseur des Enfants inside France’s Defender of Rights institution. See Rachel Hodgkin & Peter Newell, \textit{The Role and Mandate of Children’s Ombudspersons in Europe: Safeguarding and Promoting Children’s Rights and Ensuring Children’s Views Are Taken Seriously}, Eur. Network Ombudspersons for Child., 2, 10, 17, 36, 40 (Dec. 2010), http://www.crin.org/docs/ENOC%20Malta%20report%20final.pdf; Members, supra note 157. Legislation may also stipulate that there be a deputy focusing on women’s rights, such as in Ethiopia. See Reif, supra note 1, at 114–15. The Ethiopian deputy also focuses on children’s rights. See id.} Another common practice is to create separate departments or units for different focus areas. For example, numerous Latin American human rights ombudsman institutions have departments for women’s rights and children’s rights.\footnote{See Reif, supra note 140; supra notes 169–172 and accompanying text.} As discussed above, growing numbers of human rights ombudsmen are being designated as OPCAT NPMs.\footnote{See Global Status of Ratifications, Signatures and NPM Designations, supra note 169, at 2. Other human rights ombudsman offices do not create distinct departments, but allocate tasks differently. See Reif, supra note 158, at 40. For example, Finland’s Parliamentary Ombudsman, a human rights ombudsman institution, has two deputies, and subject-matter areas are divided between the three appointees. See id.} This trend is expected to produce more internal specialization: Costa Rica’s \textit{Defensor de los Habitantes} has already created an NPM unit.\footnote{See Reif, supra note 1, at 87.}

\textbf{B. The Ombudsman’s Jurisdiction over Government Departments and Human Rights}

The breadth of a human rights ombudsman’s jurisdiction plays a crucial role in the ability of the institution to protect human rights.\footnote{See Reif, supra note 1, at 114–15.} A human rights ombudsman should have jurisdiction over all of the government departments, agencies, and other public bodies that are possible rights-infringers.\footnote{See Reif, supra note 140 (“[S]ince ombudsmen scrutinize administrative conduct they regularly investigate authorities that are infringing human rights such as the police, prisons and immigration authorities.”).} In particular, a human rights ombudsman should have jurisdiction over the police, armed forces, immigration and refugee departments, prisons, detention centers, young offender cen-
ters, and other facilities where persons are held involuntarily. For example, investigations by a wide variety of ombudsman institutions into child protection matters show that governments can infringe on children’s rights not only through the conduct of child welfare, criminal justice, and police authorities, but also through the behavior of departments in charge of health, education, prison, immigration, and asylum, among others.

A human rights ombudsman should also have jurisdiction over a broad range of specific human rights. In addition to civil and political rights, economic, social, and cultural rights should also fall within the institution’s mandate. Jurisdiction over these rights is particularly important given that they are often non-justiciable; thus, an NHRI like a human rights ombudsman may be the only venue for members of the public to complain about their violation. In fact, complaints concerning health, education, and other social services are quite common for human rights ombudsmen.

C. Jurisdiction over Private Sector Actors

One typical characteristic of the ombudsman institution is that its jurisdiction is limited to public sector conduct only, usually the administrative or executive branch of government and rarely the judicial branch. While a growing number of all types of ombudsman institutions have jurisdiction over private actors providing public services, a minority of human rights ombudsmen have more extensive jurisdiction over private sector conduct. For example, human rights ombudsman institutions in Namibia, Guatemala, El Salvador, Honduras, Colombia, and Papua New Guinea have jurisdiction over private persons in human rights cases to differing degrees. In Europe, some human rights

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200 See id. Some authorities (for example, the armed forces or immigration authorities) may not exist in sub-national jurisdictions with a human rights ombudsman, but jurisdiction over the full spectrum of facilities for involuntary detention is essential if an ombudsman is to be designated as an OPCAT NPM. See id.

201 See Reif, supra note 1, at 330–31, 302.

202 See id. at 113.

203 See id. at 402.

204 See id. 11–13, 302 (noting different types of ombudsman jurisdiction over the judicial branch in Sweden, Finland, Slovenia, Albania, and Costa Rica).

205 See id. at 401–02.

206 See Reif, supra note 1, at 3, 402, 403. Hybrid commissions in Ghana and Tanzania also have jurisdiction over private sector conduct. See id.
ombudsmen have subject-specific jurisdiction over private actors.\footnote{See \textbf{European Ombudsman-Institutions}, supra note 10, at 493 (listing Cyprus, Estonia, Greece, Latvia, and Portugal as examples); \textit{Equinet}, supra note 154.} Portugal’s \textit{Provedor de Justiça} has limited jurisdiction over private sector entities that involve a special relationship of dominion in the protection of rights.\footnote{See \textit{Reif}, supra note 1, at 3, 141–42.} Greece’s ombudsman has jurisdiction over violations of children’s rights allegedly committed by private persons.\footnote{See id. at 153.} As argued earlier, there will likely be growing pressure on states to expand the jurisdiction of NHRIs to include private corporate conduct.\footnote{See \textit{Ruggie Report}, supra note 173, ¶¶ 84–85. Admittedly, this extension of jurisdiction could have its disadvantages. It has the potential to generate large numbers of complaints or investigations that drain financial and human resources, possibly resulting in backlogs and delays.}

\section*{D. Own-Motion Investigation Power}

Many classical and human rights ombudsman institutions have the power to launch investigations on their own motion.\footnote{See \textit{European Ombudsman-Institutions}, supra note 10, at 21. For example, most ombudsmen in Europe have own-motion investigatory power. See id. at 21, 490.} Own-motion investigations can be used in a variety of situations to enhance human rights protection—because the ombudsman need not wait for an actual complaint, she can be more proactive in monitoring events in her jurisdiction.\footnote{See \textit{Reif}, supra note 1, at 3, 403; Hans Gammeltoft-Hansen, \textit{The Ombudsman as a Non-Traditional Tool for Citizen Participation}, in \textit{2 The International Ombudsman Yearbook}, supra note 9, at 189, 193–95.} The ombudsman can monitor the media for reports on behavior that may constitute the target of an own-motion investigation.\footnote{See \textit{Gammeltoft-Hansen}, supra note 212, at 194–95; \textit{Reif}, supra note 50, at 273.} If the ombudsman has the power to inspect facilities where persons are detained involuntarily, such visits may bring to light situations which the ombudsman may desire to investigate.\footnote{See \textit{Reif}, supra note 1, at 104; Gammeltoft-Hansen, supra note 212, at 193–95.} Thus, own-motion investigations can benefit vulnerable populations such as prisoners, children, and the mentally ill, because they are less likely or entirely unable to complain themselves. Furthermore, a pattern of complaints about the same matter may indicate a systemic problem involving human rights issues; an own-motion investigation can be an effective mechanism to address larger systemic problems in addition to the individual concerns.\footnote{See \textit{Reif}, supra note 1, at 104; Gammeltoft-Hansen, supra note 212, at 193–95.}
Examples of own-motion investigations of human rights issues abound. The public reports of these investigations are valuable, persuasive tools for ombudsmen to use in effecting legal or political reform. For example, various human rights ombudsman institutions have conducted own-motion investigations concerning children and their rights, covering matters such as the child welfare system, the child custody process, delays in investigation of alleged sexual abuse of children, police treatment of minors, the juvenile justice sector, the treatment of children in schools, and repatriation procedures for unaccompanied immigrant minors. Because many affected individuals are unable to lodge complaints themselves, all human rights ombudsman institutions should be given strong own-motion investigation powers.

E. Inspection Powers

A number of human rights and classical ombudsman institutions have the statutory power to inspect places where persons are involuntarily detained to insure against inappropriate treatment. The inspection power can cover a broad range of locations, including prisons, detention centers, immigration facilities, young offender centers, and mental health care facilities. In the early 1990s an empirical study of ombudsman institutions in forty-eight nations found that sixty-six of seventy-six institutions (86.8%) had an inspection power. More recently, a survey of ombudsman institutions found that most, but not all, of the human rights ombudsmen throughout Europe have the power to inspect a range of facilities. Additionally, a strong inspection

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216 See Reif, supra note 158, at 41–48.

217 See European Ombudsman-Institutions, supra note 10, at 41–42; supra note 214 and accompanying text.

218 See European Ombudsman-Institutions, supra note 10, at 41–42.


power backed up by adequate financial support is essential for an ombudsman that has been assigned OPCAT NPM duties.\textsuperscript{221}

In short, inspection powers should be given to all human rights ombudsman institutions. They should be exercisable by the ombudsman on her own motion at any time, cover the full range of detention facilities, and include powers sufficient to satisfy any international obligations of the state under OPCAT. These powers should be exercised regularly.

F. Litigation Powers: The Constitutional Court and Other Legal Interventions

Many national human rights ombudsmen in Europe and Latin America, where civil law systems dominate, have been given additional powers. They may bring actions on constitutional matters involving human rights to a constitutional or supreme court, become involved in administrative court proceedings, and prosecute public officials.\textsuperscript{222} Professor Gabriele Kucsko-Stadlmayer’s survey of European ombudsmen provides the following information: four human rights ombudsmen can start criminal proceedings, while many can recommend that they be instituted; seven can initiate disciplinary proceedings, while many can recommend that they be instituted; eleven can make applications before administrative or other courts; and many have the right to bring actions before the nation’s constitutional court.\textsuperscript{223}

To summarize, the number and form of European ombudsman actions before constitutional courts varies, but a fair number can challenge the constitutionality of laws and two can contest the constitutional compatibility of treaties.\textsuperscript{224} Several can contest the constitutionality of government action in individual cases.\textsuperscript{225} Several may take the

\textsuperscript{221} See generally Global Status of Ratifications, Signatures and NPM Designations, supra note 169 (listing fifty-four states parties, thirty-seven of which had designated an NPM as of November 2010). For example, Poland’s Commissioner for Civil Rights Protection was designated as the nation’s NPM on January 18, 2008 and carried out seventy-three visits in 2008 in fulfillment of his OPCAT duties. See European Union Law, European Ombudsman—Newsletter, Apr. 2009, at 32, available at https://oldbookshop.publications.europa.eu/ebookshop/download.action?fileName=QKAB09012ENC_002.pdf&eubphfUid=10243311&catalogNbr=QK-AB-09-012-EN-C.

\textsuperscript{222} See European Ombudsman-Institutions, supra note 10, at 51–53, 55–56. Given the number of institutions with these powers, a full survey is not possible within the scope of this Article.

\textsuperscript{223} See id. at 53–56, 508–10, 515–20. These numbers do not include classical ombudsmen who may have some of these powers, including disciplinary or prosecution powers. See id.

\textsuperscript{224} See id. at 51–53, 515–20.

\textsuperscript{225} See id.
unusual approach of arguing that the government has acted unconstitutionally by its failure to legislate.\textsuperscript{226} Lastly, some human rights ombudsmen can request the interpretation of constitutional provisions.\textsuperscript{227}

The Portuguese and Spanish institutions were the first to have constitutional court powers and provide contrasting examples of their frequency of use.\textsuperscript{228} The Portuguese Provedor de Justiça is empowered to refer two types of constitutionality actions before the Constitutional Court: (1) an action to determine whether laws are unconstitutional or illegal and (2) an assessment regarding whether the government has failed to comply with the constitution through the omission of legislative measures necessary to render constitutional norms binding.\textsuperscript{229}

Since it began operating in 1975, the Provedor has launched 175 actions before Portugal’s Constitutional Court.\textsuperscript{230} Spain’s Defensor del Pueblo is empowered to bring two types of actions before Spain’s Constitutional Court: (1) actions challenging the constitutionality of legislative action, known as abstract review and (2) actions in support of an individual’s core constitutional rights in concrete cases, known as concrete review or the amparo action.\textsuperscript{231} As compared with the Portuguese Provedor, the Spanish Defensor has launched substantially fewer constitutionality actions over a slightly shorter time frame; the amparo action before the Constitutional Court is rarely used because individuals have the same right of action.\textsuperscript{232}

\textsuperscript{226} See \textit{id}. at 354–55, 517–18 (citing Portugal as an example).


\textsuperscript{228} See Reif, supra note 42, at 36.


\textsuperscript{230} See \textit{The Work of Ombudsmen & Similar Bodies}, supra note 220, at 63 n.1.

\textsuperscript{231} See Reif, supra note 1, at 147–48.

The constitutional litigation power has also been influential in Latin America. Many Latin American human rights ombudsmen can take “unconstitutionality,” amparo, habeas corpus, and other actions in their country’s courts. Some Caribbean, African, and Asian human rights ombudsman institutions also have a variety of powers related to legal representation, such as providing financial support and legal advice to complainants who are launching their own constitutional litigation and taking court action.

The vast majority of ombudsman institutions with prosecution powers, constitutional court litigation powers, or administrative court litigation powers exist in civil law states. Granting human rights ombudsman institutions litigation powers in these discrete judicial structures is a workable—even efficient—procedure for achieving timely decisions on constitutional and administrative legal questions. Further research should be done to determine whether a human rights ombudsman in a common law or pluralistic legal jurisdiction could operate in a cost-effective and timely manner with a litigation mandate. In common law jurisdictions, given their judicial branch structures, it may not even be possible to give a human rights ombudsman civil-law-type litigation powers. Giving amicus curiae or intervener functions to hu-

233 See Reif, supra note 1, at 188–92.
234 See id. at 188 & n.116, 189 & nn.118–20, 190 & nn.123–26, 192–93, 198, 201, 262 (Argentina: unconstitutionality, amparo actions; Peru: unconstitutionality, amparo, habeas corpus, habeas data, popular actions; Guatemala: judicial processes; Costa Rica: unconstitutionality, amparo, habeas corpus actions; Nicaragua: unconstitutionality, amparo, exhibition personal actions; Panama: popular, nullity, amparo, habeas data actions; Colombia: unconstitutionality, popular, tutela, habeas corpus actions; Ecuador: unconstitutionality, amparo, habeas data actions; Bolivia: unconstitutionality, nullification, amparo, habeas corpus actions; Venezuela: unconstitutionality, amparo, habeas corpus, habeas data actions; Paraguay: amparo, habeas corpus actions). A few of these institutions can also participate in administrative court procedures to protect human rights. See id. at 191.
235 See id. at 208, 210, 220–23, 242–45. For example, the Jamaica Public Defender recommends that some complainants litigate constitutional rights issues and helps those complainants by compiling a list of pre-approved barristers who are qualified to litigate the issue and by administering a legal aid fund that pays for such litigation. See id. at 210. The Seychelles Ombudsman assists complainants in human rights charter litigation and may become a party to proceedings with leave of the court. See id. at 222 n.44.
236 See supra note 63 and accompanying text. In civil law countries, the constitutional court is considered to be outside the judicial branch of government and has the power to make legally binding decisions. See Lisa Hilbink, Beyond Manicheanism: Assessing the New Constitutionalism, 65 Md. L. Rev. 15, 22–23 (2006). A separate administrative court system exists in many civil law jurisdictions. See id.; see also European Ombudsman-Institutions, supra note 10, at 25–26. In a common law country, important legal issues are usually litigated in the general court system and appealed to a supreme court for final determination. See Edward McWhinney, Supreme Courts and Judicial Law-Making: Constitutional Tribunals and Constitutional Review xv, 1–3, 23–24 (1986).
man rights ombudsmen in common law jurisdictions may be more appropriate. Similarly, research is needed to determine whether more civil law states without constitutional courts, such as Scandinavian nations, could effectively add these types of litigation mandates to their ombudsman institutions.

G. Annual Reporting, Other Reports, Website Content, and Other Tools

A human rights ombudsman’s reports and website are easy methods to provide useful information and assistance to the public. Annual and special reports can provide information on the important investigations undertaken by the ombudsman, which may increase public understanding of the ombudsman’s role and the number of future complaints to the office. Moreover, reports may enhance the public perception of the usefulness of the institution. The ombudsman can also publicize and use reports in particular cases to persuade government authorities to change law and policy. Ombudsman offices that have OPCAT NPM status also need to describe the nature of this work in their annual reports or establish a separate reporting system.

Many ombudsman institutions have websites that provide public information regarding the activities of the office. These websites demonstrate the framework of the institution and what types of complaints it can investigate. Typically, they provide access to annual and special reports as well as to other relevant publications. Some websites also act as a means for members of the public to submit complaints to the ombudsman. Human rights ombudsmen go further and use their websites to enhance their human rights protection and promotion functions. Some post their public education publications on their websites. The website for Bolivia’s Defensor del Pueblo provides a worthy example: it has numerous publications on topics such as discrimination, racism, indigenous

237 See European Ombudsman-Institutions, supra note 10, at 49.
238 See id. at 49–50; Reif, supra note 1, at 404, 407.
239 See European Ombudsman-Institutions, supra note 10, at 49–50. The investigative reports and public relations methodology of the Ontario Ombudsman Special Ombudsman Response Team is a good example of this phenomenon. See Reif, supra note 158, at 34. Further, annual reports can also be organized to highlight the human rights work of the multiple-mandate ombudsman by separating specific human rights issues into different chapters or sections. See European Ombudsman-Institutions, supra note 10, at 504.
240 See, e.g., Greek Ombudsman, supra note 183; The Parliamentary Ombudsman—JO, supra note 183.
rights, children’s rights, and women’s rights. Human rights ombudsmen focusing on children often have a special section of their website designed for use by children with child-friendly language and design features. For example, the website of Catalonia’s Síndic de Greuges, which has a Deputy Ombudsman for Children, contains a special section for minors. It enables children and youth to submit their own complaints and opinions to the Síndic by e-mail and contains educational materials on children’s rights.

A few human rights ombudsman institutions may also have the resources for regular radio or television shows. These programs are capable of widely disseminating information about their work and human rights throughout the country. Argentina’s Defensor del Pueblo is one such institution. Peru’s Defensor del Pueblo, in its early years of operation, obtained funding to create a television infomercial to inform the viewing public about the nature of their rights and about the scope of the institution’s ability to take complaints.

H. Promoting State Compliance with Human Rights Treaties, Human Rights Law Reform, Research, and Education

A number of human rights ombudsman institutions have the responsibility to improve the contents of domestic human rights law and may recommend that the state accede to or ratify human rights treaties. In connection with this responsibility, a human rights ombudsman may also be empowered to make law reform proposals and may even become involved in the amendment process. Latin American institutions often have these duties. A few European human rights ombudsmen perform similar functions.

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243 See id. The website for the human rights ombudsman in Andalusia, Spain has similar sections. See Defensor del Menor de Andalucía, supra note 159.
245 See Ombudsman’s Office: Protects your rights (Ombudsman’s Office of Peru, USAID) (videocassette) (on file with author).
246 See Ref, supra note 1, at 139, 190 n.124, 201–02, 262.
247 See id. at 188–90 nn.116–27.
248 See id. For example, the human rights ombudsmen in Peru, Colombia, Costa Rica, El Salvador, Nicaragua, Panama, Bolivia, Venezuela, and Paraguay all have these duties. See id. at 188–90 nn.116–27, 201–02, 262 (Peru: promote signature of treaties, propose new
Some human rights ombudsman institutions are empowered to engage in human rights research, to conduct studies, and to engage in human rights education. The educational efforts may be directed at public officials or the broader public. Again, a number of Latin American institutions, along with a few European ombudsmen, have these human rights education mandates.

In contrast to the potential difficulties of transporting human rights ombudsman litigation mandates from civil law systems to other legal systems, human rights research and education mandates can be provided to human rights ombudsman institutions in all types of legal systems. Full implementation of these such mandates is more likely contingent on sufficient resources.

Conclusion

The number of human rights ombudsman institutions has exploded over the course of the last three decades. They now account for at least fifty percent of the total number of ombudsman institutions worldwide. Human rights ombudsmen are prevalent in Latin America as well as in Central and Eastern Europe, but are increasingly found in Western Europe and other regions as well. There are many forces that will continue to drive nations to establish human rights ombudsman institutions. These include democratization, public institution-building or -rebuilding, comparative law influences, limited state resources, and international human rights law—in particular, the movement to establish NHHRIs. Additionally, the continuing development of international human rights law will increase the pressure on states either to expand the mandates of human rights ombudsman institutions or to give express human rights duties to classical ombudsman institutions. While most human rights ombudsmen are found in civil law jurisdictions, some of these forces may lead to a greater number of these institutions in common law jurisdictions.

249 See European Ombudsman-Institutions, supra note 10, at 56–57.
250 See id. at 57.
251 See id.
252 See id.; Reif, supra note 1, at 188 nn.118–20, 190 nn.123–26, 193, 262 (listing El Salvador, Guatemala, Honduras, Nicaragua, Panama, Colombia, Ecuador, Bolivia, Venezuela, and Paraguay as examples).
Some human rights ombudsman institutions have both administrative justice and human rights protection mandates while others stand much closer to the human rights commission model. There is considerable variation in the scope of the core powers given to and operating practices instituted by human rights ombudsman institutions. Excluding other factors that influence the degree of functional success of a human rights ombudsman transplant, a human rights ombudsman should be given wide jurisdiction over a spectrum of human rights and government actors. Such jurisdiction should include own-motion investigatory powers, inspection powers, and possibly deputy ombudsmen to focus on special human rights concerns such as children’s rights, women’s rights, and the protection of ethnic minorities. Additional human rights protection and promotion powers such as taking cases to constitutional or administrative courts, prosecuting public officials, lobbying government bodies to implement human rights treaties, and monitoring the state’s implementation of its international human rights obligations, law reform activities, and human rights research and education enhance the ombudsman’s core investigatory mandate. Governments should endow a human rights ombudsman with these additional functions and powers when the nature of the country’s legal system and the institutional structure of the state permit. Human rights ombudsman institutions with the power to litigate legal questions in the courts exist almost entirely in civil law jurisdictions; thus, further inquiry is needed to determine whether human rights ombudsman institutions established in common law or mixed systems could be given equivalent mandates.

Finally, all human rights ombudsman institutions must institute operating practices that further their ability to protect and promote human rights. Such practices could include the designation of units or departments for human rights matters, the employment of a diverse staff with appropriate human rights expertise, and the dynamic use of annual and special reports. In addition, the use of a website and the media to publicize the human rights jurisdiction of the office will help to inform the public about the human rights norms binding the state and ensure that the public utilizes the ombudsman in cases of human rights violations.
KELO SIX YEARS LATER: STATE RESPONSES, RAMIFICATIONS, AND SOLUTIONS FOR THE FUTURE

Asher Alavi*

Abstract: In 2005, the U.S. Supreme Court upheld the constitutionality of eminent domain takings that benefit private developers in Kelo v. City of New London. The case led to public outcry on both the right and the left and the revision of many state eminent domain laws to curtail such takings. However, most of the new laws have been ineffective. In many states, the burden of the takings falls largely onto poor, minority communities while, in others, revitalization projects by private developers are prohibited entirely. This Note examines the negative implications of current approaches to takings on inner-city, minority communities and concludes that states should adopt an approach that allows revitalization of blighted areas by private developers but also provides effective limits such as a narrow definition of blight, enhanced compensation for the displaced, and procedural provisions such as Community Benefits Agreements.

Introduction

The story of Susette Kelo’s fight to prevent the City of New London, the State of Connecticut, and the pharmaceutical giant Pfizer from taking her home struck a nerve throughout America.¹ Kelo’s home was not in a slum and there was no declaration that her house was in disrepair.² Instead, her property faced condemnation to allow Pfizer and New London to accomplish an ambitious economic revitalization plan that would include a new research and development facility for Pfizer at its center and would provide the city with a waterfront shopping area, conference hotel, condominium units, parks, and ma-


Although groups across the political spectrum were rooting for Kelo’s “David” to win a victory for private property owners, the Supreme Court came out in favor of “Goliath.” In its now-infamous opinion, Kelo v. City of New London, the Supreme Court announced that economic revitalization projects by private developers are constitutional “public uses” that justify the use of eminent domain.

Five years after the decision, not only did Pfizer walk away from its ambitious project, but public fear and anger over the implications of the decision have also led to more restrictive legislation in several states and multiple referenda on private eminent domain takings. In the aftermath of Kelo, forty-three states amended their eminent domain laws and seven states changed their constitutions to limit “economic development” projects like the one at issue in Kelo. Despite the public backlash, the majority of state eminent domain laws do little to limit takings for “economic revitalization” projects by private developers. Instead, most states satisfied the public outcry against Kelo by limiting eminent domain for private developers to situations of “blight” which, broadly defined, covers most properties in poor areas or with an economic or physical defect. For instance, Illinois exempts condemnations for blight from its ban on economic development takings and broadly defines blight as an area where buildings or improvements are detrimental to the public safety, health, or welfare because of a combination of five or more factors. The factors listed include dilapidation, deterioration, excessive vacancies, deleterious land-use layout, overcrowding of structures and community facilities, and lack of community planning. Such broad exceptions would allow private “economic redevelopment” takings to take place in many areas, but it is particularly poor, inner-city communi-

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3 See id. at 474.
4 See Anastasia C. Scheffler-Wood, Comment, Where Do We Go From Here? States Revise Eminent Domain Legislation in Response to Kelo, 79 Temp. L. Rev. 617, 638 (2006); Terry Pristin, Connecticut Homeowners Say Eminent Domain Isn’t a Revenue Raising Device, N.Y. Times, Sept. 8, 2004, at C8 (noting that the Kelo fight led to strange alliances between disparate groups including the conservative Institute for Justice, the ACLU, and Ralph Nader).
5 See Kelo, 545 U.S. at 488–89.
6 See Somin, supra note 1, at 2101–02 (describing the massive backlash from across the political spectrum that spurred the development of new state legislation on eminent domain); Lovell, supra note 1, at 610.
7 See Somin, supra note 1, at 2101–02.
8 See id. at 2105, 2114 (noting that twenty-two of the thirty-four new state laws are “largely symbolic in nature, providing little or no protection for property owners”).
9 See id. at 2114.
10 65 Ill. Comp. Stat. 5/11-74.4-3(a)(1) (2006); Somin, supra note 1, at 2125.
ties that are characterized by such attributes. Because such communities are predominantly composed of minorities, are the least politically connected, and have the lowest property values, they face an additional risk of displacement for tax-boosting corporate projects like the one pursued by Pfizer. Eminent domain takings like these signal a return to the racially disproportionate “urban renewal” programs that occurred between 1949 and 1976, when states and cities used federal funds and “blight” condemnations to clear out poor, minority neighborhoods, expand downtown areas, and prevent the exodus of affluent residents and businesses to the suburbs. Thus, instead of solving the perceived injustice of the *Kelo* decision, state laws restricting private economic revitalization projects to “blighted areas” will largely shift the burden of these takings to poor and minority citizens.

A minority of states, recognizing the problems with allowing private development trends to continue under the pretext of blight, ban such projects without exception. Florida, for example, not only bans all economic revitalization takings regardless of blight or a developer’s comprehensive development plan, but also bans all blight condemnations in general. While such bans certainly remove the dangers of parochial favoritism towards corporate interests over local communities and insulate poor communities from takeover, they also come with a cost. Such bans hinder or prevent a state or municipality’s attempt to

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13 See Goodin, supra note 12, at 199–02, 205.

14 See Lefcoe, supra note 12, at 828–29 (describing the regressivity of the blight standard); Goodin, supra note 12, at 200–02.

15 See Goodin, supra note 12, at 199–02.

16 See Somin, supra note 1, at 2138–39.

17 See Lefcoe, supra note 12, at 833–35; Somin, supra note 1, at 2138–39. Florida’s strong condemnation of all economic development takings arose from an eminent domain battle over Riviera Beach, a predominantly black community on the ocean. See Lefcoe, supra note 12, at 833–35. Although it was in a prime location for beachside resorts, Riviera Beach was largely impoverished. See id. When the city attempted to use eminent domain to pursue a private developer’s economic redevelopment plan, a few residents challenged the taking, despite wide support of the plan by most of the affected residents and extremely high offers of compensation for displaced residents. See id. In the aftermath of this battle, Florida voters enacted a constitutional amendment requiring a three-fifths vote of both houses of the legislature to sanction a taking that transferred property from one private person to another. See id.

pursue desperately needed revitalization projects in poor areas.\textsuperscript{19} Although the potential displacement of low-income, minority communities through private, corporate expansion is a real danger, it is equally dangerous to allow low-income neighborhoods to stagnate and devolve into slums because of a lack of economic opportunity.\textsuperscript{20} Private development plays a critical role in uplifting depressed communities by providing direct public benefits including new jobs and affordable housing for residents, increased tax dollars for the municipality, increased property values, and improved facilities and public areas for the community.\textsuperscript{21} Furthermore, because local governments and states often do not have the funds to accomplish ambitious revitalization projects, allowing private developers to assist in redevelopment projects can prevent blighted areas from regressing into slums.\textsuperscript{22}

For instance, the urban revitalization plan that led to the creation of the Inner Harbor in Baltimore stemmed from a public-private partnership with both direct purchases and eminent domain actions used to obtain waterfront land.\textsuperscript{23} To reverse the decline of property values and the flight of businesses from Baltimore, the city government and the business community in Baltimore worked together to revitalize Baltimore’s harbor into a thriving retail and entertainment district.\textsuperscript{24} The Inner Harbor development rejuvenated Baltimore and became a main tourist attraction, providing jobs for city dwellers and millions of dollars in tax revenue for the city.\textsuperscript{25}


\textsuperscript{21} See George E. Peterson & Dana R. Sundblad, \textit{The Conference Bd., Corporations as Partners in Strengthening Urban Communities} 12 (1994); Byrne, \textit{supra} note 18, at 155–56; Dowling, \textit{supra} note 19, at 330–31. Peterson & Sundblad give many examples of successful corporate-community partnerships that yielded tangible benefits to both the corporation and the urban community. See Peterson & Sundblad, \textit{supra}, at 15–43. There are a wide variety of ways that corporations can invest in the economic improvement of poor communities and also earn a profit. See id. at 26 (describing Ben & Jerry’s unique approach to community development in which it franchises Ben & Jerry’s ice-cream shops to non-profits such as the Street Youth Center in San Francisco for free to use as job-training facilities for people with few marketable skills).

\textsuperscript{22} See Byrne, \textit{supra} note 18, at 155–56; Dowling, \textit{supra} note 19, at 330–31.


\textsuperscript{25} See Byrne, \textit{supra} note 18, at 155; Millspaugh, \textit{supra} note 24, at 36.
More recently, a public-private partnership between the City of Baltimore, the State of Maryland, and Johns Hopkins University has led to a proposed biotech center in the crime-ridden and economically depressed “Middle East” neighborhood that surrounds Johns Hopkins University’s Medical School in East Baltimore. The proposed project will create two million square feet of biotech research facilities, 1,200 units of mixed-income housing, retail space and public parks, and up to 8,000 new jobs. Although this plan is not without opposition, the home replacement program and mixed-income housing project will allow many of the low-income residents to remain in their communities and will ensure fair accommodations and compensation for those who are displaced. Besides benefitting the city as a whole, the project will provide better transportation, public facilities, tax revenues, and job opportunities for the residents of the community and a resolution to the longstanding tension between the community and the University. Maryland’s eminent domain laws, while relatively weak in protecting property owners against abusive private takings, still allow much needed revitalization projects like the East Baltimore biotech project. In states that completely ban takings for such projects, a few holdouts could easily derail development plans. Thus, overly restrictive eminent domain laws can do more harm than good by curtailing beneficial projects like the one in Baltimore.

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26 See Hummel, supra note 23, at 97–99; Eugene L. Meyer, Building a Technology Park in Baltimore by Rehabilitating a Neighborhood, N.Y. Times, Aug. 6, 2008, at C7; see also discussion infra Part III.
27 See Hummel, supra note 23, at 112.
28 See id. at 120–22.
29 See id. at 124–27; Meyer, supra note 26.
31 See Byrne, supra note 18, at 155.
32 See id.; Dowling, supra note 19, at 330–31; Hummel, supra note 23, at 120–22. Dowling discusses various transformative economic revitalization projects in poor, distressed communities that came to fruition through private development and eminent domain authority. See Dowling, supra note 19, at 330–31. These include the corporate-driven Kansas Speedway revitalization project in Kansas City and the Nissan Motor Company manufacturing plant in Madison County, Mississippi, both of which provided tangible public benefits, including thousands of new jobs. See id. In addition to corporate-driven economic development, eminent domain power is crucial to grassroots, non-profit redevelopment as well. See id. For instance, the Dudley Street Neighborhood Initiative in Boston used eminent domain to provide affordable housing and revitalize decaying areas just a few blocks away from downtown Boston. See id. This initiative did not involve a corporate interest or private developer but instead was built from the ground up through neighborhood- and faith-based organizations including La Alianza Hispana, Casa Esperanza, and St. Patrick’s Church. See id. The “only feasible way to acquire land and promote neighborhood control of the project” was to use
This Note argues that the best way to protect individuals from overly broad private takings while still allowing states and local governments to pursue legitimate revitalization projects is to define blight narrowly, to provide procedural hurdles for takings in private economic revitalization projects, and to provide enhanced compensation for displaced residents (including renters). Additionally, including incentives for community support for projects such as Community Benefits Agreements will benefit local communities by giving community groups a say in the final development agreements. Overall, such limitations will discourage abuses in which blight is used as a pretext, encourage serious planning by private developers, and provide just compensation for displaced communities. Part I gives a constitutional background of the public use doctrine and the implications of the *Kelo* opinion for minority communities. Part II focuses on the legislative response to *Kelo* and the problems with both the blight exception to private economic revitalization plans and the complete bans on such plans. Part III provides case examples of beneficial public-private development projects in depressed areas that provide tangible benefits for the city while also accounting for the needs of the poor living in those areas. Finally, Part IV proposes a few reforms that states should consider adopting in their eminent domain laws that would protect affected communities and prevent abuse while also encouraging much-needed economic development.

eminent domain, and it is crucial to recognize that beneficial initiatives like this would be curtailed by strict bans on eminent domain for private development. See *id.*

33 See *Byrne*, *supra* note 18, at 157–61, 162–63.


35 See *Byrne*, *supra* note 18, at 169.
I. PRIVATE DEVELOPMENT TAKINGS, URBAN RENEWAL, AND THE KELO DECISION

The Fifth Amendment’s Takings Clause provides: “nor shall private property be taken for public use, without just compensation.” The Takings Clause applies to states through the Fourteenth Amendment, leaving states free to exercise eminent domain powers up to the constitutional limit. The extent of this limit has generated much controversy over the years. While takings to build roads, bridges, or railroads for actual “public use” are widely accepted, the question of whether a taking is for public use if it simply serves a “public purpose” has been more controversial. “Public purpose” takings could include transfer of private property from one citizen to another who will use the land more efficiently and thereby benefit more people.

Despite the controversy surrounding “public purpose” takings, the Supreme Court’s line of precedent on the issue consistently demonstrates that “public purpose” takings are constitutional. In Berman v. Parker, the Court unanimously approved the District of Columbia Redevelopment Act of 1945, which gave a redevelopment agency the authority use eminent domain to take private property to redevelop blighted slums. After a property owner, whose department store was not blighted but was within the condemned redevelopment area, challenged the taking, the Court upheld the taking as constitutional. Reasoning that such takings met the “public purpose” requirement, the Court found that the takings were within the bounds of the Fifth Amendment. The Court extended this reasoning in Hawaii Housing Authority v. Midkiff, in which it found that a Hawaii state law that transferred private property from certain landowners to others was a constitutional “public use.” Because only twenty-two landowners controlled more than seventy-two percent of the fee simple titles in Hawaii, the law allowed for wider public ownership of the land and therefore was con-

36 U.S. Const. amend. V.
40 See id.
41 See Kelo, 545 U.S. at 489.
42 See Berman, 348 U.S. at 26.
43 See id.
44 See id.
45 See Midkiff, 467 U.S. at 232.
stitutional even though the government itself never “used” the land. The *Kelo* decision reinforced the constitutionality of “public purpose” takings. The opinion, while very much in line with *Berman* and *Midkiff*, was very deferential to state “economic revitalization” plans and provided a strong base of authority for eminent domain takings.

The *Kelo* case arose out of a development plan for economically depressed New London, Connecticut. New London hoped to partner with Pfizer to change its economic outlook through a comprehensive revitalization project. Pfizer and the state contributed much-needed funds for the project and the city’s development board created plans for a state park around Fort Trumbull, two marinas, a museum, a hotel and office building, eighty new condo units, and improved infrastructure and roads. Although the redevelopment area was not blighted, the city hoped to provide a much-needed infusion of jobs into New London as well as an increase in tax revenue. Susette Kelo, a long-time resident of New London whose home was inside the city’s redevelopment planning area, refused to sell her home to the city’s Development Committee. When the city condemned the properties to prevent homeowners from blocking the plan, Kelo and the others challenged the taking as unconstitutional.

In a five-to-four decision, the Supreme Court found that New London’s economic revitalization project constituted a “public use” in accordance with the Fifth and Fourteenth Amendments. Noting that the word “use” in the takings provision of the Fifth Amendment was meant to be interpreted broadly to mean public “purpose,” the Court found that if the local government could show a rational basis for concluding that its development plan served a “public purpose,” the taking would be constitutional. In reaching its decision, the Court stressed the comprehensiveness of the plan that New London had adopted for the redevelopment project as evidence that the taking was not primarily

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46 See id.
47 See *Kelo*, 545 U.S. at 489.
48 See id. at 488–89.
49 See id. at 473–75.
50 See id.
51 See id.
52 See *Kelo*, 545 U.S. at 474–75.
53 See id. at 475–76.
54 See id.
55 See id. at 489.
56 See id. at 488–90.
perpetrated for Pfizer’s benefit.\textsuperscript{57} The Court also found that because economic development is well within the police power of the states and that the increase in property values, tax revenue, and jobs would serve the public interest, the project was a “public use.”\textsuperscript{58} Despite the absence of a finding that the condemned properties were blighted or a specific description of the role that Susette Kelo’s house would play in the redevelopment plan, the Court deferred to the determination of the city and found it to be within the bounds of the constitution.\textsuperscript{59}

Justice Kennedy, in his concurring opinion, advocated for a limit on the Court’s deference towards private “redevelopment” projects which merely favor corporate interests without providing any meaningful public benefit.\textsuperscript{60} Noting the potential abuses of “economic revitalization” projects under the Court’s hands-off approach, Kennedy argued that when faced with a “plausible accusation of impermissible favoritism to private parties,” courts should scrutinize the project to see whether the transaction primarily benefits the developer with only “incidental benefit to the city.”\textsuperscript{61} While this limitation could theoretically stop egregious takings intended to favor some private interest, a state or locality will very often be able to find a generalized “public purpose” behind a taking in practice.\textsuperscript{62}

In a spirited dissent, Justice Thomas argued that the result of this opinion would disproportionately fall on poor, minority communities.\textsuperscript{63} Harkening back to the “urban renewal” projects of the past, which some described as “negro removal” due to their effects on poor, pri-

\textsuperscript{57} See Kelo, 545 U.S. at 489; Lefcoe, supra note 12, at 812.
\textsuperscript{58} See Kelo, 545 U.S. at 488–89.
\textsuperscript{59} See id.
\textsuperscript{60} See id. at 493 (Kennedy, J., concurring).
\textsuperscript{61} See id.
\textsuperscript{62} See id. In one such example, the City of Lancaster, California attempted to use eminent domain to condemn a 99 Cents Only Store to transfer property to the adjacent Costco, which threatened to move out of the area if it could not obtain more mall space. See 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123, 1123 (C.D. Cal. 2001). The court found that this taking did not serve a public purpose because the only reason the city condemned the property was to satisfy the private expansion demands of Costco and because the city’s claim that the taking was intended to prevent “future blight” was unsupported by any authority or factual findings. See id. at 1129. Although the court in this case did not find public use, this case illustrates how local governments may abuse their eminent domain authority solely to benefit private developers and corporate interests and attempt to justify the taking by pointing to minimal incidental public benefits. See id.; David L. Callies, Phoenix Rising: The Rebirth of Public Use, in EMINENT DOMAIN USE AND ABUSE: KELO IN CONTEXT, supra note 19, at 49, 50–59 (describing various abuses of eminent domain authority for the benefit of private developers).
\textsuperscript{63} See Kelo, 545 U.S. at 521–23 (Thomas, J., dissenting).
arily black, communities, Thomas argued that the majority’s opinion would lead to similar results. Because the poor are less able to put their land to its most efficient use and are the least politically powerful, allowing states to transfer the lands and homes of poor citizens to corporate interests for any plausible “revitalization” cause would be devastating to these communities.

II. State Legislative Responses to Kelo

In response to the public outcry against Kelo, forty-three states changed their eminent domain laws to limit private development takings, some within weeks of the decision. While such eminent domain reforms were politically expedient, not many states completely curtailed private development takings like the one at issue in Kelo. For many states, the reform was simply symbolic and created no significant constraint on the ability of governments to pursue eminent domain actions to benefit private parties. A minority of states did pass meaningful eminent domain reforms that provide effective limits on economic development takings, but did so at the cost of their ability to pursue economic development projects. The trend in most states, however, was to use blight as the limiting factor in private economic development.

The post-Kelo eminent domain limitations on private takings fall into three overall categories: (1) broadly defined “blight” limitations for private, economic development takings, (2) narrowly defined “blight” limitations for private economic development takings, and (3) complete prohibitions on private economic development takings. There are both positive and negative consequences for all three kinds of reform.

64 See id.; Shelley Cashin, Race, Class, and Real Estate, in Breakthrough Communities: Sustainability and Justice in the Next American Metropolis, supra note 34, at 59, 61.
65 See Kelo, 545 U.S. at 521–23 (Thomas, J., dissenting).
67 See Somin, supra note 1, at 2105.
68 See id. For example, Connecticut’s new eminent domain law only prevents the condemnation of property “for the primary purpose of increasing local tax revenue.” See id. at 2132–33. Because it is likely impossible to prove that a property is being condemned for the “primary purpose of increasing local tax revenue” instead of to promote economic development more generally, the law really has no effect. See id.
69 See id. at 2138–43.
70 See Somin, supra note 1, at 2138–43; Lovell, supra note 1, at 617–18.
71 See Goodin, supra note 12, at 195–99.
72 See id.
ings can stimulate sagging local economies and prevent areas from degenerating into slums by providing tax breaks and municipal bond funding to private developers.\textsuperscript{73} Because the private developers also contribute planning and funding for projects, redevelopment can be both efficient and cost-effective for a city.\textsuperscript{74} Nevertheless, such projects inevitably affect low-income, minorities either by displacing them or by pricing them out of the area.\textsuperscript{75} On the other hand, states that completely ban economic redevelopment takings suffer from the opposite problem.\textsuperscript{76} Because private developers cannot exercise eminent domain powers in these states, a few holdouts can derail private development projects completely or can engage in rent-seeking behavior that makes a development project unprofitable.\textsuperscript{77} Disallowing the use of eminent domain for private revitalization projects can deter much needed redevelopment and thus allow an area to degenerate into a slum.\textsuperscript{78} Finally, state laws that provide economic redevelopment takings in narrowly defined “blighted” areas are effective in preventing overly lenient private takings such as \textit{Kelo} but, without further restraints, will also disproportionately affect low-income, minority communities due to the fact that these communities are often characterized by the defining factors of blight.\textsuperscript{79}

\textsuperscript{73} See Lynn E. Blais, Urban Revitalization in the Post-\textit{Kelo} Era, 34 Fordham Urb. L.J. 657, 681–84 (2007) (describing how local governments have turned to public-private partnerships with private developers to meet cities’ particular needs).

\textsuperscript{74} See id. at 687; Dowling, supra note 19, at 330–31.

\textsuperscript{75} See Byrne, supra note 18, at 153; Dowling, supra note 19, at 330–31.

\textsuperscript{76} See Lefcoe, supra note 12, at 830–31 (noting that without eminent domain for private economic development actions, development officials are convinced that worthwhile redevelopment projects will fail). Even though approximately eighty percent of state and federal government transactions of private property are voluntary, the threat of eminent domain may be necessary to prevent holdouts from blocking a transaction. See Marcilyn A. Burke, \textit{Much Ado About Nothing: Kelo v. City of New London, Babbitt v. Sweet Home, and Other Tales from the Supreme Court}, 75 U. Cin. L. Rev. 663, 716 (2006); Lefcoe, supra note 12, at 830–31.

\textsuperscript{77} See Lefcoe, supra note 12, at 830–31.

\textsuperscript{78} See Byrne, supra note 18, at 153–55 (noting that without eminent domain, urban regeneration projects, such as the Inner Harbor in Baltimore, would be severely weakened); Dowling, supra note 19, at 330–31; Terry Pristin, Developers Can’t Imagine a World Without Eminent Domain, N.Y. Times, Jan. 18, 2006, at C5.

\textsuperscript{79} See Goodin, supra note 12, at 198, 202. There are problems with using an overly narrow definition of blight or requiring all properties within a given area to be blighted. \textit{See id.} at 198–99. If, for example, revitalization planners choose to pursue projects in depressed areas that contain certain properties that do not meet the statutory definition of blight, they will be forced to pursue the project in an area that meets the definition, even if that area is not well-suited to the project. \textit{See id.} A sensible solution to this type of scenario is to adopt a provision similar to Iowa’s—require a large percentage of properties in a given area to meet a narrow definition of blight and allow all properties within the area that are
A. The Broad “Blight-Limitation” Model

The most common legislative reform in the aftermath of *Kelo* was to tighten the definition of “public use” to exclude development projects aimed at increasing tax revenue. These reforms largely shifted the burden of private development takings onto poor, minority communities by limiting private development actions to “blighted” areas. Because the concept of “blight” is usually both malleable and broadly defined, this restriction alone provides very little substantive protection against *Kelo*-type takings and can be used to rationalize taking nearly any piece of property as part of an economic revitalization plan. The California legislature, for instance, enacted a series of five eminent domain reform bills in the aftermath of *Kelo* that used blight as a limiting factor for economic redevelopment takings. Four of the five bills created minor procedural hurdles for local governments attempting to condemn property and one of the bills nominally narrowed the definition of “blight” for economic redevelopment purposes. These reforms are more symbolic than effective and will do little to stop eminent domain takings in California that benefit private developers. For instance, California only requires that a property have one “physical condition” and one “economic condition” that satisfy the vague qualifying criteria in the statute to be considered blight. Thus, in California and in many other states, local officials retain wide discretion in their implementation of the eminent domain statute, and can use “blight” as a pretense for nearly any taking.

necessary and incidental to the project to be taken. See *id*. This will give planners flexibility in pursuing beneficial revitalization projects while protecting against corrupt or abusive takings. See *id*.

80 See *id* at 194–95.
81 See *id* at 199–202.
83 See Somin, *supra* note 1 at 2131–32.
84 See *id*.
85 See *id*.
86 See *id*.
87 See *id*. A high profile case in Lakewood, Ohio demonstrates the ease with which “blight” can be used to justify nearly any type of private redevelopment taking. See Rebecca Leung, *Eminent Domain: Being Abused?*, CBS News (July 4, 2004), http://www.cbsnews.com/stories/2003/09/26/60minutes/main575343.shtml. Under Ohio law, a municipality that qualifies as an “impacted city” is allowed to use eminent domain to pursue economic development benefitting private parties. See Christopher S. Brown, Comment, *Blinded by the Blight: A Search for a Workable Definition of “Blight” in Ohio*, 73 U. Cin. L. Rev. 207, 210 (2004). Additionally, Ohio provides a broad definition of blight for purposes of redevelopment projects by “impacted cities” and municipalities are given wide latitude in determining what constitutes blight. See *id* at 210–11. Using its wide latitude in defining blight,
Although blight definitions like California’s make limitations on economic redevelopment condemnations essentially meaningless, in practice these blight condemnations overwhelmingly affect urban minority communities.88 It is not hard to understand why.89 Not only are low-income communities likely to meet any definition of “blight,” but there also are much stronger incentives for local governments and private developers to condemn and redevelop in low-income areas than in higher income areas.90 The first major incentive is the low monetary cost of taking properties in depressed, urban communities compared to takings in more affluent areas.91 Because municipal governments are often low on funds and private developers want to maximize profits, obtaining property for redevelopment at a low cost is an ideal scenario.92 Second, the political cost of condemning and redeveloping property in poor, minority communities is small compared to redevelopment projects in more affluent, white neighborhoods.93 Low-income minorities are often cut off from the political process and lack the political capital to influence elections.94 Given their overall marginalization, these communities can lack the ability to deter municipal governments and private developers from targeting their neighborhoods for condemnation.95

The history of the controversial urban renewal projects of the mid-twentieth century confirms that low-income, urban minorities (particularly African Americans) faced disproportionate displacement in blight condemnations.96 With the passage of the Housing Acts of 1949 and 1954, urban renewal programs symbolized “progress” for American cities and became the primary means for municipal governments to combat the dispersal of middle and upper class families and businesses

88 See Goodin, supra note 12, at 200–02.
89 See id.
90 See id.
91 See id.
92 See id.
93 See Goodin, supra note 12, at 202–04.
94 See id.
95 See id.
from the cities into outlying suburbs.\textsuperscript{97} The new jobs and new technologies that resulted from urban renewal projects meant more revenue for city governments and downtown businesses—but standing in the way were the poor, urban communities that kept the city “blighted.”\textsuperscript{98} The rhetorical use of the term “blight” to refer to inner-city slums deliberately evokes the image of a disease that should be isolated and eradicated.\textsuperscript{99} The goal of saving America’s downtowns from the “diseased neighborhoods” came at the overwhelming expense of the poor, most of whom were African American.\textsuperscript{100} The upheaval and displacement of black neighborhoods due to urban renewal programs not only uprooted people from their homes and communities but also devastated their sense of belonging in the nation.\textsuperscript{101} Many of the same problems are inherent in broad, blight-centered eminent domain authority for economic revitalization projects that lack further protections for poor communities against pre-textual takings.\textsuperscript{102}

\textsuperscript{97} See Robert M. Fogelson, Downtown: Its Rise and Fall, 1880–1950, at 318 (2001); Mindy Thompson Fullilove, Root Shock: How Tearing Up City Neighborhoods Hurts America, and What We Can Do About It 57–59, 74–75 (2005). Fullilove describes four decades of upheaval after urban renewal in what was once a vibrant and thriving black community in beautiful Roanoke, Virginia. See Fullilove, supra, at 57–59, 74–75. The renewal effort was based on a declaration of “blight” that was pre-textual, exaggerated, and racist—the white power structure championed the destruction of the community in favor of “better uses” for the land. See id.

\textsuperscript{98} See Fogelson, supra note 97, at 318–19, 349; Fullilove, supra note 97, at 57. To be sure, many city neighborhoods were legitimately dangerous and were both unsanitary and unfit for human habitation. See Fogelson, supra note 97, at 318–19. For instance, the filthy, crowded, and dilapidated tenement houses on the Lower East Side of New York, which housed poor immigrants, would meet any definition of blight. See id. The problem with the concept of blight, however, was that proponents of urban renewal did not restrict themselves to redeveloping slum areas that posed a danger to the health and safety of their residents. See id. Instead, downtown business interests and their allies were able to pressure local officials to declare neighborhoods surrounding central business districts as “blighted” even if they were not slums. See id. at 365.

\textsuperscript{99} See Fogelson, supra note 97, at 349.

\textsuperscript{100} See David Fleming, City of Rhetoric: Revitalizing the Public Sphere in Metropolitan America 77–79 (2008); Fullilove, supra note 97, at 57–59, 166–67.

\textsuperscript{101} See Fullilove, supra note 97, at 166–67.

\textsuperscript{102} See Byrne, supra note 18, at 152–53. Byrne notes, however, that there are protections in place today, such as the Fair Housing Act and informed consent provisions in some states that allow low-income residents of cities to fight against racist or pre-textual takings. See id. at 152–55.
B. Narrow Definition of Blight Model

A few states such as Iowa and Indiana also use blight as the limitation for private economic development takings.\textsuperscript{103} Unlike the majority of state reforms, however, these states provide a much narrower definition of blight.\textsuperscript{104} The benefit of limiting economic development takings to narrowly defined “blighted” properties is that it protects against private-benefit economic development takings like the one at issue in Kelo.\textsuperscript{105} Under this type of system, states and municipalities can no longer rely on a vague “public use” justification for taking private property or use a conveniently broad definition of “blight” as a pretext for such a taking.\textsuperscript{106} Instead, the parcel to be taken (or the majority of properties within the taking area) must actually satisfy the specific criteria in the statute in order to for private property to be taken for a redevelopment project.\textsuperscript{107} For instance, Indiana only finds blight if the area is “a public nuisance, is unfit for habitation, does not meet the building code, is a fire hazard, or is otherwise dangerous.”\textsuperscript{108} Thus, using a narrow definition of blight puts a meaningful check on a government’s power of eminent domain while also allowing flexibility for needed redevelopment projects.\textsuperscript{109}

The downside of the narrow definition of blight is that without further statutory protections, it strengthens the already disproportionate targeting of low-income communities for private redevelopment.\textsuperscript{110} Just like the urban renewal programs of the past that used “blight” as an excuse to raze minority communities, today’s “economic revitalization” projects can be similarly destructive, even with a narrow definition of blight.\textsuperscript{111} Thus, more provisions are needed to ensure that communities targeted for revitalization receive fair treatment, have a voice in the planning efforts, receive just compensation, and receive adequate and affordable housing in the aftermath of the project.\textsuperscript{112}

\textsuperscript{103} See Goodin, supra note 12, at 198–99; 50 State Report Card, supra note 66, at 18–19.
\textsuperscript{104} See Goodin, supra note 12, at 198–99.
\textsuperscript{105} See id.
\textsuperscript{106} See id.
\textsuperscript{107} See, e.g., Ind. Code Ann. § 32-24-4.5-7 (LexisNexis 2002 & Supp. 2010) (forbidding most private-to-private condemnations and restricting the definition of blight); Iowa Code § 6A.22 (2008); supra note 79.
\textsuperscript{108} See § 32-24-4.5-7.
\textsuperscript{109} See Goodin, supra note 12, at 198–99.
\textsuperscript{110} See id. at 202.
\textsuperscript{111} See id.
\textsuperscript{112} See id.
Finally, a minority of states completely restricted private development takings for the benefit of private parties. Florida, for instance, bans all eminent domain actions to relieve blight and requires municipalities to wait ten years before transferring taken private property to another private owner or developer. Florida is now considered the model for effective eminent domain reform because it neutralizes any threat of abusive or pre-textual takings. Similarly, Georgia countered the *Kelo* decision by explicitly stating that economic development is not a valid public use that justifies an eminent domain action.

Although such bans effectively prevent the exploitation and displacement of low-income minority communities inherent in private economic redevelopment takings, they also come with a major cost—they give local governments no flexibility in pursuing projects that could boost not only the city as a whole, but also the affected neighborhoods. The specter of abusive takings is certainly real and local governments often do not act in the best interests of the communities. Nevertheless, completely banning private economic redevelopment is a harmful overreaction to the problem because corporations and businesses are very important players in the health of a city and the neighborhood where they are located. Local governments, in order

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113 See Somin, supra note 1, at 2138–42.
115 See id.
118 See Daniel B. Kelly, *Pretextual Takings: Of Private Developers, Local Governments, and Impermissible Favoritism*, 17 SUP. CT. ECON. REV. 173, 178–80 (2009) (noting that allowing unlimited private involvement in the eminent domain process raises a number of concerns including corruption, inordinate influence, and conflicts with the public interest). Kelly also notes that there is a definite possibility in private economic development takings that “private parties threaten to relocate unless the local government condemns on their behalf.” See id.
119 See Peterson & Sundblad, supra note 21, at 12–14; Lefcoe, *supra* note 12, at 830–31. While there are risks involved for corporations that choose to get involved in reinvestment projects, corporate involvement in the health of adjacent communities can in fact benefit both parties by decreasing crime, increasing property values, promoting an educated population, and improving physical conditions. See Peterson & Sundblad, supra note 21, at 12–14. Corporations can choose different strategies and levels of involvement in community development, including direct involvement, community partnership around a business core, or reaching communities through intermediary institutions. See id. Regardless of the level of involvement, however, profit maximization and community-building
to improve the economic health of their communities, often rely upon private developers for much-needed funding and planning for major urban revitalization projects.\textsuperscript{120} Despite the fear of corporate favoritism or slum clearance, private and corporate redevelopment can play an important role in turning distressed communities into healthy neighborhoods.\textsuperscript{121} Because a local government’s most fundamental role is to protect the health, safety, and welfare of its citizens, revitalizing dilapidated, run-down, economically depressed areas is thus part of a local government’s basic duties.\textsuperscript{122} If a private developer collaborates with a local community to provide an efficient, well-planned, and socially just economic redevelopment project for a depressed area, then the entire city can reap the benefits.\textsuperscript{123}

Eminent domain plays a very important role in beneficial redevelopment projects.\textsuperscript{124} Many public-private development projects are large in scale and require a lot of land to be implemented effectively.\textsuperscript{125} Because a single property owner can derail even small-scale development projects, eminent domain takings become crucial for the success of large projects.\textsuperscript{126} Not only would a property owner’s veto over a development project lead to inefficient results, but it could also hinder a local government’s efforts to renew and rebuild economically depressed

\begin{footnotes}
\item[120] See Sean Zielenbach, The Art of Revitalization: Improving Conditions in Distressed Inner-City Neighborhoods 249 (2000); Blais, \textit{supra} note 73, at 681–83. Zielenbach notes the importance of a variety of actors in the successful revitalization of a depressed neighborhood, particularly community organizations, local governments, local businesses, and churches. See Zielenbach, \textit{supra}, at 223. He also notes that while corporate-driven, “trickle-down” economic growth may revitalize a downtown, it has not proved to be a panacea for the lowest-income residents. See \textit{id}. at 226. Nevertheless, bottom-up community development can be very effective in revitalizing an area, particularly when community organizations collaborate with large institutions and corporations in the revitalization planning. See Alexander Von Hoffman, House by House, Block by Block: The Rebirth of America’s Urban Neighborhoods 158 (2003).
\item[121] See Anastasia Loukaitou-Sideris & Paul Ong, Lessons for Community Economic Development, in Jobs and Economic Development in Minority Communities, \textit{supra} note 34, at 295, 298.
\item[122] See Pritchett, \textit{supra} note 96, at 45–46.
\item[123] See Von Hoffman, \textit{supra} note 120, at 158 (noting the importance of large institutions and local governments in successful community redevelopment programs).
\item[125] See Blais, \textit{supra} note 73, at 681–83; Dowling, \textit{supra} note 19, at 330–31.
\item[126] See Blais, \textit{supra} note 73, at 683–84. Without the ability to use eminent domain, a single holdout can veto the entire project or coerce the developer to pay much more than necessary to acquire the land. See \textit{id}.\end{footnotes}
areas. Indeed, for some cities, “spot revitalization,” in which a city or developer strategically buys and rehabilitates or develops property surrounding a blighted area with the hope of catalyzing reinvestment in the area, is not an effective solution. Thus, a state is severely limiting a local or municipal government’s ability to revitalize blighted areas by banning private economic revitalization projects.

III. Economic Revitalization and Eminent Domain: Case Studies

Because eminent domain plays such an important role in urban planning and redevelopment, states should calibrate their laws to allow for private takings that are part of a comprehensive, community-supported redevelopment plan in depressed areas. At the same time, these laws must also prevent the transfer of private property simply in services of an economically “better use.” In order to fully appreciate

128 See Hummel, supra note 23, at 115–16 (describing the failure of Baltimore and Johns Hopkins to revitalize the Middle East neighborhood through spot revitalization).
129 See Dowling, supra note 19, at 330–31; Lefcoe, supra note 12, at 830–31. Newark, New Jersey provides an example of how states and cities can use economic revitalization projects to rejuvenate their poorest and most depressed cities. See Rafael Zabala, Enterprise Renaissance Revitalizes Newark, N.J., 10 F. for Applied Res. & Pub. Pol’y 112, 115 (1995). In 1983, New Jersey passed the Urban Enterprise Zone Act, which authorized tax incentives for businesses to move back into cities and facilitated targeted investment in poor areas. See id. at 112–13. Newark chose the Newark Economic Development Corporation (NEDC) to manage its “enterprise zone” and revitalize the city. See id. Through cooperation with corporations as well as with the city, the state, and community organizations, the NEDC was able to generate more than $5 billion in economic development activities and helped secure local benefits, including a number of programs to benefit local businesses, provide employment training for residents, and rebuild existing houses and commercial structures. See id. The enterprise zone program also gave city residents the opportunity to purchase taxable goods from businesses at a fifty percent discount, with the rest of the sales tax proceeds going to economic development and public improvement programs in the city, including an around-the-clock police unit. See id. at 114. New Jersey’s Urban Enterprise Zone program and the work of the NEDC proved to be a huge success in Newark, not only by bringing in companies and building up commercial corridors, but also by creating thousands of permanent jobs for residents along with thousands of refurbished affordable housing units. See id. at 115. For a city that during the 1980s had an unemployment rate that was twice the national average, an average per capita income that was half the nation’s average, and a soaring foreclosure and vacancy rate, the redevelopment program was a veritable urban renaissance. See id.

131 See id. Finding this balance is not easy; therefore takings for economic revitalization projects require strict limitations and procedures. See id. As noted by Justice O’Connor in her dissent in Kelo, nearly any redevelopment project can claim to be for a “public use” because it may have some secondary benefits to the public such as increased tax revenue, more jobs, and maybe even aesthetic pleasure. See Kelo v. City of New London, 545 U.S. 469, 502 (2005) (O’Connor, J., dissenting). For instance, the planners and officials in New
the correct balance needed in eminent domain laws, it is important to see how private redevelopment can be used to uplift rather than destroy poor communities. The following case examples demonstrate that corporate interests can align with community interests in urban revitalization projects and provide tangible benefits for neighborhoods and entire cities.

A. The East Baltimore Development Project—Using Economic Redevelopment and Eminent Domain to Transform a Neighborhood

With Johns Hopkins buying up everything north of Monument Street and tearing the shit down, I think we all see the writing on the wall in East Baltimore.

—Proposition Joe

London truly felt that Pfizer’s proposed research facility and development plan would revitalize the city’s crumbling infrastructure and sagging economy and therefore benefit the city as a whole. See Editorial, A Turning Point for Eminent Domain?, N.Y. Times (Nov. 19, 2009, 6:36 PM), http://roomfordebate.blogs.nytimes.com/2009/11/12/a-turning-point-for-eminent-domain. Unfortunately, they were wrong and homes and families were displaced for nothing. See Patrick McGeehan, Pfizer and 1,400 Jobs to Leave City That Won Land-Use Suit, N.Y. Times, Nov. 13, 2009, at A1. States should set meaningful limits on taking authority for private development projects to prevent situations such as this, in which private property and especially poor communities are sacrificed with no other justification except vague promises of a greater good. See infra Part IV.

See Dowling, supra note 19, at 301.

See Peterson & Sundblad, supra note 21, at 12–14; Thomas D. Boston, The Role of the Black-Owned Businesses in Black Community Development, in Jobs and Economic Development in Minority Communities, supra note 34, at 161, 168–71. The recent history of urban revitalization in Oakland, California demonstrates how economic revitalization projects can integrate local community members in the planning. See Alex Salazar, Designing a Socially Just Downtown, Nat’l Housing Inst. (2006), http://www.nhi.org/online/issues/145/designingdowntown.html. In 2003, Oakland mayor Jerry Brown attempted to reverse the city’s downward spiral into “slumification” through an ambitious economic revitalization project in Oakland’s “Westside,” including its downtown area. See id. Unfortunately, the plan centered on the development of high-priced condominium units and, while it would be successful in gentrifying parts of the city, it would disproportionately displace many low-income residents. See id. To prevent this scenario, local housing rights activists and members of the affected communities were able to convince the private developer of the financial viability of building mixed-income housing on less desirable parcels within the development area by pressuring the city to provide a tax credit to the developer for these buildings. See id. The end result of the grassroots housing advocacy by members of the community was the inclusion of affordable, mixed-income housing as part of the development area. See id. This project’s success highlights the importance of community involvement in any economic revitalization project. See id.

See The Wire: More With Less (HBO television broadcast Jan. 6, 2008). Proposition Joe, a fictional East Baltimore drug kingpin in the critically acclaimed HBO series The Wire, discussed “the writing on the wall in East Baltimore” at a co-operative meeting of drug
Eminent domain takings used to promote economic development are a critical tool of state and local governments and sometimes the only effective means to revitalize a depressed, crime-ridden area.\(^{135}\) The ambitious East Baltimore Development Initiative (EBDI) biotech project, spearheaded by the City of Baltimore and Johns Hopkins University, demonstrates both the desperate need for some economic revitalization projects and how they can be used to breathe new life into a poor and hopeless neighborhood.\(^{136}\)

Johns Hopkins University, one of the premier research and medical institutions in the nation, is only blocks away from a collection of the most desperately poor and violent neighborhoods in Baltimore, ironically known as the “Middle East.”\(^{137}\) Long-standing tension has existed between the university and the residents of the Middle East neighborhoods, both because of Hopkins’ expansions into Middle East territory and because of crimes committed against Johns Hopkins’ students and faculty by Middle East residents.\(^{138}\) The University, the City of Baltimore, and even the federal government made various attempts to revitalize the Middle East neighborhood through rebuilding individual buildings and blocks with the hope that the rebuilding process would attract new investment and uplift the neighborhood.\(^{139}\) For instance, in 1994, the Department of Housing and Urban Development (HUD) designated the Middle East neighborhoods as an “empowerment zone.”

dealers. See id. In response to his lamentation over lost drug territory, another drug dealer replied: “Yeah, they movin’ the hood out.” See id. This fictional scene encapsulates the actual tension between Johns Hopkins University and the surrounding East Baltimore neighborhoods, which are notorious for a violent drug trade. See Hummel, supra note 23, at 97; Stephen Kiehl, Seeds of Renewal in Oliver, BALT. SUN, May 7, 2008, at B1. Given the history between the neighborhood and the university and the many failed attempts at “spot revitalization,” the university and the city decided to pursue a much more ambitious approach to redevelopment—the East Baltimore Development Initiative (EBDI), centered around the biotech industry. See Hummel, supra note 23, at 117.

\(^{135}\) See Dowling, supra note 19, at 330–31. One amicus brief in *Kelo* noted that “by creating job opportunities for local residents, such [economic revitalization] projects attack what may well be the single greatest contributor to urban misery.” See Brief Amici Curiae of Brooklyn United for Innovative Local Dev., et al. in Support of Respondents at 11, *Kelo*, 545 U.S. 469 (No. 04-108).


\(^{137}\) See Hummel, supra note 23, at 97.

\(^{138}\) See id. Residents who lived near the Hopkins complex referred to it as “the compound” and its leaders as “vampires” because of Hopkins’ spread across the neighborhood. See id. The leaders of Hopkins equally distrusted the residents of the neighborhood, particularly after a Hopkins medical student was raped and a medical school professor was attacked in her own office. See id.

\(^{139}\) See id. at 97, 114–15.
and allocated $250 million to “catalyze reinvestment in these decaying neighborhoods.”\textsuperscript{140} The Historic East Baltimore Community Action Coalition (HEBCAC) was tasked with the responsibility of coordinating and implementing the rehabilitation program in East Baltimore and chose to implement its agenda by strategically rehabilitating blighted houses in the neighborhood.\textsuperscript{141} These new homes were then sold to residents of the neighborhood in exchange for the residents’ deteriorating homes.\textsuperscript{142} Despite their efforts, however, HEBCAC’s revitalization project did not produce the results it intended.\textsuperscript{143} Despite the project’s spiraling costs and increasing debt, the number of vacant properties in the area doubled by the year 2000.\textsuperscript{144}

Instead of accepting the status quo and leaving the neighborhood to sink deeper into violence and disrepair, however, Johns Hopkins and the City of Baltimore developed a much more ambitious plan to change the nature and health of the Middle East neighborhoods.\textsuperscript{145} The plan centered on the Life Sciences industry, given Johns Hopkins’ status as one of the premier medical research institutions in the nation; the eighty-eight acre, ten- to fifteen-year development would result in two million square feet of biotech research space, up to 100,000 square feet of retail and commercial space, up to 8,000 new jobs, and more than 2,000 units of new and rehabilitated mixed income housing.\textsuperscript{146} The plan also included new parks, playgrounds, and gardens, a brand new public

\textsuperscript{140} See id. at 115. As of 2004, the crime rate in East Baltimore was double that of the rest of the city, which at the time had one of the highest crime rates in the nation. See E. Baltimore Dev. Inc., \textit{The East Baltimore Revitalization Initiative, Annie E. Casey Found.} (Sept. 2007), http://www.aecf.org/MajorInitiatives/CivicSites/~/media/PDFFiles/East_Balti_Summary.pdf. More than one-third of families in East Baltimore had incomes below the poverty level and the median household income was half that of the rest of the city’s. \textit{See id.} Forty-one percent of Middle East residents were not even in the labor force, with another fourteen percent unemployed. \textit{See id.} The staggering crime and poverty of East Baltimore was a major impetus behind the EBDI project. \textit{See id.}

\textsuperscript{141} See Hummel, \textit{supra} note 23, at 115–16.

\textsuperscript{142} See id.

\textsuperscript{143} See id.

\textsuperscript{144} See id.

\textsuperscript{145} See id. at 117; \textit{About, E. BALT. DEV. INC.,} http://www.ebdi.org/about (last visited May 8, 2011). Instead of a scattered-site, individual neighborhood approach, the EBDI plan would focus first on rebuilding a core area and then on the peripheral areas. \textit{See Hummel, supra} note 23, at 117. The development plan covers eighty-eight acres and will cost approximately $1.8 billion, making it one of the largest revitalization plans in Baltimore history. \textit{See id.}

\textsuperscript{146} See Kiehl, \textit{supra} note 136; Meyer, \textit{supra} note 26. The first phase of the project, which began in 2006, covers 31 acres, includes 5 life science buildings, 3 parking garages, 900 units of housing, 40,000 square feet of retail space, and several new parks. \textit{See Rona Marech, Biotech Park to Get Under Way; Developers Break Ground Today on $120 Million East Baltimore Life Science Center, BALT. SUN, Apr. 17, 2006, at 1B.}
school for East Baltimore children from kindergarten to the eighth grade, and an infusion of new retail businesses ranging from retail stores to dry cleaners to coffee shops.  

The Johns Hopkins University, the City of Baltimore, the State of Maryland, the Federal Government, and a number of private financial partners, foundations, community groups, and non-profits formed a public-private partnership to develop and implement this plan. This partnership led to the creation of the East Baltimore Development Initiative (EBDI), a non-profit organization tasked with overseeing the entire ten- to fifteen-year project. In the words of the former mayor of Baltimore, the EBDI project would be a chance to “rebuild a neighborhood from the ground up.”

What has kept this project from resembling the “urban renewal” projects of the past is community collaboration and accommodation—EBDI both listened to and integrated community concerns in its development process and has “take[en] pains to accommodate the people who were there before all the building began.” Middle East neighborhood groups including the Oliver Community Association and the Collington Square Neighborhood Association partnered with the development initiative and community representatives have seats on EBDI’s board of directors, thereby guaranteeing the neighborhood a voice in the planning. To allay fears of abusive displacement, for instance, EBDI has offered progressive relocation assistance that allows residents of East Baltimore who are displaced in the redevelopment project to improve their social and economic situations and secure the ability to be included in the revitalized community. This relocation assistance for displaced residents provides different types of aid throughout the project and includes monetary compensation for the fair market value of the property, replacement housing payments for property owners, up to three and one-half years rent for displaced ten-

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148 See Hummel, supra note 23, at 98.

149 See id. at 112.

150 See id. at 114.

151 See Kiehl, supra note 136.


153 See Hummel, supra note 23, at 117–18. EBDI and its partners also created a new type of relocation strategy in which families affected by eminent domain takings are given first priority to move into newly created housing units in the revitalized neighborhood. See EBDI 2005–2006 Annual Report, supra note 147, at 4.
nants, legal and social support services, and moving expenses. Additional funds contributed by Johns Hopkins and the Casey Foundation provide supplemental benefits for displaced residents that include continued social service support after the moving process is complete, eighteen additional months of rental assistance, and augment federal assistance for homeowners by up to $70,000. The program has already had an impact—as of 2007, 396 households were relocated with the right to return to the neighborhood in brand new housing units. Additionally, thirty-nine of the fifty-six new senior apartments and twenty-four of the forty-two new workforce apartments were claimed by East Baltimore residents.

Furthermore, EBDI required a set amount of on-site jobs to be filled by East Baltimore residents, thereby ensuring that the neighborhood will directly benefit from the influx of companies and retailers. EBDI’s development project is still ongoing but residents and local firms have already benefitted from the development. For instance, more than thirty-five percent of all project contracts were awarded to women, minorities, and local firms and local residents were connected to more than fifty-five percent of the on-site jobs. Though the project is far from being completed, a number of blocks in the neighborhood have already undergone transformation and better housing and new job opportunities have moved in. Overall, most residents of the redeveloped East Baltimore neighborhoods have welcomed the positive changes stemming from the project including the improved safety, increased job opportunities and training, new and improved housing, and progressive relocation assistance. While it is still too early to determine how residents will be fully integrated into the “economic engine” of the com-

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155 See id. at 118–19. On average, homeowners impacted by the EBDI project receive $150,000 in benefits and renters receive close to $40,000. See id.
157 See id.
158 See id.
159 See id.
160 See id.
161 See Kiehl, supra note 134. In May 2008, the first 5 of 122 new or rehabilitated homes were built in the Oliver neighborhood, just north of Johns Hopkins and the new East Side biopark. See id. The project is certainly not without its controversy and, despite its large relocation benefits, some in the neighborhood have complained that EBDI has not provided housing for neighborhood property owners quickly enough. See Kiehl, supra note 136. Despite the slow process, however, EBDI has made progress towards its promise to provide new housing for property owners and even former critics have been pleased with the progress in the development and relocation plan. See id. at 3B.
162 See Kiehl, supra note 134.
pleted biopark project, overall, the redevelopment effort has given significant hope to a once desperately poor and violent neighborhood.\textsuperscript{163}

B. Community Benefits Agreements in Los Angeles—Ending the Enmity Between Business and Community

\textit{If they don’t comply with even one portion of the agreement then the whole thing is void.}

—Victor Narro\textsuperscript{164}

Not only are private economic redevelopment plans often the most effective way of revitalizing a depressed neighborhood, but community partnerships made with private developers are also the most cost-effective way for a city or municipality to fund projects that otherwise would not happen and that directly benefit local communities.\textsuperscript{165} Aid to local governments has been one of the largest victims of state budget cuts in recent years and the federal government has cut its funding to cities as well.\textsuperscript{166} For this reason, cities and local governments often depend heavily on corporations and private developers as the source of funding for much-needed economic development projects.\textsuperscript{167} While tight budgets and local economic stagnation have often influenced local and city officials into favoring corporate interests at the expense of affected communities, this does not have to be the case.\textsuperscript{168} In fact, through procurement and development rules, cities can use corporate-sponsored projects not only to promote smart growth, curb sprawl, and promote economic development, but also to provide tangible benefits to local communities.\textsuperscript{169} The greatest tool that local and city governments can use to accomplish these goals, and that communities can use to get a voice in redevelopment projects, are community

\begin{footnotes}
\item[163] See Kiehl, \textit{supra} note 136.
\item[164] See Leavitt, \textit{supra} note 34, at 265. Victor Narro was a lawyer representing the Coalition of Humane Immigrant Rights and was part of the Figueroa Corridor Coalition for Economic Justice in Los Angeles. See \textit{id}. The FCCEJ’s negotiations to protect residents affected by the Staples Center project resulted in a binding agreement between the developer, the city, and the FCCEJ, with which the developer would have to comply in order to implement its project. See \textit{id}.
\item[165] See LeRoy, \textit{supra} note 34, at 208.
\item[166] See \textit{id}.
\item[167] See \textit{id}.
\item[168] See Callies, \textit{supra} note 62, at 56 (describing the lengths to which the City of Akron, Ohio went to please the Ganley Toyota-Mercedes Benz car dealership, including condemning neighborhood properties to transfer to Ganley); LeRoy, \textit{supra} note 34, at 208.
\item[169] See Leavitt, \textit{supra} note 34, at 258; LeRoy, \textit{supra} note 34, at 207.
\end{footnotes}
benefits agreements (CBAs), which are “legally enforceable contracts that result from a negotiation process whereby a developer will provide certain benefits in return for a community group’s promise to support the project.”\footnote{See Leavitt, supra note 34, at 258.} Across the nation, grassroots “Davids” are able to use CBAs in order to negotiate with developer “Goliaths” and gain tangible community benefits including the creation of living-wage jobs, affordable housing, and local hiring requirements.\footnote{See id. at 257–58.}

In Los Angeles, community groups and neighborhood organizations used CBAs to secure community needs during the expansion of both the downtown Staples Center and the Los Angeles airport.\footnote{See id.; LeRoy, supra note 34, at 200.} The history of community organization and negotiation in the Staples Center project in particular demonstrates how CBAs can be used to prevent abusive displacement by private developers in economic revitalization projects.\footnote{See Leavitt, supra note 34, at 262; LeRoy, supra note 34, at 200.} The Figueroa Corridor in Los Angeles covers a forty-block area between the University of Southern California and the Staples Center, with Martin Luther King, Jr. Boulevard to the south, Eighth Street to the north, Western Avenue to the west, and Alameda Street to the east.\footnote{See id.; Leavitt, supra note 34, at 263.} Figueroa Street is a major corridor in Los Angeles, but also includes older residential neighborhoods and one of the poorest areas in the city known as Skid Row.\footnote{See id.; Steve Lopez, Now Comes the Heavy Lifting, L.A. Times, Oct. 23, 2005, at B1.} Skid Row contains one of the largest populations of homeless people in the United States, with thousands of people living in informal structures such as camping tents, sleeping bags, and cardboard boxes on the street. See Solomon Moore, Some Respite, if Little Cheer, for Skid Row Homeless, N.Y. Times, Oct. 31, 2007, at A14. Drug infestation, crippling poverty, and rampant violence make Skid Row one of the worst living environments in the nation. See Lopez, supra.

\footnote{See Leavitt, supra note 34, at 263.} \footnote{See id.} \footnote{See id.}
housing prices to skyrocket. The local landlords would cash in on the dramatic rise in housing prices by threatening evictions in order to raise prices or by converting single-room occupancies in nearby Skid Row to upscale housing.

The residents of the Figueroa Corridor community felt very uneasy about the upcoming development, fearing mass evictions, price increases, and job losses. Fortunately for the community, its residents were well-organized and its community groups had won victories for low-income members in the past. To face this latest challenge, the Figueroa Corridor Coalition for Economic Justice (FCCEJ) worked with other groups, including the Los Angeles Alliance for a New Economy and Strategic Action for a Just Economy, to develop a consolidated strategy to ensure that community voices were heard and needs were met. As a result, the FCCEJ was able to enter into formal negotiations with both the developer and the city. Through strong negotiations resulting in a legally binding CBA, the FCCEJ secured a number of direct benefits for the community from the private developer, which were integrated into and buttressed by the city’s own agreement with the developer. The provisions of the agreement include local hiring requirements, living wage and unionized job benchmarks, minimum requirements for affordable housing for low-income individuals, provisions for developer-funded parks and recreation facilities for the community, environmental planning agreements, and preferential parking for local residents.

Thus, CBAs have brought about a “fundamental change” in the dynamics of development by giving residents a voice in shaping the future of their communities. Through the use of CBAs, neighborhood

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179 See id.
180 See id.
181 See Leavitt, supra note 34, at 263.
182 See id.
183 See id. The FCCEJ is the umbrella group for local unions, religious groups, community-based and city-wide organizations, environmentalists, students, health groups, block groups, and worker centers. See id. The developer was wary of the negative publicity that would result from a prolonged struggle with the community, particularly given the unrest among the local residents and their clashes with police during the Democratic National Convention at the Staples Center. See id. at 264.
184 See id. at 264, 268.
185 See id. at 268.
186 See Leavitt, supra note 34, at 268.
187 See Danny Feingold, LAX Rising (Los Angeles, California), in Breakthrough Communities: Sustainability and Justice in the Next American Metropolis, supra note 34, at 199, 200–01; Leavitt, supra note 34, at 265, 271–72; LeRoy, supra note 34, at 208–09.
stakeholders are able to sit directly across the table from developers and ensure that their needs are addressed and integrated into development plans. Furthermore, CBAs are also beneficial for cities because they provide a way to fund otherwise unaffordable projects and services while also ensuring that the projects directly serve their constituents’ needs. While a CBA is only one tool to use in private economic revitalization projects, CBAs can be a very potent way to link community needs to private economic development.

IV. Finding the Middle Ground in Eminent Domain Reform

Eminent domain allows state and local governments to correct market failure and promote the welfare of citizens, but it can also lead to corruption and land grabbing. Private redevelopment projects, although ostensibly done in the name of “economic revitalization” with real public benefits, are often little more than patronage to big box retailers or major corporations. Thus, without strong and substantive limits on eminent domain, city and local governments easily capitulate to private demands without regard to the communities they are affecting. For this reason, state eminent domain laws must walk a fine line between being too beholden to private interests and being too strict and narrow, thereby curtailing private redevelopment plans that would

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188 See LeRoy, supra note 34, at 208–09.
189 See id.
190 See Leavitt, supra note 34, at 259, 265.
191 See Dowling, supra note 19, at 330–32. It is certainly true that state and local governments have abused eminent domain, primarily to the detriment of poor and minority communities. See Fullilove, supra note 97, at 223–25; Callies, supra note 62, at 50–51; Lefcoe, supra note 12, at 846–47. Yet these communities are also those who have the most to gain from a comprehensive and community-oriented redevelopment plan that integrates local needs with corporate funding and planning. See Dowling, supra note 19, at 330–32; LeRoy supra note 34, at 208. With such a partnership, both sides gain. See LeRoy, supra note 34, at 208. While corporations and private developers cannot replace government or community organizations as either funders or policy designers in revitalization projects, they offer focused energy and a goal-oriented mindset that community organizations and local governments often lack. See id. In fact, corporate-community partnerships in low-income neighborhoods can be beneficial for all parties involved: community organizations can pave the way for local acceptance of the partnering business so that the business can profit in a new market, and the business can offer products and jobs that the neighborhood would otherwise lack. See Peterson & Sundblad, supra note 21, at 12.
192 See Peterson & Sundblad, supra note 21, at 12.
193 See John Fee, Reforming Eminent Domain, in Eminent Domain Use and Abuse: Kelo in Context, supra note 19, at 125, 130–31; Lefcoe, supra note 12, at 846–47.
stimulate economically depressed communities. While there is certainly no uniform solution to eminent domain reform and economic revitalization projects in general, there are a number of steps state legislatures can take to ensure that private economic revitalization takings are both fair and provide direct public benefits.

First, states should require a finding that a property satisfies strictly defined criteria before it can be condemned and before any development plan can begin. Such a limitation would prevent states from flippantly condemning private property to satisfy a business or corporate developer and then justifying the condemnation post hoc through a broadly conceived notion of blight. The primary argument against using blight as a limit on condemnations is that it shifts the burden of eminent domain takings to poor communities that already are disproportionately affected by these takings. Completely banning blight or economic redevelopment condemnations, however, prevents states and local governments from fulfilling their most fundamental duty—protecting and preserving the health, safety, and welfare of citizens.

How to define blight is a thorny issue that has confounded legislatures and city planners for decades. While it is overly simplistic to expect to have a simple definition that encapsulates the complex and fluid state of neighborhoods, states can set meaningful limits on the definition of blight to prevent it from being completely open-ended. Factors often included in statutory definitions of blight such as “age,” “inadequate planning,” “incompatible land use,” and “dilapidated buildings” are overly vague and are not necessarily indicative of the true nature of a given neighborhood. Factors that should be included in a definition of blight are those which demonstrate that a property poses a danger to the health, safety, and welfare of the community. Good examples of

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194 See Dowling, supra note 19, at 330–31; Fee, supra note 193, at 130–31 (noting that narrowing the definition of public use would potentially deter many beneficial projects).
196 See Goodin, supra note 12, at 198–99.
197 See id.
198 See Blais, supra note 73, at 674.
199 See Dowling, supra note 19, at 330.
200 See Fogelson, supra note 97, at 360–61; Goodin, supra note 12, at 199–202.
201 See Dowling, supra note 19, at 333; Goodin, supra note 12, at 198–99.
203 See id. at 231–32. These may include: structural unsoundness, prolonged vacancies, unsafe or unsanitary conditions, conditions that endanger life or property by fire, and environmental contamination. See id. States should avoid requiring every parcel in a given redevelopment area to be “blighted” however, since redevelopment projects are often large in scale and need to use eminent domain in order to acquire a large number of properties in a
narrow “blight” definitions include statutes like those in Iowa and Indiana, which limit abusive takings while still allowing eminent domain to be used in depressed areas that need redevelopment. Overall, by codifying a narrow definition of blight for purposes of eminent domain, city planners and private developers will be restrained from using eminent domain abusively but economic revitalization projects will occur in areas that are in desperate need.

Second, procedural requirements should be built into eminent domain laws to ensure that before economic revitalization takings occur, residents are not only able to receive fair compensation for the loss of their housing, but also are able to play a role in the development plan for their communities. One aspect of the Kelo opinion that states could codify into their eminent domain laws is to require a comprehensive redevelopment plan with strict requirements that must be met before any taking is approved. To ensure the redevelopment plan is necessary and benefits the community, states could codify a judicial review provision whereby governments are precluded from condemning any private property to transfer to another private party unless there is a showing: (1) that the project has “substantial and direct public uses and benefits,” (2) that acquiring the property was “necessary to accomplish the comprehensive redevelopment plan,” and (3) that displaced parties are included or have an opportunity to be included in the project. Before any condemnation, states should also require that the redevelopment planning processes be open to public input, with public hearings and state-funded technical assistance to facilitate participation. Any significant changes to the project or underlying justification by the developer should be subject to judicial review. Such requirements would prevent pre-textual, abusive takings and would allow for greater community participation in economic redevelopment plans.

given area. See Dowling, supra note 19, at 330; Goodin, supra note 12, at 198–99. A sensible, middle-ground approach is to require a minimum threshold of “blighted” properties in a given development area before a taking can occur and to require every other property in the redevelopment area to be “reasonably necessary” for the overall project. See Goodin, supra note 12, at 198–99.

204 See Goodin, supra note 12, at 198–99.
205 See Dowling, supra note 19, at 332–33.
206 See id.
207 See Kelo v. City of New London, 545 U.S. 469, 484–85 (2005); Dowling, supra note 19, at 332–33.
208 See Hummel, supra note 23, at 110–11.
209 See Dowling, supra note 19, at 330–32.
210 See id.
211 See id. at 330–34.
Third, states should provide displaced residents with enhanced compensation, above fair market value.\footnote{212 See David L. Callies & Shelley Ross Saxer, Is Fair Market Value Just Compensation? An Underlying Issue Surfaced in Kelo, \textit{in} Eminent Domain Use and Abuse: Kelo in Context, \textit{supra} note 19, at 137, 148–49.} Because the fair market value of housing in distressed areas is quite low, setting the compensation figure at a premium will provide some restitution of the non-economic value of the property to displaced residents.\footnote{213 See \textit{id.} at 151–53. The \textit{Kelo} Court stressed that states are allowed to place further restrictions on the exercise of eminent domain power; thus it is well within a state’s authority to require additional factors to be included in a just compensation calculation, as well as to grant a premium to residents for takings that are part of economic revitalization projects. \textit{See id.} at 150.} This premium could be calculated based on the value of the land’s highest and best use or by the value of the property to the receiving entity, thereby giving the resident some of the increased value of the property that will result from the economic revitalization project.\footnote{214 See \textit{id.} at 153.} Increased relocation benefits could also be a part of a state’s just compensation laws.\footnote{215 See \textit{id.} at 152.} When the federal government exercises its power of eminent domain, displaced residents and businesses receive compensation in the form of moving expenses, dislocation allowances, and other incidental expenses.\footnote{216 See 42 U.S.C. § 4622 (2006).} Such federal benefits do not apply to state, local, or private redevelopment projects, and therefore do not protect all those who may be displaced by a taking.\footnote{217 See Callies & Saxer, \textit{supra} note 212, at 152.} States could compensate such individuals by enacting additional compensation provisions like Maryland’s, which would cover displaced residents’ moving expenses and provide them allowances to rent, lease, or purchase comparable housing.\footnote{218 See Md. Code Ann., Real Prop. § 12-202 (LexisNexis 2010); Hummel, \textit{supra} note 23, at 108–10.} Additionally, to preserve communities and limit displacement, local governments should be encouraged to offer condemnees an opportunity to acquire new homes or housing units in the revitalized area so that they can retain their ties to the neighborhood.\footnote{219 See Dowling, \textit{supra} note 19, at 333.}

Finally, state legislatures should include provisions in their laws that provide incentives for local governments and developers to integrate community planning and local benefits into their redevelopment strategies.\footnote{220 See Zabala, \textit{supra} note 129, at 112–13.} These provisions could include tax incentives for busi-
nesses to hire local residents within a redevelopment area or tax credits for investors to invest in small businesses within the area.\textsuperscript{221}

For any renewal effort to be successful, there must be strong community leadership, organization, and support from within the neighborhood dedicated to the neighborhood’s revitalization.\textsuperscript{222} Thus, the needs, concerns, and strategies of community groups, religious organizations, tenant organizations, and non-profits in a neighborhood should be integral to any redevelopment plan and developers should be encouraged to collaborate and strategize with community leaders in drafting and implementing their projects.\textsuperscript{223} The best time to ensure that developers include community concerns in development plans is at the beginning, when a private developer is seeking zoning changes, easements, infrastructure assistance, or even government funding.\textsuperscript{224} In return for this assistance, the city government can require the developer to include community groups at the planning table and make commitments to provide local benefits such as jobs and training.\textsuperscript{225} In this way, the developer, the city, and the neighborhood all benefit and progress can be made in neighborhoods which may otherwise degenerate into slums.\textsuperscript{226}

\textsuperscript{221} See id.; Kyle R. Williams, Note, State Tax Credits for Private Start-Up Capital: Arching Toward Urban “Entrepreneurial Redevelopment,” 6 Wash. U. J.L. & Pol’y 299, 301, 304 (2001). New Jersey’s “Enterprise Zone Act,” for instance, provided significant tax incentives for businesses to relocate in depressed areas, hire low-income residents, and improve real estate within the enterprise zone. See Zabala, supra note 129, at 113–14. This strategy was successful in Newark and improved the quality of life of many of its residents. See id. Additionally, states should consider authorizing local governments to use development agreements—private contracts between a city and a developer in which a developer agrees to provide benefits for the public in exchange for zoning protection. See Brad K. Schwartz, Note, Development Agreements: Contracting for Vested Rights, 28 B.C. Envtl. Aff. L. Rev. 719, 720 (2001). While CBAs alone may suffer from enforcement problems such as problems with standing, cities and towns can bypass some of these problems by integrating a CBA into a larger development agreement that the city can enforce. See Patricia E. Salkin & Amy Lavine, Understanding Community Benefits Agreements: Equitable Development, Social Justice and Other Considerations for Developers, Municipalities and Community Organizations, 26 UCLA J. Envtl. L. & Pol’y 291, 295 (2008).

\textsuperscript{222} See Von Hoffman, supra note 120, at 252.

\textsuperscript{223} See id.; LeRoy supra note 34, at 208.

\textsuperscript{224} See Mary Nelson & Steven McCollough, Community Activism for Creative Rebuilding of Neighborhoods (Chicago, Illinois), in Breakthrough Communities: Sustainability and Justice in the Next American Metropolis, supra note 34, at 157, 165.

\textsuperscript{225} See id.

\textsuperscript{226} See id.
**Conclusion**

Overall, the reaction to the *Kelo* opinion has led to some positive changes in state eminent domain laws, but for the most part has not substantially curbed abusive takings. Some states allow economic revitalization takings for any property that meets a broad definition of blight, simply shifting the burden of takings onto poor communities. Without further protections for affected communities or substantive limitations on private redevelopment takings, this eminent domain “reform” almost exactly mirrors the urban renewal programs of the past. Other states reacted to *Kelo* by banning private economic redevelopment takings completely, effectively curbing state and local governments from pursuing private development projects to turn around depressed communities.

With effective limitations and procedures, private development can be an important aspect of revitalizing entire neighborhoods and cities. Eminent domain is a crucial tool for governments to have available to pursue revitalization projects due to the potentially catastrophic effect of “holdouts.” Thus, states should not completely ban the use of eminent domain in private redevelopment. Instead, substantive limits should be placed on private redevelopment takings. These limits should include a prerequisite finding of narrowly defined “blight” for purposes of “economic redevelopment” takings, procedural requirements before any taking occurs, enhanced compensation for displaced residents, and incentives for developers to integrate community concerns into redevelopment projects.
EXPELLED TO NOWHERE: SCHOOL EXCLUSION LAWS IN MASSACHUSETTS

MELANIE RICCOBENE JARBOE*

Abstract: Chapter 71, section 37H 1/2 of the Massachusetts General Laws allows school principals to suspend any student charged with a felony and to expel that student if he or she is convicted or found to be delinquent. Students expelled from one school in Massachusetts have no right to attend any other school in the state. Therefore, expulsion has the potential to bring a student’s educational career to an end. This Note argues that chapter 71, section 37H 1/2 of the Massachusetts General Laws is unconstitutional under both the Federal and Massachusetts Constitutions because it violates students’ right to a “minimally adequate education.” Further, this Note argues that the Massachusetts legislature should adopt House Bill 178, “An Act Relative to Students’ Access to Educational Services and Exclusion from School,” which strikes an appropriate balance between school safety and educational opportunity.

Introduction

One spring day in 1996, fourteen-year-old Tom Berrigan was with five of his friends in Woburn, Massachusetts when they met up with a group of younger boys.¹ One of Tom’s friends pulled up his shirt to reveal a small souvenir baseball bat that he had tucked into his pants.² The gesture convinced the younger boys to give up their chips and soda to the older boys.³ Police caught up with Tom and his friends and charged all six boys with armed robbery, a felony.⁴ Massachusetts law

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2 Id.
3 Id.
4 Id.; see Mass. Gen. Laws ch. 265, § 17 (2008) (defining armed robbery). In Massachusetts, any crime punishable by imprisonment in the state prison is a felony. Mass. Gen. Laws ch. 274, § 1 (2008). In addition to more “serious” crimes like armed robbery, felonies include kicking another person with a shod foot and receiving stolen property worth more than $250. See ch. 265, § 15B(b) (defining assault and battery with a dangerous weapon as a felony); Commonwealth v. Tevlin, 741 N.E.2d 827, 833 (Mass. 2001) (holding that, though not dangerous per se, a sneaker may be a “dangerous weapon” when used to stomp or kick); see also Mass. Gen. Laws ch. 266, § 60 (2008) (defining receipt of stolen property worth more than $250 as a felony).
allows principals to indefinitely suspend or expel students who get into trouble, even when they are off school grounds. Tom’s principal took advantage of the law and suspended Tom from school for the final six weeks of the school year despite the fact that he had been a bystander. As a result, Tom missed the end of the year in all of his classes and the opportunity to try out for the high school football team. “Who could have known that a moment of bravado and a bag of potato chips would cost Tom Berrigan so dearly?”

Every state, including Massachusetts, has zero tolerance policies with respect to in-school behavior such as assaulting faculty members or bringing drugs or weapons onto school property. Massachusetts takes this zero tolerance approach one step further by regulating conduct that occurs outside of school hours, during school vacations, or off school property. Chapter 71, section 37H ½ of the Massachusetts General Laws (“37H ½” or “section 37H ½”) allows a principal to suspend a student “for a period of time determined appropriate” if (1) the student has been charged with a felony and (2) the principal “determines that the student’s continued presence in school would have a substantial detrimental effect on the general welfare of the school.” If the

6 Flint, supra note 1.
7 Id.
8 Id.
9 See, e.g., Gun-Free Schools Act, 20 U.S.C. § 7151 (2006); § 37H(a) (providing that a principal may expel a student who is found on school property or at a school function in possession of a dangerous weapon or a controlled substance or who assaults a staff member). Although sections 37H and 37H ½ invite discretionary application and are therefore not true zero tolerance laws, administrators across the state often apply them as though they are not discretionary. See infra Part III.B.
11 § 37H ½(1); see infra note 115 (detailing procedural protections under 37H ½). Section 37H ½ does not define “substantial detrimental effect,” nor does it give any guidelines on the determination in each case, leaving ample discretion in the hands of the administrator. See § 37H ½. The expansive definition of a felony in Massachusetts means that students are subject to exclusion under 37H ½ for a broad range of conduct. See id.; supra note 4.
student is found guilty of the felony charge, the principal is further empowered to expel the student.\textsuperscript{12} Significantly, 37H\textsubscript{1/2} also states: “Upon expulsion of such student, no school or school district shall be required to provide educational services to such student.”\textsuperscript{13} Once a student is expelled from one school in the Commonwealth, no other school is required to provide that student with an education.\textsuperscript{14} Though some cities and towns choose to provide alternative education for students who are excluded (suspended or expelled), they are not required to do so and funding considerations dictate that many do not.\textsuperscript{15}

The Massachusetts legislature has considered and rejected several attempts to change the law.\textsuperscript{16} Nevertheless, House Bill 178, which State Representative Alice K. Wolf of Cambridge filed on January 19, 2011, provides a new opportunity to reconsider 37H\textsubscript{1/2}.\textsuperscript{17}

\begin{footnotes}
\textsuperscript{12} See § 37H\textsubscript{1/2}(2).
\textsuperscript{13} Id.
\textsuperscript{14} See id. The Individuals with Disabilities Education Act (IDEA) protects the educational opportunities of special education students even when they are expelled for misbehavior. 20 U.S.C. § 1412(a)(1)(A) (2006); Antonucci, \textit{supra} note 10. IDEA does not similarly protect the educational opportunities of general education students. See Antonucci, \textit{supra} note 10. There are also educational opportunities for students incarcerated with the Department of Youth Services (DYS) in Massachusetts. Mass. Gen. Laws ch. 18A, § 2 (2008) (“The department shall provide . . . services and facilities for the . . . education, training and rehabilitation of all children and youth referred or committed [to the department by the courts].”). Although 37H\textsubscript{1/2} affects special education students and those who are ultimately committed to DYS, this Note focuses on general education students who are “expelled to nowhere” and are not guaranteed alternative education after expulsion from school. See \textit{infra} Parts II–III. “Expelled to nowhere” is a term of art that first appeared in a 2003 law review article. See Eric Blumenson & Eva S. Nilsen, \textit{One Strike and You’re Out? Constitutional Constraints on Zero Tolerance in Public Education}, 81 WASH. U. L.Q. 65, 107 (2003). In this Note, the term refers to students who are expelled and do not receive alternative educational services. See \textit{id}.

\textsuperscript{15} See Parkins v. Boule, 2 Mass. L. Rptr. 331, 341–42 (Mass. Super. Ct. Aug. 3, 1994), available at 1994 WL 879558 (lamenting the lack of alternative educational options for excluded children while recognizing the mandate of the Supreme Judicial Court (SJC) that an expelled student, under current law, has no right to alternative education); Amy E. Mulligan, Note, \textit{Alternative Education in Massachusetts: Giving Every Student a Chance to Succeed}, 6 B.U. PUB. INT. L.J. 629, 631 (1997) (discussing the Education Reform Act, which established a commission to study the feasibility of universal alternative education and calling the gap in educational services for those excluded “intolerable”); Antonucci, \textit{supra} note 10 (acknowledging a gap in services for those students who are neither eligible for special education nor incarcerated).


tled “An Act Relative to Students’ Access to Educational Services and Exclusion from School,” proposes several key changes to the law that strike an appropriate balance between school safety and educational opportunity for Massachusetts students.\(^{18}\)

Of course, each school in Massachusetts must be afforded the latitude to preserve decorum, both in service of safety and to create an optimal learning environment.\(^{19}\) Section 37H\(\frac{1}{2}\), however, is overbroad because it affords schools the opportunity to regulate conduct that occurs off school grounds and to permanently end a student’s educational opportunities.\(^{20}\) Part I of this Note discusses the evolution and effects of the zero tolerance movement, both nationwide and in Massachusetts. Part II describes the application of 37H\(\frac{1}{2}\) in Massachusetts. Part III argues that 37H\(\frac{1}{2}\) is unconstitutional. Section A argues that a minimally adequate education is a fundamental right. Section B argues that 37H\(\frac{1}{2}\) violates students’ procedural due process rights. Section C argues that 37H\(\frac{1}{2}\) violates students’ rights to equal protection. Finally, Part IV discusses House Bill 178 and proposes that the Massachusetts legislature adopt the bill because it furthers the legitimate state interest of keeping schools safe without infringing upon the constitutional rights of students. Part IV also proposes further changes to the law that House Bill 178 does not address.

I. THE EVOLUTION AND EFFECTS OF “ZERO TOLERANCE”

Across the nation, reports of youth violence and school shootings during the 1990s increased the public perception that “American children ha[d] become Public Enemy #1.”\(^{21}\) In 1993, a Massachusetts ap-perlinks for individual testimonies). The November 2009 hearing is the most recent instance of testimony on 37H\(\frac{1}{2}\), therefore statements made at the hearing will be used throughout this Note to support arguments in favor of amending 37H\(\frac{1}{2}\), despite the fact that House Bill 3435 is no longer pending. See id.

\(^{18}\) See Mass. H.R. 178.

\(^{19}\) See Hart, supra note 16 (quoting Education Commissioner Robert Antonucci’s statements that “[s]uspending and expelling some disruptive students will strengthen the climate for learning” and that “[s]afe schools are a top priority”).

\(^{20}\) See Flint, supra note 1.

\(^{21}\) Education on Lockdown: The Schoolhouse to Jailhouse Track, ADVANCEMENT PROJECT ET AL., 11 (Mar. 2005), http://www.advanceproject.org/sites/default/files/publications/FINALEORep.pdf; see Sara Sun Beale, You’ve Come a Long Way, Baby: Two Waves of Juvenile Justice Reforms As Seen from Jena, Louisiana, 44 HARV. C.R.-C.L. L. REV. 511, 514, 537 (2009) (calling attention to racial imagery and warnings of “youthful superpredators” from politicians and the media and reporting that in 1993, 48% of network news segments and 40% of newspaper articles about youth concerned violence). Though the national mood was decidedly fearful and media coverage of crime was on the rise, crime rates were actually
peals court ruled that a public school could not prevent a student from attending who had been found delinquent by reason of a homicide that occurred off school property during the summer.\textsuperscript{22} The court found that public policy in the Commonwealth dictated that “students should not be expelled from school for reasons having nothing to do with school.”\textsuperscript{23} The Legislature enacted 37H\textsuperscript{1/2} to overturn the court’s ruling and to ensure that schools had the power to expel students for off-campus activity.\textsuperscript{24} Nationwide, politicians capitalized on similar fears to enact laws that were “tough on crime.”\textsuperscript{25} The timing was perfect; the public largely supported the adoption of harsh laws regulating student behavior in and out of school.\textsuperscript{26}

The national impulse to get tough on juvenile crime, both in and out of school, was mirrored by a similar shift in the rhetoric of the nation’s juvenile courts away from rehabilitation and towards punish-

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{23}] Antonucci, \textit{supra} note 10 (quoting Petruzzelli, No. 1993-J-237).
\item[\textsuperscript{24}] See \textit{id.}
\item[\textsuperscript{26}] See Flint, \textit{supra} note 1; see also Paul M. Bogos, Note, “Expelled. No Excuses. No Exceptions.”—\textit{Michigan’s Zero-Tolerance Policy in Response to School Violence: M.C.L.A. Section 380.1311, 74 U. Det. Mercy L. Rev. 357, 364, 367–68 (1997) (suggesting that harsh measures help the state perform its duty to provide children a learning environment).}
\end{enumerate}
\end{footnotesize}
ment.27 The U.S. Supreme Court extended the rights of defendants in adult criminal trials to juveniles, which protected the procedural due process rights of juveniles but also tended to shift the focus away from rehabilitation and towards punishment.28 Massachusetts juvenile courts followed suit, adopting an offense-based sentencing grid, repudiating the infancy defense, and developing a high reliance on commitment to the Department of Youth Services.29 These changes stood in stark contrast to the beliefs underlying the juvenile court system since its inception—namely that children are different from adults and should therefore be treated differently—and in spite of scientific research indicating that children’s brains are not fully matured.30

27 See Barry C. Feld, The Politics of Race and Juvenile Justice: The “Due Process Revolution” and the Conservative Reaction, 20 JUST. Q. 765, 774–75 (2003) (“Gault and its progeny precipitated a procedural revolution that unintentionally, but inevitably, transformed the juvenile court from its original Progressive conception of a social welfare agency into a legal one. . . . [and] altered juvenile courts’ focus from ‘real needs’ to ‘criminal deeds’ . . . .”); Barbara Kaban & James Orlando, Revitalizing the Infancy Defense in the Contemporary Juvenile Court, 60 Rutgers L. Rev. 33, 45–46 (2007) (citing the enactment of state laws eliminating or reducing the confidentiality of juvenile court records and proceedings, opening delinquency proceedings to the public, allowing various agencies access to records of juvenile court proceedings, facilitating the transfer of children from the juvenile justice system to the criminal justice system, and expanding sentencing options in juvenile courts).

28 See, e.g., New Jersey v. T.L.O., 469 U.S. 325, 339 (1985) (“The preservation of order and a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult.”); In re Winship, 397 U.S. 358, 365–68 (1970) (holding that proof beyond a reasonable doubt is required in juvenile proceedings); In re Gault, 387 U.S. 1, 30–31, 33, 36, 55 (1967) (holding that due process requires that a juvenile must be given adequate notice of the charges against him or her, the assistance of counsel, and the right against self-incrimination); Feld, supra note 27, at 774–75; William Haft, More Than Zero: The Cost of Zero Tolerance and the Case for Restorative Justice in Schools, 77 DENY. U. L. REV. 795, 797, 801 (2000) (suggesting that zero tolerance policies and restrictions on constitutional rights in the public schools are consistent with trends away from lenity in criminal law and contradict the premise that children are incapable of criminal mens rea); Kaban & Orlando, supra note 27, at 44–45 (citing the shift from rehabilitation to punishment).

29 Kaban & Orlando, supra note 27, at 60–61. DYS is the juvenile justice agency of the Commonwealth of Massachusetts responsible for detaining and treating juveniles committed to its care by the courts. See Deborah Passarelli, Note, Department of Youth Services: Control over Sentencing and Monitoring of Juvenile Delinquents, 21 New Eng. J. on CRIM. & CIV. CONFINEMENT 575, 575–76 (1995).

30 See Mass. Gen. Laws ch. 119, § 53 (2008) ("[A]s far as practicable, [juvenile defendants] shall be treated, not as criminals, but as children in need of aid, encouragement and guidance. Proceedings against children under said sections shall not be deemed criminal proceedings."); Roper v. Simmons, 543 U.S. 551, 569–75 (2005) (holding that the death penalty could not be imposed upon juvenile offenders because of their lack of maturity, their susceptibility to outside influences and peer pressure, and their still-developing character); Beale, supra note 21, at 514, 516; Kaban & Orlando, supra note 27, at 47–50 (citing studies confirming that brain immaturity in adolescents affects impulse control and the ability to
criminalization of juvenile court has increased the possibility that a juvenile will be charged with a higher-grade offense; if that offense is a felony, school authorities can invoke 37H½ and keep the student out of school.31

The zero tolerance movement focuses on the safety of schools and schoolchildren but does not account for the needs of the offending child or the long-term effects of school exclusion on the community at large.32 Zero tolerance policies eliminate a student’s ability to learn from his or her behavioral mistakes and decrease the possibility that an at-risk student will develop trusting relationships with school personnel.33 According to one study, students excluded from school are more likely to become involved in a physical fight, carry a weapon, smoke, use alcohol and drugs, and have sex.34 In addition, students who are excluded from school face higher risks of dropping out of school later

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31 See Feld, supra note 27 at 772–75; Kaban & Orlando, supra note 27, at 44–45. Depending on the crime committed and past offenses, Massachusetts charges juveniles in juvenile court (potentially resulting in an adjudication of delinquency) or in adult court (potentially resulting in a guilty conviction). See § 54. Section 37H½ applies to juveniles with both delinquency adjudications and guilty convictions. See Mass. Gen. Laws ch. 71, § 37H½(2) (2008).

32 See Haft, supra note 28, at 796–97; Flint, supra note 1 (citing the conflict between arguments that “schools must be kept safe at all costs” and the belief that “young people need to be led by the hand out of trouble—not kicked out of school at the precise time they need an education most”).


DeMarco, supra note 21, at 571; Johanna Wald, Zeroing in on Rule-Breakers: ‘One Strike and You’re Out’ Rules Are Doing More Harm Than Good, Bos. Globe, Aug. 13, 2000, at F1 (arguing that subjecting a student who makes a mistake to the same consequence as a student who purposefully breaks the law or a school rule “make[s] a mockery of . . . justice and fairness” and makes children suspicious and distrustful of adults); see also H.R. 3435 Hearing, supra note 17 (statement of Joel M. Ristuccia, School Psychologist) (“When building principals rely heavily on student exclusion to achieve school safety, they create a school environment that is reductive and punitive. Such school environments . . . distance students from school and negatively impact learning.”).

34 Brooks et al., supra note 21, at 22–23; see H.R. 3435 Hearing, supra note 17 (statement of Daniel J. Losen, Senior Education Law and Policy Associate, The Civil Rights Project at UCLA) (indicating that, although exclusion can be appropriate when students present a true danger to the school community, time away from school means that troubled students are unsupervised, increasing the risk of substance abuse and violent crime).
on (if readmitted), feeling isolated from society, committing further offenses, and becoming permanently court-involved.\textsuperscript{35}

The consequences for a community that relies on exclusion as a disciplinary measure are also severe.\textsuperscript{36} A student who becomes involved in the criminal justice system costs the state much more money than a student who is sitting in a classroom.\textsuperscript{37} More fundamentally, if one purpose of school is to educate productive members of society, a community suffers when it refuses to educate all of its children, especially those with trouble exhibiting appropriate behavior.\textsuperscript{38}

The public willingness to sanction such harsh consequences for the nation’s youth stands in contrast to the ideals and motivations behind the nation’s most well-known education case, \textit{Brown v. Board of Education}.\textsuperscript{39} In \textit{Brown}, Chief Justice Earl Warren wrote:

\begin{quote}
Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.\textsuperscript{40}
\end{quote}


\textsuperscript{36} See Bogos, supra note 26, at 360; Hart, supra note 16 (“[N]othing positive can come of having hundreds of often troubled youngsters out of school . . . .”).

\textsuperscript{37} See Bogos, supra note 26, at 386 (remarking that Michigan spends $5000 per year to educate a student in school but $23,000 per year when expelled students enter the juvenile justice system); see also H.R. 3455 \textit{Hearing}, supra note 17 (statement of Daniel J. Losen, Senior Education Law and Policy Associate, The Civil Rights Project at UCLA).

\textsuperscript{38} See Haft, supra note 28, at 803.


\textsuperscript{40} \textit{Brown}, 347 U.S. at 493.
A similarly staunch commitment to education is also written into the Massachusetts Constitution, which states:

[I]t shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially . . . public schools and grammar schools in the towns; . . . to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, good humor, and all social affections, and generous sentiments among the people.\(^{41}\)

Despite these lofty sentiments, Massachusetts excludes over one hundred students per year pursuant to 37H\(\frac{1}{2}\).\(^ {42}\)

II. The Application of Section 37H\(\frac{1}{2}\) in Massachusetts

_The children we are banishing from our schools are the same children with whom we share an intertwined and interdependent future. . . . The students we expel from school will not disappear from society. We are in danger of not only creating an underclass, but creating an outclass that will come back to haunt us._

—Isabel Raskin\(^ {43}\)

In April 1994, the Massachusetts legislature enacted 37H\(\frac{1}{2}\).\(^ {44}\) Before the end of the school year in June, schools had already excluded twelve students under 37H\(\frac{1}{2}\).\(^ {45}\) Over the course of the next three school years, exclusions hovered in the low sixties before spiking to 130 in the 1997–1998 school year.\(^ {46}\) Exclusions pursuant to 37H\(\frac{1}{2}\) dipped back down to around one hundred per year for the following three years.\(^ {47}\) Since then, 37H\(\frac{1}{2}\) has been applied to between 93 and 180 students per year.\(^ {48}\)

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\(^{41}\) Mass. Const. ch. V, § II. The first public school in America opened in Massachusetts, and the Commonwealth enacted the nation’s first compulsory school attendance law in 1842. DeMarco, _supra_ note 21, at 566.

\(^{42}\) See _infra_ Tables 1, 2.

\(^{43}\) H.R. 3435 Hearing, _supra_ note 17 (statement of Isabel Raskin, Education Attorney, Suffolk University Juvenile Justice Center).

\(^{44}\) Antonucci, _supra_ note 10.

\(^{45}\) See _infra_ Table 1.

\(^{46}\) See _id._

\(^{47}\) See _id._

\(^{48}\) See _id.; infra_ Table 2.
Though committed in their opposition to the law, advocates have had virtually no success reversing exclusions pursuant to 37H 1/2 in Massachusetts courts, which almost universally defer to school administrators’ decisions and rule against students. ⁴⁹ Even more troubling, however, is the fact that although 37H 1/2 affected almost 1800 students between 1994 and 2010, not all of those cases received judicial, political, or public notice. ⁵⁰ As one scholar notes, “many parents often do not have the mindset, time, or means to pursue redress against the educational ‘system’ beyond the administrative process through the courts, and the parents who do have the resources are often ostracized, frustrated, and unsuccessful.” ⁵¹ Additionally, time is of the essence—a student who misses more than seven school days in six months is already at risk for retention (being held back in the same grade for a second year), to say nothing of missing months or an entire school year waiting for judicial action. ⁵² For those families with the resources to do so, it is more expedient and more effective to pay for tutoring or private school than to risk the negative effects of a total lack of education during the litigation process. ⁵³


⁵² See Hanson, supra note 51, at 358; see also Mass. Gen. LAWS ch. 76, § 1 (2008).

⁵³ See Hanson, supra note 51, at 358.
The problems caused by 37H 1/2 are vast, its application is over-broad, and its benefits are uncertain, but the law has stood unchanged since its enactment in 1994.\textsuperscript{54} Popular support from key stakeholders has ensured that the law stays on the books.\textsuperscript{55} Principals and education officials worry about the possibility that a troubled youth could cause future incidents, bad publicity, and lawsuits if he or she is not excluded.\textsuperscript{56} Schools benefit because the students they expel are often the same students who score poorly on standardized tests that are used in school evaluations.\textsuperscript{57} Parents want disruptive students out of their children’s classrooms.\textsuperscript{58} Teachers benefit from a policy that allows them to rid their classrooms of troublemakers.\textsuperscript{59} In the wake of highly publicized school shootings throughout the late 1990s and beyond, the public sympathizes with educators’ attempts to run safe schools and seems willing to forgive any resulting missteps.\textsuperscript{60} Virtually unanimous public support creates an absence of political pressure to change the law—

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\textsuperscript{55} See Brady, supra note 54, at 161, 164, 189; Flint, supra note 1; Hart, supra note 16; Wald, supra note 33.


\textsuperscript{57} See Blumenson & Nilsen, supra note 14, at 68; Maureen Carroll, Comment, Educating Expelled Students After No Child Left Behind: Mending an Incentive Structure That Discourages Alternative Education and Reinstatement, 55 UCLA L. REV. 1909, 1929 (2008). No Child Left Behind, which Congress enacted in 2001 as a reauthorization of the Elementary and Secondary Education Act, demands that public schools show adequate yearly progress (AYP) towards full proficiency in reading and math. See Carroll, supra, at 1927–28. Schools face increasingly harsh consequences for every year they fail to make AYP and there is corresponding pressure on principals to raise AYP at all costs. See id. at 1928. While ninety-five percent of enrolled students must participate in the standardized tests that factor into AYP, there is no requirement that schools allow any particular student to attend school. See id. at 1927–28. By expelling low-scoring students, principals increase the probability of making AYP and escaping tough sanctions. See id. at 1928–29. Moreover, because minority students are often some of the lowest scoring students in schools, the exclusionary incentive applies with greater force to them. Id. at 1930.

\textsuperscript{58} Flint, supra note 1.

\textsuperscript{59} See Blumenson & Nilsen, supra note 14, at 67–68.

\textsuperscript{60} See id. at 65; Brady, supra note 54, at 159–60; Robert G. Fraser, Student Discipline from the Perspective of the School Attorney, 34 NEW ENG. L. REV. 573, 579 (2000); Flint, supra note 1.
thus, the Legislature has considered and turned down several bills that would lessen the impact of 37H½.\textsuperscript{61}

III. \textbf{Section 37H½ Infringes on Students’ Fundamental Constitutional Right to a Minimally Adequate Education}

A. \textit{The Fundamental Right to a Minimally Adequate Education}

Despite the recognized importance of education in American society, the U.S. Supreme Court has repeatedly held that education is not a fundamental right.\textsuperscript{62} The Massachusetts Supreme Judicial Court (SJC) has also held that there is no fundamental right to education in the Commonwealth.\textsuperscript{63} Nevertheless, both courts have indicated that a minimally adequate education may, in fact, be a fundamental right guaranteed by the U.S. and Massachusetts Constitutions.\textsuperscript{64} If the right to a

\textsuperscript{61} See Flint, \textit{supra} note 1. In 1997, Massachusetts State Representative Patricia D. Jehlen of Somerville filed a bill that would impose more guidelines on principals seeking to expel students and would increase the protections of the appeals process, but that bill did not result in an amendment to 37H½. \textit{Id.} In 1998, the State Legislature considered a bill sponsored by Representative Barbara Gardner of Holliston that would require biannual hearings for excluded students attempting readmission into school and would prohibit the expulsion of students younger than eleven. Hart, \textit{supra} note 16. This bill did not result in amendments to 37H½ either—in 2007, 37H½ was applied to a fourth-grade student. See E-mail from Mass. Dep’t of Elementary & Secondary Educ. (DESE) Admin., to author (Feb. 17, 2010, 08:31 EST) (on file with author) [hereinafter 2010 E-mail from DESE Admin.] (providing access to the 2007 statistics via a link that was live for seven days, in response to an e-mail sent to data@doe.mass.edu). In 2009, Representative Alice K. Wolf of Cambridge filed House Bill 3435, which would have made sweeping changes to the law. See H.R. 3435, 2009 Leg., 186th Sess. (Mass. 2009). House Bill 3435 did not make it out of committee before the end of the legislative session, and Representative Wolf filed House Bill 178 in January 2011. See H.R. 178, 2011 Leg., 187th Sess. (Mass. 2011); \textit{infra} Part IV.

\textsuperscript{62} See Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 458 (1988) (“Nor have we accepted the proposition that education is a ‘fundamental right,’ like equality of the franchise, which should trigger strict scrutiny when government interferes with an individual’s access to it.”); Plyler v. Doe, 457 U.S. 202, 223 (1982) (“Nor is education a fundamental right; a State need not justify by compelling necessity every variation in the manner in which education is provided to its population.”); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973) (“We have carefully considered each of the arguments supportive of the District Court’s finding that education is a fundamental right or liberty and have found those arguments unpersuasive.”).

\textsuperscript{63} See Doe v. Superintendent of Sch. of Worcester, 653 N.E.2d 1088, 1095 (Mass. 1995) (holding that the Massachusetts Constitution does not guarantee the right to an education).

\textsuperscript{64} See, \textit{e.g.}, Papasan v. Allain, 478 U.S. 265, 285 (1986) (“[T]his Court has not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review.”); \textit{Plyler}, 457 U.S. at 221 (holding that the
minimally adequate education is a fundamental one, its denial would
be subject to strict scrutiny.\textsuperscript{65} Although there is certainly a compelling
state interest in safe schools, 37H\(\frac{1}{2}\) is not the most narrowly tailored
means of achieving the state’s compelling interest and therefore fails
strict scrutiny.\textsuperscript{66}

1. The Right to a Minimally Adequate Education Is of a Fundamental
Nature

In \textit{San Antonio Independent School District v. Rodriguez} the U.S. Su-
preme Court held that education was not a fundamental right.\textsuperscript{67} The
plaintiffs in \textit{Rodriguez} alleged that funding disparities between poor ur-
ban school districts and wealthy suburban school districts were uncon-
stitutional.\textsuperscript{68} The Court held that the funding disparities did not violate
plaintiffs’ constitutional rights because the funding scheme did not op-
erate to the detriment of a suspect class and because “lack of personal
resources has not occasioned an absolute deprivation of the desired
benefit.”\textsuperscript{69} However, the Court stated that the “absolute denial of edu-
cational opportunities to any of [a state’s] children” may give rise to a
charge that “the system fails to provide each child with an opportunity
to acquire the basic minimal skills necessary for the enjoyment of the
rights of speech and of full participation in the political process.”\textsuperscript{70}
Thus, the absolute denial of educational benefits under 37H½ may be constitutionally significant.  

Indeed, the Court has repeatedly suggested that public education is deeply rooted in our nation’s history, values, and traditions and that an educated citizenry is a prerequisite to the continued functioning of our democratic system.  

Such deep roots in American society suggest that the right to receive a minimally adequate education is of a fundamental nature. In Wisconsin v. Yoder, the Court stated that “some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.” In Plyler v. Doe, the Court characterized the public schools “as a most vital civic institution for the preservation of a democratic system of government” and distinguished public education from “some governmental ‘benefit’” because of the “importance of education in maintaining our basic institutions, and the lasting im-

ess and to the rights of free speech and association guaranteed by the First Amendment” and suggested that “any classification affecting education must be subjected to strict judicial scrutiny.” Id. at 63 (Brennan, J., dissenting). Also in dissent, Justice Thurgood Marshall stated that the fundamental importance of education was demonstrated “by the prior decisions of this Court, by the unique status accorded public education by our society, and by the close relationship between education and some of our most basic constitutional values.” Id. at 111 (Marshall, J., dissenting). The Rodriguez Court “never rejected the nexus between education and the exercise of one’s constitutional rights” and the Court “ultimately accepted the plaintiffs’ arguments and observed that, under a different set of facts, an ‘identifiable quantum of education’ could be a constitutionally protected prerequisite to the exercise of other fundamental rights.” Barbour, supra note 64, at 210; see Rodriguez, 411 U.S. at 36 (majority opinion). The Court has also recognized that students have a liberty right, guaranteed by the Fourteenth Amendment, against state barriers to learning. See Meyer, 262 U.S. at 396–97, 399–400, 403 (holding that a state law prohibiting teaching foreign languages to students who had not yet passed the eighth grade unconstitutionally violated the students’ rights to learn).

71 Barbour, supra note 64, at 210; see Rodriguez, 411 U.S. at 36.
72 See, e.g., Plyler, 457 U.S. at 221 (noting the importance of education in maintaining basic national institutions); Yoder, 406 U.S. at 213, 221 (“[A]s . . . pointed out early in our history, . . . some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.”); Meyer, 262 U.S. at 400 (“The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted.”). In fact, the Framers and early congresses promoted education as a central concern of the federal government. See Barbour, supra note 64, at 208–09.
73 See Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (“Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful ‘respect for the teachings of history [and], solid recognition of the basic values that underlie our society.’” (alteration in original) (quoting Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring))).
74 Yoder, 406 U.S. at 221.
pact of its deprivation on the life of the child.”

Indeed, in *Papasan v. Allain*, the Court stated, “this Court has not yet definitively settled the question[,] whether a minimally adequate education is a fundamental right” but indicated that the case did not “require resolution” of the issue. Thus, the question of whether the U.S. Constitution protects the right to a minimally adequate education remains unresolved.

Even if the U.S. Constitution does not provide complete protection for students excluded under 37H 1/2, the Massachusetts Constitution and the education jurisprudence of the SJC strengthen the case that students in Massachusetts have a fundamental right to a minimally adequate education. The SJC has held that there is no fundamental right to education in the Commonwealth. Even so, in *McDuffy v. Secretary of the Executive Office of Education*, the SJC held that the Commonwealth has a constitutional obligation to provide all public school students with

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76 *Papasan*, 478 U.S. at 285–86. In *Papasan*, students brought suit challenging Mississippi’s distribution of public school land funds. *Id.* at 267–68. The Court stated, “The petitioners do not allege that schoolchildren . . . are not taught to read or write; they do not allege that they receive no instruction on even the educational basics; they allege no actual facts in support of their assertion that they have been deprived of a minimally adequate education.” *Id.* at 286. The Court therefore stated, “As we see it, we are not bound to credit and may disregard the allegation that the petitioners have been denied a minimally adequate education.” *Id.*

77 See *id.* at 285–86.

78 See *Mass. Const.* ch. V, § II; *McDuffy*, 615 N.E.2d at 523–28. The Massachusetts Constitution directs the “legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, . . . especially . . . public schools and grammar schools in the towns.” *Mass. Const.* ch. V, § II. The *Rodriguez* Court suggested that if a right is explicitly or implicitly mentioned in a state constitution, then that right is a fundamental right for the citizens of that state. See *Rodriguez*, 411 U.S. at 33–34. The education clause in the Massachusetts Constitution seems to pass this test, especially when the issue is the absolute denial of all educational opportunities in the Commonwealth. See *Mass. Const.* ch. V, § II; *Rodriguez*, 411 U.S. at 23–25, 33–34. But see Bd. of Educ. v. Sch. Comm. of Quincy, 612 N.E.2d 666, 670 n.8 (Mass. 1993) (holding that the school attendance statute did not require the school committee to offer alternative education to an expelled student); Parkins v. Boule, 2 Mass. L. Rptr. 331, 341–42 (Mass. Super. Ct. Aug. 3, 1994), *available at* 1994 WL 879558 (finding expulsion without the provision of alternative education constitutional).

79 See, e.g., *Worcester*, 653 N.E.2d at 1095. The Massachusetts courts have affirmed schools’ ability to expel students for misconduct and have held that there is no right to an alternative education after expulsion. See *Quincy*, 612 N.E.2d at 670 n.8; *Parkins*, 2 Mass. L. Rptr. at 341–42. The SJC stated, however, that it was for the legislature to determine whether and in what manner alternative education would be provided to expelled students. See *Quincy*, 612 N.E.2d at 670 n.8. This leaves room for the legislature to mandate the provision of alternative education after expulsion. See *id.*; *infra* notes 171–172 and accompanying text (discussing the mandate in House Bill 178 that principals provide alternative education to excluded students).
an “adequate” education. Further, the court held that the education provided had to “prepare [students] to participate as free citizens of a free State to meet the needs and interests of a republican government.”

In the inquiry into whether a right has been unconstitutionally infringed or merely burdened, courts consider “[t]he directness and substantiality of the interference.” In both Rodriguez and McDuffy, the issue was whether all students had the right to the same degree of education. Conversely, in the case of 37H½, the issue is whether all students have the right to some degree of education. Unlike in Rodriguez and McDuffy, where students had access to educational services, 37H½ leaves many students without even the minimally adequate education both the Rodriguez Court and the McDuffy court suggested was constitutionally guaranteed.

2. The Denial of a Minimally Adequate Education Fails Strict Scrutiny

If a minimally adequate education is a fundamental right, courts would subject permanent exclusion under 37H½ to strict scrutiny. Under strict scrutiny, the government has the burden of proving that a law is necessary to achieve a compelling government purpose and that the law is narrowly tailored, meaning that it is the least restrictive means of achieving that purpose. The Commonwealth would likely be able to satisfy the first prong and prove that 37H½ serves a compelling state in-

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80 See McDuffy, 615 N.E.2d at 545, 554–55.
81 Id. at 548.
83 See Rodriguez, 411 U.S. at 11–17; McDuffy, 615 N.E.2d at 548.
84 See Mass. Gen. Laws ch. 71, § 37H½ (2008) (providing for permanent exclusion from Massachusetts schools after expulsion). The argument that “expulsion to nowhere” violates equal protection is unlike the arguments advanced in both Rodriguez and McDuffy. See Rodriguez, 411 U.S. at 28; McDuffy, 615 N.E.2d at 552. In both cases, students argued that funding disparities between schools violated equal protection. See Rodriguez, 411 U.S. at 28; McDuffy, 615 N.E.2d at 552. Even so, every student had the opportunity to sit in a classroom and learn; under 37H½ that opportunity is denied to some. See § 37H½; Rodriguez, 411 U.S. at 37; McDuffy, 615 N.E.2d at 519. Between 1993 and 2003, only 49.8% to 68.0% of excluded general education students received alternative education, leaving many students without any educational resources. See infra Table 1. After 2003, changing methods of categorizing disciplinary actions makes drawing firm conclusions about the exact percentage of general education students receiving alternative education difficult. See infra Table 2.
85 See Rodriguez, 411 U.S. at 37; McDuffy, 615 N.E.2d at 521–22.
86 See Rodriguez, 411 U.S. at 17; Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942); Wald, supra note 33.
87 See, e.g., Wygant, 476 U.S. at 280; Rodriguez, 411 U.S. at 17, 97.
terest by citing the need to create safe and productive educational environments. It is difficult to dispute the 1998 statements of the Commonwealth’s Education Commissioner, Robert Antonucci, that “[s]uspending and expelling some disruptive students will strengthen the climate for learning” and that “[s]afe schools are a top priority.” In addition, Massachusetts courts defer to the decisions of educators because of the inescapable fact that “[s]chool officials have a duty to provide a safe and secure environment in which all children can learn.”

Despite the compelling state interest in keeping schools safe, $37H\frac{1}{2}$ is not the least restrictive or most narrowly tailored way of achieving that purpose. First, $37H\frac{1}{2}$ gives principals discretion to take action against a student without regard to the actual crime the student has committed. While the continued presence in school of a student charged with sexually assaulting another child may indeed have “a substantial detrimental effect on the general welfare of the school,” the presence of a student charged with felony theft may not be quite so detrimental. In the latter case, a student who steals an iPhone, a bicycle, or an expensive jacket is subject to the same consequence of expulsion as a student who sexually molestes another child.

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88 See Blumenson & Nilsen, supra note 14, at 108.
91 See Wygant, 476 U.S. at 280; Woodard v. Los Fresnos Indep. Sch. Dist., 732 F.2d 1243, 1246 (5th Cir. 1984) (holding that disciplinary measures are a deprivation of substantive due process when they are “arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning”); Blumenson & Nilsen, supra note 14, at 109–10 (noting that a state may not constitutionally utilize “expulsion-to-nowhere” when “there are other, reasonable ways to achieve [the state’s] goals with a lesser burden on constitutionally protected activity” (quoting Dunn v. Blumstein, 405 U.S. 330, 343 (1972))).
92 See MASS. GEN. LAWS ch. 71, § 37H½ (2008); Wald, supra note 33 (“Zero tolerance laws treat all offenses falling within certain categories with equal severity, regardless of intent, mitigating circumstances, or previous record.”).
93 See § 37H½(1); MASS. GEN. LAWS ch. 266, § 30 (2008) (defining felony theft as theft of anything worth more than $250); Stoughton, 767 N.E.2d at 1056–57 (upholding a principal’s exclusion of a student charged with “indecent assault and battery on a child under the age of fourteen years, and rape and abuse of a child”).
94 See § 37H½ (allowing principals to suspend or expel students charged with or convicted of any felony). Moreover, three different students could have committed the same offense and receive different treatment after exclusion. See id.; see also Blumenson & Nilsen, supra note 14, at 109. A special education student has a right to receive alternative
Commissioner Antonucci recognized the potential for overly broad applications of 37H½ in an advisory opinion, stating:

Because of the range of offenses included in the term felony, educational professionals should view the circumstances of each case carefully and make a reasoned determination whether the specific conduct underlying the felony charge or conviction can support the required finding that the student’s continued presence would have a substantial detrimental effect on the general welfare of the school.95

Though the Commissioner urged restraint, there is ample indication that principals have applied 37H½ indiscriminately and have not heeded the call to carefully consider each case.96 Therefore, even if the official policy is that a student should only be expelled if the student’s continued presence would truly have a detrimental effect on the general welfare of the school, school officials seem to have jettisoned those guidelines in favor of exclusion in less serious cases.97

In addition, 37H½ is not narrowly tailored to further the goal of school safety because it allows punishment for crimes occurring outside the school day, off school property, and without regard to the individuals involved in the incident.98 Such punishment does not fit the crime because students are subject to school-based sanctions for their off-

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95 Antonucci, supra note 10.
96 See H.R. 3435 Hearing, supra note 17 (statement of Phillip Kassel, Advocacy Director, South Coastal Counties Legal Services) (“The notion that school administrators should have no patience for violence and drugs in schools has morphed into blanket permission to utilize nearly unreviewable discretion to damage kids’ [’] lives for reasons that often do not relate to school safety.”); Flint, supra note 1.
97 See H.R. 3435 Hearing, supra note 17 (statement of Phillip Kassel, Advocacy Director, South Coastal Counties Legal Services); Flint, supra note 1.
98 See § 37H½ (allowing punishment for a felony charge or conviction without regard to when and where the alleged offense took place); H.R. 3435 Hearing, supra note 17 (statement of John L. Reed, Education Chair, NAACP New England Area Conference) (“The concept of due process has always been a major issue with [37H½] because of the provision that indicates a student may be subject to school disciplinary actions after school, on the weekends, off school property, and [based on] any court-related matter if it is brought to the attention of school administration.”).
While crimes occurring during the school day, on school property, or involving school community members might justify the harsh penalties prescribed by 37H\(\frac{1}{2}\), a crime happening outside of school hours, off school property, and involving no school community members gives rise to a much weaker inference that a student’s presence in school is detrimental. These differentiations would not be difficult to write into the law.

Further, if a student’s out-of-school conduct has garnered the attention of the juvenile justice system, that student is already answering for his or her conduct in court. A student should not also face punishment at school, especially when that student’s conduct is unrelated to his or her behavior at school. Otherwise, a student is doubly punished for only “one act of childish misconduct.”

Finally, long-term or permanent exclusion of students charged with or convicted of felonies is not the least restrictive means of ensuring the safety of other children. Services such as alternative education, counseling, and in-school suspension (removal to another location in the school) are currently or potentially available at every school in Massachusetts. Expansion of these existing services is a more narrowly tailored way of furthering the state interest in keeping schools safe. Though these services cost money and, in the short term, cost much more than simply kicking a student out of school, the long-term costs of permanent expulsion likely outstrip the short-term costs of educating a child after a felony exclusion. Moreover, “surprisingly

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99 See Brady, supra note 54, at 176 (stating that a substantive due process inquiry includes the question of “[w]hether the punishment fits the crime”).

100 See id. Expulsion from school for activity occurring outside of school arguably does not meet this test in all situations. See id.


102 See Education on Lockdown: The Schoolhouse to Jailhouse Track, supra note 21, at 7 (stating that the “double dose of punishment” is the result of school districts teaming up with law enforcement to create a schoolhouse to jailhouse track).

103 See id.

104 Id.

105 See Brady, supra, note 54, at 176.

106 See 34 C.F.R. § 300.530 (2010). IDEA requires that if a school removes a special education student from school for more than ten days after a violation of a code of conduct, the school must provide continued educational services to the student. See id. Because IDEA mandates alternative education for special education students, every district has alternative education services in place. See id.

107 See id.

108 See Bogos, supra note 26, at 386 (noting that prison costs more than school).
little evidence” exists documenting the effectiveness of zero tolerance policies in reducing school violence.  

If the statute does not further the Commonwealth’s pursuit of school safety, the statute is unconstitutional at any level of review. 

B. The Constitutionally Deficient Procedures of Section 37H½ 

Section 37H½ deprives students of procedural due process because the procedures outlined in 37H½ are not “fundamentally fair.” In Goss v. Lopez, the U.S. Supreme Court held that students have a property interest in an education and a liberty interest in their reputation and that access to education should not be limited unless pursuant to fundamentally fair procedures. The Court also held that “some kind of notice” and “some kind of hearing” were required before suspensions of ten days or less. The Court further noted, “Longer suspensions or

109 Wald, supra note 33; see Act Out, Get Out?, supra note 30, at 4.
110 See Adira Siman, Note, Challenging Zero Tolerance: Federal and State Legal Remedies for Students of Color, 14 CORNELL J.L. & PUB. POL’Y 327, 344–45 (2005). Even if the courts applied intermediate scrutiny, the burden would still be on the government to prove that the law is substantially related to an important governmental purpose, and the means chosen must be a more than reasonable way of achieving that goal. See Plyler, 457 U.S. at 217–18, 218 n.16, 230 (applying intermediate scrutiny to analyze the denial of public education to undocumented immigrant children and holding that Texas had not met its burden); Blumenson & Nilsen, supra note 14, at 108 n.171. Even subjected to rational basis review, 37H½ is still unconstitutional because it is not rationally related to a legitimate state interest. See Blumenson & Nilsen, supra note 14, at 110–11. “Despite nearly two decades of implementation of zero tolerance policy and its application to mundane and non-violent misbehavior, there is no evidence that frequent reliance on removing misbehaving students improves school safety or student behavior.” H.R. 3435 Hearing, supra note 17 (statement of Daniel J. Losen, Senior Education Law and Policy Associate, The Civil Rights Project at UCLA). In the absence of evidence that 37H½ is making the Commonwealth’s schools safer, the law is not a reasonable means of achieving the goal of school safety. See Siman, supra, at 344–45; Wald, supra note 33. The availability of alternate means to secure school safety and to differentiate between students who are truly dangerous and students who merely need some guidance further illustrates the irrationality of permanent expulsion. See Siman, supra, at 344–45.
111 See Goss v. Lopez, 419 U.S. 565, 574 (1975); accord U.S. CONST. amend. XIV, § 1 (“No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .”).
112 Goss, 419 U.S. at 574–75. In Goss, various high school students were suspended without a hearing and sued the school district, alleging procedural due process violations. Id. at 567.
113 See id. at 579.
expulsions for the remainder of the school term, or permanently, may require more formal procedures.”

An analysis under Goss shows that the procedural safeguards outlined in 37H½ do not satisfy the constitutional standard. First, 37H½ does not mandate that a school provide a hearing to a student before excluding him or her from school. The law merely states, “The student shall receive written notification of the charges and the reasons for such suspension [or expulsion] prior to such suspension [or expulsion] taking effect.” The student may appeal the principal’s decision and receive a hearing, but must remain out of school until the hearing occurs. Providing a right to a hearing only on appeal is in direct conflict with the Goss requirement that a hearing must accompany any suspension of ten days or less.

114 Id. at 584. In addition, Goss highlights the lack of investigatory care and potential procedural violations stemming from exclusions that are the result of conduct occurring off school grounds. See id. at 580–81 n.9.
115 See id. at 574, 576, 584. Notice and hearing procedures for suspensions are detailed in 37H½:

The student shall have the right to appeal the suspension to the superintendent. The student shall notify the superintendent in writing of his request for an appeal no later than five calendar days following the effective date of the suspension. The superintendent shall hold a hearing with the student and the student’s parent or guardian within three calendar days of the student’s request for an appeal. At the hearing, the student shall have the right to present oral and written testimony on his behalf, and shall have the right to counsel. The superintendent shall have the authority to overturn or alter the decision of the principal or headmaster, including recommending an alternate educational program for the student. The superintendent shall render a decision on the appeal within five calendar days of the hearing. Such decision shall be the final decision of the city, town or regional school district with regard to the suspension.

116 See § 37H½.
117 Id.
118 Id. In addition, anything a student says at a principal’s or superintendent’s hearing may be used against the student in the felony prosecution. Telephone Interview with Barbara Kaban, Deputy Dir./Dir. of Research & Policy, Children’s Law Ctr. of Mass. (Mar. 12, 2010); see H.R. 178, 2011 Leg., 187th Sess. (Mass. 2011) (requiring that a student be provided with “notice that statements at [a] hearing may be used against the student in investigative or criminal or delinquency proceedings”). Principals and superintendents want to know if a student committed the charged offense, and a student without counsel does not know to remain silent in the face of questioning. See Telephone Interview with Barbara Kaban, supra. Because most students are not represented by counsel at these hearings, the possibility of self-incrimination is high. Id.
119 See Goss, 419 U.S. at 579, 584; H.R. 3435 Hearing, supra note 17 (statement of Phillip Kassel, Advocacy Director, South Coastal Counties Legal Services) (“Under current prac-
Despite the clear two-pronged test under 37H½, the second prong—the “dangerousness determination”—is either meaningless or fully collapses into the first prong—the felony charge or conviction. In *Doe v. Superintendent of Schools of Stoughton*, the SJC confirmed the existence of a two-pronged inquiry when it stated that “more than a felony charge is required to impose suspension” under 37H½. Just a few sentences later, however, the SJC stated that 37H½ “does not prohibit the principal from drawing an inference of detrimental effect based on the nature of the crime alone.” Even after such inexact statutory compliance by schools, judges tend to defer to a principal’s decision to exclude a student unless that decision is “arbitrary and capricious, so as to constitute an abuse of discretion.” According to the SJC, “Because school officials are in the best position to determine when a student’s actions threaten the safety and welfare of other students, we must grant school officials substantial deference in their disciplinary choices.”

When permanent expulsion is at stake, the procedures afforded by 37H½ are not “fundamentally fair,” as required by the *Goss* Court, and do not adequately protect a student’s property interest in his or her education. There is no hearing, no meaningful judicial review, and a
lack of compliance with the terms of the statute. The procedures afforded by 37H½ and the lesser procedures actually followed by schools and courts do not meet the standard set in Goss for suspensions of ten days or less; therefore, they do not meet the standard necessary for a complete denial of educational opportunity.

C. The Discriminatory Effects and Disparate Impact of Section 37H½

Section 37H½ is also constitutionally suspect because minority students are over-represented in exclusion statistics, raising equal protection concerns. Classification based on race is subject to strict scrutiny because of the history of de jure and de facto racial discrimination in this nation. Even so, when a contested law is facially neutral, the Supreme Court has held that there is no equal protection violation without

127 See Goss, 419 U.S. at 576, 579.
128 See U.S. Const. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”); Bell & Mariscal, supra note 25 (stating that while zero tolerance policies appear race-neutral, they have a discriminatory effect and propel youth of color into the juvenile justice system); see also Korematsu v. United States, 323 U.S. 214, 216 (1944) (“[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.”); Skinner, 316 U.S. at 536, 541 (holding that a law requiring the sterilization of individuals convicted three times for crimes of “moral turpitude” unconstitutionally violated equal protection because it infringed on the fundamental right of procreation); Wald, supra note 33; infra Tables 1, 2. A common measure of whether a group is disproportionately affected is whether its proportion in the target classification (here, students excluded under 37H½) exceeds its representation in the population by ten percent of that classification. See Russell J. Skiba et al., The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment, Ind. Educ. Pol’y Center, 3–4 (June 2000), http://www.indiana.edu/~safeschl/cod.pdf. For example, if African American students made up twenty percent of the student population and more than twenty-two or less than eighteen percent of excluded students were African American, then the law would have a disproportionate effect on African American students.

129 See Robert W. Bennett, “Mere” Rationality in Constitutional Law: Judicial Review and Democratic Theory, 67 Calif. L. Rev. 1049, 1076 (1979); Carroll, supra note 57, at 1913 (noting that the history of legal racism compels a closer look at the denial of alternative education to expelled students because it further widens the achievement gap between minority and white students). The Supreme Court stated: “A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race. Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns . . . .” Palmore v. Sidoti, 466 U.S. 429, 432 (1984) (citation omitted). Additionally, the nation’s history of race-based discrimination makes it less likely that the political process will protect racial minorities and more likely that states will pass laws that disproportionately impact minority groups, thus calling for a “correspondingly more searching judicial inquiry.” See United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); Carroll, supra note 57, at 1913.
proof of a discriminatory purpose.\textsuperscript{130} Despite the profound impact of racism on laws and on the behavior of citizens, however, racist motives are rarely expressed and are difficult to prove.\textsuperscript{131} Some scholars suggest that, because analyzing the presence of discriminatory intent “does not tell the whole story,” courts should use a standard that considers the effects of discrimination.\textsuperscript{132} Under an effects test, “any action that has the same effects as obvious discrimination—the same insulting, stigmatizing, or subordinating effects—should also be unconstitutional.”\textsuperscript{133}

Decades after \textit{Brown} mandated equality of opportunity in education, students of color do not have the same educational opportunities as white students.\textsuperscript{134} In addition, African American students are ex-

\textsuperscript{130} See, \textit{e.g.}, McCleskey v. Kemp, 481 U.S. 279, 292 (1987) (holding that, in order to demonstrate an equal protection violation, the defendant “must prove that the decision-makers in his case acted with discriminatory purpose”); City of Mobile v. Bolden, 446 U.S. 55, 67 (1980) (holding that an election system that disadvantaged minorities would not be subject to strict scrutiny unless there was purposeful discrimination); Washington v. Davis, 426 U.S. 229, 239 (1976) (noting that the Court had never found that a racially disproportionate impact, standing alone, violated equal protection). \textit{But see Yick Wo v. Hopkins}, 118 U.S. 356, 375–74 (1886) (invalidating a facially neutral law that was enforced in a racially disparate manner). In contrast, the SJC has suggested that no discriminatory purpose is necessary to claim an equal protection violation under the Massachusetts Constitution. \textit{See Sch. Comm. of Springfield v. Bd. of Educ.}, 319 N.E.2d 427, 434 (Mass. 1974) (holding that “regardless of legislative intent . . . , any action taken . . . which would tend to reverse or impede the progress toward the achievement of racial balance in Springfield’s schools would constitute a violation of . . . arts. 1 and 10 of the . . . Massachusetts Constitution”); \textit{see also Mass. Const. pt. 1, art. I} (ratified as amended in 1976) (“Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.”). Therefore, proof of disparate impact may be enough for a Massachusetts court to hold 37H\textsuperscript{1/2} unconstitutional as a violation of equal protection. \textit{See Springfield}, 319 N.E.2d at 434.


\textsuperscript{133} See Strauss, \textit{supra} note 131, at 962.

\textsuperscript{134} See Josie Foehrenbach Brown, \textit{Escaping the Circle By Confronting Classroom Stereotyping: A Step Toward Equality in the Daily Educational Experience of Children of Color}, 6 \textit{Afr.-Am. L. & Pol’y Rep.} 134, 135–36 (2004); Hanson, \textit{supra} note 51, at 334 n.127; \textit{Dismantling the School-
pelled and suspended at disproportionate rates nationwide.\textsuperscript{135} Even when controlling for actual classroom behavior, socioeconomic status, and gender, minority students are disproportionately excluded from school.\textsuperscript{136} In schools that rely heavily on suspension and expulsion as disciplinary tools, which are often schools with a high proportion of minority students, the risk that the application of these punishments will have a racially disparate impact increases.\textsuperscript{137}

Once one accepts that minority students have decreased educational opportunity to begin with, the disparity in the application of zero tolerance policies further decreases the probability that a minority student will obtain an education.\textsuperscript{138} The disproportionate exclusion of minority students increases the risk that “African-American families who have benefited from the effects of education after \textit{Brown} may very well lose their gains in social, economic, and community development.”\textsuperscript{139} Indeed, a student who is “expelled to nowhere” has little chance to benefit from whatever educational opportunities are available.\textsuperscript{140}

\textit{to-Prison Pipeline}, NAACP LEGAL DEF. & EDUC. FUND, INC., 3–4 (OCT. 10, 2005), http://naacpldf.org/files/publications/Dismantling_the_School_to_Prison_Pipeline.pdf. American schools, especially in urban settings, are “moving toward resegregation” and African American and Latino students lag behind their white counterparts on academic assessments. \textit{Brown}, supra, at 135. Additionally, children of color learn from teachers who have fewer years of experience and who may teach a subject in which they do not have an academic background. \textit{Id.} at 136. Children of color are also more likely to be in a larger class in an underfunded school, further diminishing the quality of educational opportunity. \textit{Id.}

\textsuperscript{135} Hanson, supra note 51, at 332–33. A 1992 study found that African American students were suspended at a rate 250\% higher than the rate at which white students were suspended. Donald H. Stone, \textit{Crime & Punishment in Public Schools: An Empirical Study of Disciplinary Proceedings}, 17 AM. J. TRIAL ADVOC. 351, 366 (1993). The notion that increased rates of exclusion among African American students are due to increased rates of poor behavior among those students is not supported by the facts. \textit{See} Skiba et al., supra note 128, at 6. “Whether based on school records or student interviews, studies have failed to find racial disparities in misbehavior sufficient to account for the typically wide racial differences in school punishment. If anything, African American students appear to receive more severe school punishments for less severe behavior.” \textit{Id.} (citations omitted). White students are disciplined more often for smoking, leaving school without permission, vandalism, and obscene language. \textit{Id.} at 13. African American students are referred to the principal’s office more often for disrespect, excessive noise, threats, and loitering—offenses that are both subjectively defined and less serious. \textit{See id.}

\textsuperscript{136} See Bell & Mariscal, supra note 25; Dismantling the School-to-Prison Pipeline, supra note 134, at 6; \textit{Act Out, Get Out?}, supra note 30, at 5; Skiba et al., supra note 128, at 15–16.

\textsuperscript{137} See Siman, supra note 110, at 329; Skiba et al., supra note 128, at 18.

\textsuperscript{138} See Brady, supra note 54, at 167 (stating that zero tolerance policies disproportionately impact students of color and special education students); Hanson, supra note 51, at 333.

\textsuperscript{139} Hanson, supra note 51, at 333.

\textsuperscript{140} See \textit{id.}
Additionally, it is more likely that African American students will be subject to exclusion under 37H1/2 because they are more likely to be targeted by police and receive harsh sentences in court.141 Moreover, race makes an impact at selected stages of juvenile processing because juvenile justice officials may be more likely to confine a youth with no family presence or who lacks resources to pay for community-based alternatives to confinement.142 Most crucially, minorities receive more serious outcomes than their white counterparts.143 If minority youth are more likely to be stopped by police and more likely to be sentenced harshly, they are also more likely to fall under the umbrella of 37H1/2 and to become a member of the uneducated underclass.144

The data on the application of 37H1/2 shows that, whether due to police action, prosecutorial decisions, or school-based biases, African

141 See Beale, supra note 21, at 542; Hanson, supra note 51, at 334; Reed, supra note 35, at 609; Skiba et al., supra note 128, at 6 (“African Americans are twice as likely to be the target of stop-and-frisk practices, five times more likely to be detained, and up to ten times as likely to be incarcerated.” (citations omitted)). Between 2002 and 2004, African Americans were 16% of youth nationwide but 28% of juvenile arrests, 30% of referrals to juvenile court, 35% of youth judicially waived to criminal court, and 58% of youth admitted to state adult prison. And Justice for Some: Differential Treatment of Youth of Color in the Justice System, Nat’l Council on Crime & Delinq., 3 (Jan. 2007), http://www.nccd-crc.org/nccd/pubs/2007jan_justice_for_some.pdf. The same trends apply to Latino students. Neelum Arya et al., America’s Invisible Children: Latino Youth and the Failure of Justice, Nat’l Council of La Raza & Campaign for Youth Just. 6 (May 20, 2009), http://www.modelsforchange.net/publications/213 (stating that, as compared with white youth, Latino youth are 4% more likely to be petitioned, 16% more likely to be adjudicated delinquent, 28% more likely to be detained, 41% more likely to receive an out-of-home placement, 43% more likely to be waived to the adult system, and 40% more likely to be admitted to adult prison).


143 See Beale, supra note 21, at 542; Alex R. Piquero, Disproportionate Minority Contact, Future Child., Fall 2008, at 59, 60 (“The racial differences that begin with juvenile involvement in crime become larger as youth make their way through the different stages of the juvenile justice system—from detention, to formal hearings, to adjudications, to out-of-home placements, and finally to waiver to adult court.”); And Justice for Some: Differential Treatment of Youth of Color in the Justice System, supra note 141, at 3; Arya et al., supra note 141, at 6.

144 See Beale, supra note 21, at 542; Reed, supra note 35, at 609; Skiba et al., supra note 128, at 6.
American students are disproportionately excluded from schools in Massachusetts.\textsuperscript{145} Beginning in 2004, the Massachusetts Department of Education began tracking the application of 37H\(\frac{1}{2}\) by race.\textsuperscript{146} The more recent data reiterate the disproportionate exclusion of African American students under 37H\(\frac{1}{2}\).\textsuperscript{147} Although African American students only made up an average of 8.39\% of the student population statewide between 2004 and 2010, between 19\% and 39\% of students excluded under 37H\(\frac{1}{2}\) were African American.\textsuperscript{148} Conversely, white students made up an average of 71.79\% of the student population and between 36\% and 56\% of students excluded under 37H\(\frac{1}{2}\).\textsuperscript{149} Thus, white students are disproportionately underrepresented in the excluded population.\textsuperscript{150} These statistics show that minority students bear the brunt of the consequences under 37H\(\frac{1}{2}\) and are disproportionately denied a minimally adequate education in the Commonwealth.\textsuperscript{151}

IV. House Bill 178: A First Step Towards Reform

Even if a court upheld 37H\(\frac{1}{2}\) as constitutional, Massachusetts House Bill 178 provides an opportunity for the legislature to preserve principals’ abilities to keep schools safe while removing many of the defects of the current law.\textsuperscript{152} House Bill 178 does not address all of the

\begin{itemize}
  \item \textsuperscript{145} See infra Tables 1, 2.
  \item \textsuperscript{146} See infra Table 2. Between 1993 and 2003, African American students comprised between 8.0\% and 8.8\% of the students in the Massachusetts public schools but between 18.5\% and 27\% of all exclusions. See infra Table 1. During the same period, the percentage of Hispanic students in the statewide school population grew from 8.8\% to 11.2\%. See id. Even accounting for the increase in numbers, Hispanic students disproportionately represented between 25.3\% and 39.4\% of exclusions statewide. See id. In comparison, white students comprised between 75.1\% and 79.3\% of the student population but represented only 33.1\% to 48\% of the exclusions. See id.
  \item \textsuperscript{147} See infra Table 2.
  \item \textsuperscript{148} See id. Hispanic students made up an average of 13.21\% of the statewide population during the same period but an average of 18.29\% of exclusions pursuant to 37H\(\frac{1}{2}\). See id. School officials disproportionately excluded Hispanic students every year between 2004 and 2010 except for 2006, when they were excluded slightly less often than statistically expected. See id.
  \item \textsuperscript{149} See id.
  \item \textsuperscript{150} See id.; see also Skiba et al., supra note 128, at 3.
  \item \textsuperscript{151} See infra Table 2.
  \item \textsuperscript{152} See H.R. 178, 2011 Leg., 187th Sess. (Mass. 2011). House Bill 177, a companion bill to House Bill 178, requires the commissioner to file a yearly report with the legislature concerning the number of, duration of, and reasons for exclusions in each school district, and a breakdown of excluded students “by grade level, race, gender, special education status, socioeconomic status, and English language proficiency,” in addition to “the alternative education options provided to students and the number of students re-admitted under the provisions of this section.” H.R. 177, 2011 Leg., 187th Sess. (Mass. 2011).
\end{itemize}
problematic features of 37H½, but it provides a necessary first step in
the struggle to strike an appropriate balance between school safety and
educational opportunity for all students in the Commonwealth.153
House Bill 178 would amend 37H½ to ensure that procedures at the
school level were standardized between schools and districts and pre-
served students’ due process rights.154 In light of the substantial defer-
ence that courts show towards the decisions of school administrators,
fair process and standardized procedures must exist.155

There are five main provisions in House Bill 178 that address the
deficiencies of the current law.156 First, House Bill 178 imposes a one-
year cap on all exclusions and prohibits exclusions of more than ten
days in a single school year unless the administrator determines that
“the student’s presence in school would have a substantial detrimental
effect on the general welfare of the school.”157 Thus, while 37H½ per-
mits all public schools to refuse admission to an excluded student,
House Bill 178 ensures that a student’s education does not end perma-
nently after a felony exclusion.158

Second, House Bill 178 provides guidance to administrators in
considering whether a student’s continued presence in school would
have a substantial detrimental effect.159 House Bill 178 requires a de-
termination that a preponderance of the evidence supports three con-
clusions:

(a) that the student engaged in one or more acts of inten-
tional misconduct . . .;

(b) that the student’s misconduct, because of its severity or a
pattern of similar misconduct, indicates that if the student

153 See Mass. H.R. 178; see also H.R. 3435, 2009 Leg., 186th Sess. (Mass. 2009) (narrow-
ing the types of felonies within the scope of the law, providing explicit guidance to admin-
istrators in the substantial detrimental effect determination, providing a ninety-day cap on
felony exclusions, and requiring other Commonwealth schools to admit a student who has
been excluded pursuant to 37H½ after the exclusion period has ended).
154 See H.R. 3435 Hearing, supra note 17 (statement of Peter Hahn, Co-Chair, Juvenile
and Child Welfare Section Council of the Massachusetts Bar Association); see also id.
(statement of Phillip Kassel, Advocacy Director, South Coastal Counties Legal Services).
155 See id. (statement of Peter Hahn, Co-Chair, Juvenile and Child Welfare Section
Council of the Massachusetts Bar Association).
157 See id. The one-year cap also applies to non-felony exclusions. See id.
158 Compare Mass. Gen. Laws ch. 71, § 37H½ (2008) (“Upon expulsion of such stu-
dent, no school or school district shall be required to provide educational services to such
student.”), with Mass. H.R. 178 (“A school committee shall not exclude a student from
public schools for any period in excess of one year . . . .”).
159 See Mass. H.R. 178; supra notes 121–124 and accompanying text.
remains in school, the student is likely to engage in further misconduct threatening the institutional and personal security necessary for the learning and teaching environment, or that the student is likely to engage in illegal dealings in controlled substances and promote illegal drug use on school premises; and

(c) that there is a clear nexus between the student’s misconduct and the general welfare of the school.\textsuperscript{160}

Such clarity regarding when a student’s continued presence in school would constitute a substantial detrimental effect prevents the dangerousness determination from collapsing into the felony charge or conviction, as it often does under the current law.\textsuperscript{161}

Furthermore, House Bill 178 would require principals to issue written decisions when a student is excluded after a dangerousness determination.\textsuperscript{162} The decisions would need to “demonstrate that the standards required . . . have been considered and evaluated” and would need to be in the form of “a narrative reflecting an individualized analysis, specific to the student, that sets out whether and how the preponderance of the evidence supports the conclusion that the student should be excluded . . .”\textsuperscript{163} Written decisions would help ensure that a student is excluded only for reasons related to school safety and only after careful consideration and proper procedural steps.\textsuperscript{164}

Fourth, House Bill 178 requires a hearing in advance of or shortly after the start of any exclusion and provides detailed requirements for a

\textsuperscript{160} Mass. H.R. 178. House Bill 3435, proposed in 2009, limited the scope of the law to reach only felonies involving violence toward a person, the use of a dangerous weapon, sexual assault, or trafficking in controlled substances. See H.R. 3435, 2009 Leg., 186th Sess. (Mass. 2009). Although the three required considerations of House Bill 178 arguably exclude most of the felonies excluded by House Bill 3435, House Bill 178 is not explicit. Compare id. (listing specific felonies that bring a student within the reach of the law), and Mich. Comp. Laws § 380.1311(2) (2005) (limiting expellable offenses to weapons possession, arson, and criminal sexual conduct), with Mass. H.R. 178 (requiring a determination of a nexus between the misconduct and the general welfare of the school).

\textsuperscript{161} See Doe v. Superintendent of Sch. of Stoughton, 767 N.E.2d 1054, 1058 (Mass. 2002).

\textsuperscript{162} Mass. H.R. 178.

\textsuperscript{163} Id.

\textsuperscript{164} See id.; see also H.R. 3435 Hearing, supra note 17 (statement of Dan French, Executive Director, Center for Collaborative Education); id. (statement of Phillip Kassel, Advocacy Director, South Coastal Counties Legal Services) (“The requirement that a principal go down a checklist and write a reasoned decision creates no burden that does not already exist for the conscientious disciplinarian.”).
fair hearing.\footnote{Compare Mass. H.R. 178 (requiring a hearing in advance or shortly after the start of any exclusion of ten days or more), with Mass. Gen. Laws ch. 71, § 37H½ (2008) (requiring a hearing only if the student appeals the suspension to the superintendent).} House Bill 178 requires that the school conduct a hearing “within ten calendar days of any pre-hearing decision to exclude a student.”\footnote{See Mass. H.R. 178.} If an administrator makes a written determination that there is substantial evidence that “the student will engage in further misconduct, or incite others to misconduct, which is violent or which threatens violence if the student is not immediately barred from school premises,” the administrator may exclude the student immediately.\footnote{See id.} In cases of immediate exclusion however, the school must hold a hearing within five days of the alleged misconduct.\footnote{See id.} Whether the hearing occurs within five or ten calendar days of the alleged misconduct, House Bill 178 requires that the school provide written notice to the student at least three days in advance of the hearing.\footnote{See id.} Such notice must set forth the student’s procedural rights at the hearing, which include the right to bring an attorney, the right to cross-examine witnesses, and the right to examine the evidence that the school relied upon in assessing whether the alleged conduct occurred and in making the dangerousness determination.\footnote{See id.}

Fifth, House Bill 178 requires principals to “develop a school-wide education service plan for all students who are excluded from school for more than ten consecutive school days.”\footnote{See Mass. H.R. 178.} Requiring principals to provide alternative education to students who are excluded for more
than ten days will prevent any student from being “expelled to nowhere” and will ensure that the student’s education continues during the period of exclusion.\footnote{172}{See id. Although alternative education programs present another set of risks that a student will not receive a minimally adequate education, some education is preferable to no education at all. See generally Barbour, supra note 64 (arguing that alternative education programs infringe upon the right to a minimally adequate education).}

Although House Bill 178 represents a significant improvement upon current practices, further changes are necessary in order to ensure that 37H½ only applies to students whose presence poses a serious threat to the school community.\footnote{173}{See, e.g., Mich. Comp. Laws § 380.1311(2) (2005) (limiting expellable offenses to weapons possession, arson, and criminal sexual conduct); H.R. 3435, 2009 Leg., 186th Sess. (Mass. 2009) (limiting expellable offenses to violence towards a person, use of a dangerous weapon, sexual assault, or trafficking in controlled substances and requiring consideration of non-exclusionary alternatives); supra note 160.} First, even if principals consider the required elements before making a dangerousness determination, there is no guarantee that a student who has committed a non-violent felony will not be excluded.\footnote{174}{Compare Mass. H.R. 178 (applying to all felonies), with Mass. H.R. 3435 (limiting expellable offenses); supra note 160.} Section 37H½ would better protect students’ ability to stay in school if it limited the types of felonies that triggered potential exclusion.\footnote{175}{See Mass. H.R. 3435 (limiting expellable offenses); see also § 380.1311(2) (limiting expellable offenses); supra note 160.} In addition, principals should be required to consider alternatives to exclusion before removing a student from school after a felony charge or conviction.\footnote{176}{See Mass. H.R. 3435. House Bill 3435 would have required principals to consider several factors in advance of exclusion, including whether the incident occurred in or near school; whether the conduct was defensive; whether similar conduct is likely in the future; and whether transfer—as opposed to exclusion—would lessen the threat posed by the student’s presence in school. Id. Other factors include “whether no[n]-exclusionary alternatives to suspension and expulsion are appropriate”; “whether other students from the school were involved”; “whether the conduct was egregious and involved violence or threats of violence causing or capable of causing serious bodily harm”; “the student’s relative culpability given his or her chronological and developmental age and ability to understand the consequences of the misconduct”; “whether the student has been identified or been referred for evaluation for special needs”; “whether it was the student’s intention to cause or create fear of serious bodily harm”; whether the incident involved a weapon and more than two students or the use of a dangerous weapon; and, if drugs were involved, the “relative seriousness of the controlled substance involved and the quantity found in the student’s possession.” Id. Many of these considerations have more to do with exclusions pursuant to section 37H (which addresses weapon and drug exclusions, not felony exclusions), but the list of factors is instructive because it requires nuanced consideration of the circumstances instead of a mechanical determination to exclude a student. See id.} Especially if all felonies trigger potential action under 37H½, principals should be required to engage...
in a nuanced consideration of the alleged conduct, the student’s past behavior in school, and the actual risks to the school community.\textsuperscript{177}

In addition to legislative reform, schools and teachers across the state can take other steps to decrease the long-term consequences for students who come within the reach of 37H\textsuperscript{1/2}.\textsuperscript{178} Educators should lessen reliance on zero tolerance policies such as 37H\textsuperscript{1/2} and increase reliance on in-school counseling, parent communication, mediation, and behavioral modification techniques.\textsuperscript{179} Not only would this decrease the number of students who misbehave during the school day, but it would also have a positive effect on students’ out-of-school behavior and consequently, on the number of students who commit felonies.\textsuperscript{180}

Furthermore, lawmakers and school officials need to remember that children are different from adults—physically, mentally, socially, and emotionally.\textsuperscript{181} After a felony charge or conviction, a juvenile must be able to learn from his or her mistakes and decide to become a productive member of society.\textsuperscript{182} Education is a prerequisite to exercising other constitutional rights, to gaining employment, to service in the military, and to other basic functions of citizenship.\textsuperscript{183} The fundamental importance of education in the life of every American dictates that, before taking it away, the government must meet a higher burden than 37H\textsuperscript{1/2} currently requires.\textsuperscript{184}

**Conclusion**

Section 37H\textsuperscript{1/2} was passed in a panic about school safety but has had hidden consequences since its inception, depriving far too many students of their right to a minimally adequate education. The disproportionate effect on minority students and the lack of alternative education in many cities and towns raises further questions about the law’s wisdom. In addition, citizens without a basic education are not pre-

\textsuperscript{177} See id. (requiring consideration of several non-exclusionary alternatives). Although factors (a) through (c) in House Bill 178, required as part of the dangerousness determination, address these concerns somewhat, they do not do so explicitly. See Mass. H.R. 178; supra note 160 and accompanying text.

\textsuperscript{178} See Wald, supra note 33.

\textsuperscript{179} See id.; Act Out, Get Out?, supra note 30, at 21.

\textsuperscript{180} See Wald, supra note 33.

\textsuperscript{181} See Roper v. Simmons, 543 U.S. 551, 569–75 (2005) (noting juveniles’ lack of maturity, their susceptibility to outside influences and peer pressure, and their still-developing character).

\textsuperscript{182} See DeMarco, supra note 21, at 571.


pared to fully exercise other constitutional rights, are unqualified for most careers, and cannot join the military or go to college. Pursuant to 37H\(\frac{1}{2}\), over 1600 Massachusetts students have begun their journey into the uneducated underclass, a journey that may begin with something as foolish as stealing a bag of chips.

Though 37H\(\frac{1}{2}\) is either unknown or popular in Massachusetts, the law has had severe consequences for communities. The excluded students of today are the repeat offenders of tomorrow and will crowd the Commonwealth’s prisons for many years to come. Despite the fact that educating a child for one year costs less than imprisoning that same child for one year, communities are excluding students at alarming rates without regard to the long-term consequences.

Section 37H\(\frac{1}{2}\) must be amended. The law must protect schools’ ability to keep students safe, but it must also reflect the reality that children make mistakes and should not lose the opportunity to obtain a minimally adequate education after “one act of childish misconduct.”\(^{185}\) House Bill 178 provides the legislature with the opportunity to clarify the procedures that educators must follow in order to exclude a student and to ensure that exclusions balance the need for safe schools with students’ interests in continued education.

\(^{185}\) See *Education on Lockdown: The Schoolhouse to Jailhouse Track*, supra note 21, at 7.
Table 1: 1993–2003 Statistics*

<table>
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<th>School Year</th>
<th>Total Student Population by Race (%)</th>
<th>All Exclusions by Race (%)</th>
<th>$37H\frac{1}{2}$ Exclusions (#)</th>
<th>General education students receiving alternative education (%)</th>
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* The Massachusetts Department of Elementary and Secondary Education (DESE) keeps statistics on the racial makeup of the student population in Massachusetts public schools. See Student Data, Mass. Department of Elementary & Secondary Educ., http://profiles.doe.mass.edu (follow “State Profile” hyperlink; then follow “Students” tab; then use arrows to navigate from year to year) (last visited Apr. 3, 2011). The data in the column labeled “All Exclusions by Race” was computed by dividing the number of African American (AA), Hispanic (H), or white (W) students expelled each year by the total number of expulsions each year. See Student Exclusions, Mass. Department of Elementary & Secondary Educ., http://www.doe.mass.edu/infoservices/reports/exclusions (follow hyperlinks for each year’s report) (last visited Apr. 3, 2011). The data on the number of exclusions pursuant to $37H\frac{1}{2}$ and the number of general education students receiving alternative education is contained in the DESE’s yearly reports as well. See id. All data about Asian and Native American students has been omitted from these calculations.

Table 2: 2004–2010 Statistics*

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<th>School Year</th>
<th>Total Student Population by Race (%)</th>
<th>$37H\frac{1}{2}$ Exclusions by Race (%)</th>
<th>$37H\frac{1}{2}$ Exclusions (#)</th>
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* See E-mail from Mass. Dep’t of Elementary & Secondary Educ. (DESE) Admin., to author (Jan. 10, 2011, 14:07 EST) (on file with author) (providing a link to the 2004–2010 statistics that was live for seven days, in response to an e-mail sent to data@doe.mass.edu); 2010 E-mail from DESE Admin., supra note 61; Student Data, Mass. Department of Elementary & Secondary Educ., http://profiles.doe.mass.edu (follow “State Profile” hyperlink; then follow “Students” tab; then use arrows to navigate from year to year) (last visited May 8, 2011). All data about Asian and Native American students has been omitted from these calculations.
THE RIGHT TO UNDERSTAND YOUR DOCTOR: PROTECTING LANGUAGE ACCESS RIGHTS IN HEALTHCARE

Lily Lo*

Abstract: The current federal landscape governing language access in healthcare provides for inadequate enforcement and compliance. This Note examines existing language access laws to determine the legal rights of limited English proficiency (LEP) individuals to obtain healthcare services. This Note explores California’s progressive work in ensuring language access rights for LEP individuals and recommends that states model their language access legislation after California’s to guarantee language access in healthcare settings. Such legislation would remove barriers and promote greater access to healthcare for LEP patients.

Introduction

Thirteen-year-old Gricelda Zamora, the child of Spanish-speaking parents, often acted as family translator whenever the Zamora family interacted with the English-speaking outside world.1 When, however, young Gricelda developed severe abdominal pain, requiring a trip to Mesa Lutheran Hospital in Arizona, the family found itself without an interpreter.2 Gricelda herself was too ill to speak.3 Although the hospital subscribed to a telephone translation service, it did not provide an interpreter for Gricelda’s Spanish-speaking parents.4 The emergency department physician diagnosed Gricelda with gastritis and discharged her.5 The doctor informed Gricelda’s parents in English that they should bring her back to the hospital if her condition deteriorated.6

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1 Alice Hm Chen et al., The Legal Framework for Language Access in Healthcare Settings: Title VI and Beyond, 22 J. Gen. Internal Med. 362, 362 (2007).
3 Scioscia, supra note 2.
4 Chen et al., supra note 1, at 362; Scioscia, supra note 2.
5 Scioscia, supra note 2.
6 Chen et al., supra note 1, at 362.
Otherwise, they should schedule a doctor’s appointment in three days.\footnote{Scioscia, \textit{supra} note 2.} Gricelda’s parents, however, with their limited English, believed that the doctor had instructed them to wait three days before returning.\footnote{Chen et al., \textit{supra} note 1, at 362.} Two days later, Gricelda’s pain worsened, and her parents brought her back to the emergency department a second time where she was diagnosed with a ruptured appendix.\footnote{Id.} The hospital arranged for Gricelda to be airlifted to a medical center in Phoenix.\footnote{Id.} Unfortunately, the diagnosis came too late, and Gricelda died shortly thereafter.\footnote{Id.}

Romualdo Rivera, who was also primarily Spanish-speaking, arrived at the emergency department at Temple University Hospital in Philadelphia, complaining of chest pains.\footnote{Hospital Interpreters Bridge Language Gaps, Lower Risks, USA TODAY (Nov. 21, 2004), http://www.usatoday.com/news/health/2004-11-21-hospital-translators_x.htm.} With the help of a hospital-provided interpreter, Romualdo was able to communicate effectively with the examining physician regarding his condition.\footnote{Id.} In addition, the physician was able to gather an adequate medical history because he was able to ask questions and receive answers with the interpreter’s assistance.\footnote{Id.} Consequently, the doctor determined that the source of Mr. Rivera’s pain was not his heart, but his stomach.\footnote{Id.} These divergent experiences demonstrate the critical importance of language access and the benefits to all parties.\footnote{Id.}

Unfortunately, miscommunications due to language barriers make stories like Gricelda’s all too common.\footnote{See Chen et al., \textit{supra} note 1, at 362; Hospital Interpreters Bridge Language Gaps, Lower Risks, \textit{supra} note 12.} Even worse, many more individuals are unable to obtain healthcare at all as a result of language barriers.\footnote{See, \textit{e.g.}, Eliza Barclay, \textit{Speaking the Same Language: Medical Providers Struggle to Communicate with Immigrant Patients}, WASH. POST, Apr. 21, 2009, at F1.} While access to healthcare is a significant challenge across the country, healthcare access problems are especially acute for minorities and immigrants.\footnote{Leighton Ku & Demetrios G. Papademetriou, Access to Health Care and Health Insurance: Immigrants and Immigration Reform, in \textit{Securing the Future: U.S. Immigrant Integration Policy} 83, 83 (Michael Fix ed., 2007). See generally Migration Pol’y Inst., http://www.mi-
health insurance are the primary obstacles to healthcare services, cultural and linguistic barriers exacerbate these problems for growing minority and immigrant communities.\textsuperscript{20}

The United States has always been a nation of immigrants, but it has become even more diverse in recent years, with more than thirty-seven million Americans born in foreign countries.\textsuperscript{21} According to the U.S. Census, almost fifty-five million people—nearly nineteen percent of the U.S. population—speak a language other than English at home.\textsuperscript{22} Moreover, hundreds of languages are spoken across the country.\textsuperscript{23}

As racial and ethnic diversity in the United States continues to increase, so does the need for effective language services to assist individuals with limited English proficiency (LEP).\textsuperscript{24} LEP individuals include “persons born in other countries, some children of immigrants

\textsuperscript{20} Susan Okie, \textit{Immigrants and Health Care—At the Intersection of Two Broken Systems}, 357 \textit{New Eng. J. Med.}, 525, 525 (2007); Cunningham & Felland, supra note 19, at 1, 2; Sarita A. Mohanty, \textit{Unequal Access: Immigrants and U.S. Health Care}, \textsc{Immigr. Pol’y Focus}, 1, 6 (July 2006), http://www.immigrationpolicy.org/sites/default/files/docs/Unequal Access.pdf. The recent health reform, entitled the Patient Protection and Affordable Care Act (PPACA), attempts to achieve universal coverage through an individual mandate imposed on citizens and legal immigrants. \textit{See Wash. Post, Landmark: The Inside Story of America’s New Health Care Law and What It Means for Us All} 1, 7, 85 (2010). Notably, PPACA does not address the coverage gap for illegal immigrants because it does not require them to comply with the individual mandate and furthermore does not allow them to purchase insurance from the state-based exchanges. \textit{See id.} at 88.


\textsuperscript{22} \textit{Id.}


\textsuperscript{24} Mohanty, supra note 20, at 6.
born in the United States, and other non-English or limited English proficient persons born in the United States, including some Native Americans.”

Thus, LEP individuals include both native-born and naturalized citizens, permanent residents, and illegal immigrants.

Communication is essential to the effective delivery of healthcare. Widespread language access will not only increase access to healthcare for LEP patients, but it will also improve the quality and cost-effectiveness of that care. Surgeon and writer Dr. Pauline Chen notes, “Patients who speak English poorly or not at all face longer hospital stays, an increased risk of misdiagnoses and medical errors, and decreased access to acute and preventative care services, often regardless of socioeconomic or insurance status.”

The oft-cited excuse that language access services are cost-prohibitive fails to acknowledge the many economic benefits of providing such services. Effective communication necessarily results in greater efficiency, both in terms of time and resources. More accurate diagnoses would provide for decreased lengths of stay and facilitate patient turnover at hospitals. Moreover, fluid conversation between patient and doctor would eliminate unnecessary diagnostic tests and thus reduce costs. Language access services also lead to increased patient satisfaction and more efficient resource utilization. Patients who need interpretation assistance are generally more satisfied with professionally trained medical interpreters than when family or friends help interpret.

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26 See id.
32 See id. at 3.
33 Id. at 2.
34 Id. at 2–3.
35 Id. at 2.
The need for language access services stems not only from social responsibility, but also from a legal responsibility. Part I of this Note provides an overview of the legal framework supporting the mandate for language access in healthcare. Part II identifies problems and failures due to inadequate and inconsistent federal enforcement and implementation of appropriate and effective language access services. Part III details efforts of both states and private institutions to complement the federal landscape governing language access services in healthcare. Part IV examines California’s language services program as a potential model to emulate. Finally, Part V suggests that other states adopt legislation, similar to California’s, to protect the healthcare access rights of LEP individuals in the United States.

I. Legal Authority

A. A Federal Mandate

A mix of federal and state laws governs language access rights in the healthcare setting. Although no congressional act expressly prohibits language discrimination, section 601 of Title VI of the Civil Rights Act of 1964 has been interpreted to protect against language discrimination. The clause provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination.”

36 See Chen et al., supra note 1, at 362. An economic argument also exists to support increased immigrant access to healthcare. See Mohanty, supra note 20, at 1. LEP individuals are “less likely to use primary and preventive care services and more likely to use emergency rooms.” Perkins, supra note 23, at 3. Additionally, delays in treatment could result in more serious conditions and subsequent treatment that is both less effective and more costly. Mohanty, supra note 20, at 6.

tion under any program or activity receiving Federal financial assistance." Title VI specifically applies to federally funded programs or activities, which in the healthcare context include hospitals, physicians, clinics, nursing homes, social service agencies, and other medical entities that receive federal funding. As a result, much of the healthcare industry is subject to the language access mandate.

The federal government and its agencies have also interpreted Title VI to mandate that recipients of federal aid provide language assistance. Thus, the Civil Rights Act of 1964 is arguably the most important piece of federal legislation to provide a legal right to language access services.

B. Federal Enforcement of the Language Access Mandate

On August 11, 2000, President Bill Clinton issued Executive Order 13,166, entitled “Improving Access to Services for Persons with Limited English Proficiency.” The Executive Order effectively required each federal agency to “develop and implement a system by which LEP persons can meaningfully access [the] services [it provides].” Moreover, each agency was tasked with the goal of ensuring that recipients of federal aid also provide meaningful access for LEP individuals. Overall, the result was a heightened awareness of the language access issue with respect to LEP individuals.

40 Chen et al., supra note 1, at 363; Allison Keers-Sanchez, Commentary, Mandatory Provision of Foreign Language Interpreters in Health Care Services, 24 J. LEGAL MED. 557, 563 (2003). Due to the limitations of Title VI, this Note assumes that hospitals and other medical entities are federally funded. See 42 U.S.C. § 2000d. To the extent that a healthcare facility does not receive any federal funds, it may nonetheless be subject to state regulations. See infra Part III.A. Private facilities are not implicated, but may be subject to common law tort liability. See infra Part III.C.
41 See Chen et al., supra note 1, at 363; Keers-Sanchez, supra note 40, at 563.
42 See, e.g., 45 C.F.R. § 80.3(b)(2) (2010) (requiring all recipients of federal financial assistance from HHS to provide meaningful access to LEP persons); Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons with Limited English Proficiency; Policy Guidance, 65 Fed. Reg. 50,123, 50,124 (Aug. 16, 2000) ("[T]he significant discriminatory effects that the failure to provide language assistance has on the basis of national origin, places the treatment of LEP individuals comfortably within the ambit of Title VI and agencies’ implementing regulations.").
43 Chen et al., supra note 1, at 362.
45 Id.
46 Id.
47 See Chen et al., supra note 1, at 363.
In coordination with Executive Order 13,166, the Department of Justice (DOJ) issued a policy guidance document ("the LEP Guidance") that detailed the compliance standards that all federal aid recipients must meet in order to fulfill their Title VI obligations and to ensure that their programs and activities are accessible to LEP individuals. 48 Notably, the legal responsibility to provide language assistance has a wide reach, spanning across areas as diverse as education and police protection. 49 In the LEP Guidance, the DOJ set forth its understanding that Title VI requires federal aid recipients to "take reasonable steps to ensure 'meaningful' access to the information and services they provide." 50 "Reasonable steps" were to be defined in consideration of four factors: (1) the number or proportion of LEP individuals in comparison to the total number of individuals served; (2) the frequency of contact with the program; (3) the nature and importance of the program; and (4) the resources available to the recipient. 51


51 Id. at 50,124–25. Analysis of each of the four factors would determine the extent to which language assistance should be provided such that, the greater the number or proportion of LEP persons, the more likely language services are needed[,] . . . the more frequent the contact with a particular language group, the more likely that interpreting or translating services in that language are needed[,] . . . the more important the recipient's service or program, the more likely language services are needed[,] . . . [and] smaller recipients with more limited budgets are not expected to provide the same level of language services as larger recipients with larger budgets.

Chen et al., supra note 1, at 363. The third factor in the DOJ's policy guidance document—the nature and importance of the program—affirms the need for language services in the healthcare context at a time when healthcare has become increasingly important and there is a burgeoning movement towards healthcare as a "right." See Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons with Limited English Proficiency; Policy Guidance, 65 Fed. Reg. at 50,125; Transcript of Second McCain, Obama Debate, CNN (Oct. 7, 2008), http://www.cnn.com/2008/POLITICS/10/07/presidential.debate.transcript/ (declaring that healthcare should be a right for every American). The DOJ clearly had healthcare in mind when it required further steps from programs with "life or death implications." See Enforcement of Title VI of the Civil Rights Act of 1964—National
Together, these factors balance the benefits of requiring language assistance against the risks of imposing cost-prohibitive burdens on smaller entities such as local governments and small businesses. In addition to the four factors specified by the DOJ, the LEP Guidance advises recipients to consider the extent to which written or oral language services are necessary to ensure meaningful access for LEP individuals.

Consistent with Executive Order 13,166, the U.S. Department of Health and Human Services (HHS) also issued its own policy guidance document two weeks later. In doing so, HHS substantially adopted the DOJ’s model, providing guidance to enable recipients to understand their own obligations as well as a framework for evaluating compliance. Specifically, HHS requires recipients to provide oral and written language assistance at no additional cost to LEP individuals.

With regard to oral interpretation, the HHS policy guidance document describes a range of oral language assistance options, both formal and informal. Although HHS notes that friends and family members, including minor children, can serve as interpreters, it explicitly warns that a federal fund recipient “may expose itself to liability under Title VI if it requires, suggests, or encourages” the use of such persons. Moreover, recipients must ensure that competent, but not necessarily formally certified, interpreters are made available.

In addition, the HHS policy guidance document calls for the written translation of “vital” materials in languages other than English. To

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55 See id. at 52,765.

56 Id. at 52,768.

57 Id. at 52,766–67.

58 Id. at 52,769.


60 Id. at 52,767. A vital document “contains information that is critical for accessing the federal fund recipient’s services and/or benefits, or is required by law.” Id. at 52,773. The revised HHS policy guidance states that the classification of a document as “vital” is dependent on a number of factors such as “the importance of the program, information,
provide some certainty to recipients, the HHS policy guidance document contains a safe harbor provision for written translations.\textsuperscript{61} According to the 2003 revised policy guidance, the safe harbor provision creates a presumption of compliance whenever an entity “provides written translations of vital documents for each eligible LEP language group that constitutes five percent or 1000, whichever is less, of the population of persons eligible to be served or likely to be affected or encountered.”\textsuperscript{62} However, if fewer than fifty LEP persons activate the five percent trigger, the entity can still receive safe harbor protection if it “provides written notice in the primary language of the LEP language group of the right to receive competent oral interpretation of those written materials, free of cost.”\textsuperscript{63} As a result, recipients who follow the suggestions of the provision can generally be assured of their compliance with the written translation requirements of Title VI.\textsuperscript{64} Nevertheless, failure to adhere to the safe harbor provision does not signify noncompliance.\textsuperscript{65}

To enforce Title VI of the Civil Rights Act, HHS maintains an administrative enforcement mechanism through its Office for Civil Rights (OCR).\textsuperscript{66} OCR has authority to investigate complaints regarding language barriers, as well as to initiate its own investigations.\textsuperscript{67} When a federal fund recipient violates its Title VI obligation, OCR will first attempt to negotiate a settlement before withholding federal funds for noncompliance.\textsuperscript{68}

In addition to promulgating LEP guidance concerning language access, HHS, through its Office of Minority Health, has also developed language access standards specific to healthcare organizations.\textsuperscript{69} The National Standards on Culturally and Linguistically Appropriate Ser-
vices in Health Care were devised to “correct inequities that currently exist in the provision of health services and to make these services more responsive to the individual needs of all patients [and] consumers.”\textsuperscript{70} The standards were developed through an intense research, public comment, and review process.\textsuperscript{71} Standards four through seven address language services and govern federal fund recipients because they are rooted in Title VI.\textsuperscript{72}

C. Limitation of the Right to Bring a Discrimination Claim Under Title VI

In general, both the DOJ and HHS policy guidelines reflect an understanding that Title VI prohibits intentional discrimination as well as discrimination based on disparate impact.\textsuperscript{73} Specifically, they prohibit federal aid recipients from “utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin.”\textsuperscript{74}

The Supreme Court’s decision in Alexander v. Sandoval, however, eliminated a private right of action under Title VI based on disparate

\begin{itemize}
  \item 4) Health care organizations must offer and provide language assistance services, including bilingual staff and interpreter services, at no cost to each patient/consumer with limited English proficiency at all points of contact, in a timely manner during all hours of operation
  \item 5) Health care organizations must provide to patients/consumers in their preferred language both verbal offers and written notices informing them of their right to receive language assistance services
  \item 6) Health care organizations must assure the competence of language assistance provided to limited English patients/consumers by interpreters and bilingual staff. Family and friends should not be used to provide interpretation services (except on request by the patient/consumer)
  \item 7) Health care organizations must make available easily understood patient-related materials and post signage in the languages of the commonly encountered group and/or groups represented in the service area
\end{itemize}

Paras, supra, at 60; see National Standards on Culturally and Linguistically Appropriate Services (CLAS) in Health Care, 65 Fed. Reg. at 80,875–76.

\textsuperscript{73} See 45 C.F.R. § 80.3(b)(2) (2010). While intentional discrimination requires intent, actions with a disparate impact may be unintentional but nonetheless adversely affect or limit a particular group. See Alexander v. Sandoval, 532 U.S. 275, 285–86 (2001) (distinguishing the discriminatory effect justifying relief in Lau from the discriminatory intent now required for a Title VI claim).

\textsuperscript{74} 45 C.F.R. § 80.3(b)(2).
impact.\textsuperscript{75} Relying on the absence of congressional intent, the Court held, in a five-to-four decision, that an individual could only bring a Title VI claim in cases of intentional discrimination.\textsuperscript{76} Nonetheless, the Court hinted that an individual may be able to bring a course of action based on a disparate impact theory in state court.\textsuperscript{77}

Thus, the Court rejected its earlier interpretation that Title VI protected against more than just intentional discrimination.\textsuperscript{78} The dissent, however, criticized the majority for improperly rejecting established precedent and interpreting the statute in a way that “[did] violence to both the text and the structure of Title VI.”\textsuperscript{79} The dissent further argued that, as recognized in prior cases, Congress did intend to include a private right of action for disparate impact cases.\textsuperscript{80}

Nevertheless, as a result of the majority’s ruling in \textit{Sandoval}, a plaintiff must show that the federal fund recipient acted with discriminatory intent in failing to provide language services.\textsuperscript{81} This is significantly more difficult than proving disparate impact discrimination because the individual must show that the recipient both intended to discriminate and knew that it was discriminating against the individual.\textsuperscript{82} Because

\begin{itemize}
  \item[75] \textit{Sandoval}, 532 U.S. at 285. In \textit{Sandoval}, the plaintiff brought a Title VI claim against the Alabama Department of Public Safety for offering driver’s license examinations exclusively in English. \textit{Id.} at 279. She claimed that the department’s failure to provide the test in Spanish had a disparate impact on non-English speakers. \textit{Id.}
  \item[76] \textit{Id.} at 277, 285, 289.
  \item[77] \textit{See id.} at 287 (“'Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.'” (quoting \textit{Lampf v. Gilbertson}, 501 U.S. 350, 365 (1991))).
  \item[78] \textit{Id.} at 285. In \textit{Lau v. Nichols}, Chinese students who could not speak English brought suit against the San Francisco school system for neglecting to provide supplemental English language instruction. 414 U.S. at 564. The Court determined that the students had a right under Title VI to receive bilingual education such that they would be afforded a meaningful opportunity to participate in the educational system. \textit{Id.} at 566, 568. Thus, under \textit{Lau}, federal fund recipients are required to ensure that language barriers do not exclude non-English speaking individuals from meaningful participation in their benefits and services. \textit{Id.} at 566–68. Notably, the Court did not question \textit{Lau}’s interpretation of Title VI’s national origin clause to prohibit discrimination on the basis of language. Perkins, \textit{supra} note 23, at 7.
  \item[79] \textit{Sandoval}, 532 U.S. at 294, 304 (Stevens, J., dissenting).
  \item[80] \textit{Id.} at 297 (discussing \textit{Cannon v. Univ. of Chi.}, 441 U.S. 677 (1979)).
  \item[81] \textit{See id.} at 285 (majority opinion).
  \item[82] Perkins, \textit{supra} note 23, at 6. As one practitioner noted, “Such a showing [of intentional discrimination] is an almost impossible burden of proof that makes the law useless for dealing with the current manifestations of discrimination.” Gordon Bonynman, \textit{Dynamic Conservatism and the Demise of Title VI}, 48 \textit{St. Louis U. L.J.} 61, 71 (2003). A disparate impact claim requires a plaintiff to show that a facially neutral practice, adopted without discriminatory intent, has a disproportionate impact on a protected class. Mona T. Peter-
Sandoval did not explicitly void Title VI disparate impact regulations, however, federal agencies continue to enforce LEP regulations through their own civil rights offices in cases of disparate impact.83

D. Other Federal Laws Governing Language Access

Beyond Title VI, an array of federal requirements ensures the provision of language access services.84 Notably, the Hospital Survey and Construction Act requires hospitals to improve language access in healthcare.85 Moreover, government-funded health insurance programs such as Medicaid, Medicare, and the Children’s Health Insurance Program have functioned as vehicles for the expansion of language access services within healthcare delivery.86 For example, Medicaid promotes the availability of language assistance services by offering federal matching funds to states.87

The Hospital Survey and Construction Act, popularly known as the Hill-Burton Act, was enacted in 1946 to provide federal grants and loans to facilitate the physical “construction and modernization” of the nation’s public and nonprofit hospitals.88 Widespread access to healthcare was a critical goal of the legislation.89 Facilities that receive Hill-Burton funding are subject to a “community service” obligation, which requires the recipient to make services “available to all persons residing . . . in the facility’s service area without discrimination on the ground of race, color, national origin, creed, or any other ground unrelated to an individual’s need for the service or the availability of the needed service in the facility.”90 OCR, in enforcing the Hill-Burton Act, has interpreted

84 See Paras, supra note 72, at 36–58 (summarizing key language access laws, policies, and requirements in Appendix C).
85 See id. at 41.
86 See id. at 41–42.
87 Chen et al., supra note 1, at 365. Still, each state retains the discretion to decide “whether and how its Medicaid program will provide reimbursement for interpreting, and providers cannot receive payments for these services unless the state chooses to provide them.” Id.
the non-discrimination provision to require hospitals to provide language assistance services to LEP patients.\textsuperscript{91} Past OCR administrative remedies have required hospitals to “[e]stablish procedures for communicating with LEP patients at all hours of a facility’s operation” and to “[n]otify patients that interpretive services are available,” among other things.\textsuperscript{92}

\textbf{II. LIMITATIONS OF EXISTING FEDERAL ENFORCEMENT MECHANISMS}

Federal enforcement mechanisms for securing non-discriminatory language access have long been criticized for being inefficient and inadequate.\textsuperscript{93} First, the federal government has little power to compel private actors, such as insurers and physicians, to provide language access services to LEP individuals because such actors do not receive federal funds.\textsuperscript{94} Although many private physicians do receive Medicare payments, they are excluded from Title VI’s reach because Medicare payments are not considered federal financial assistance.\textsuperscript{95}

Additionally, as noted earlier, an individual only has a cause of action for intentional discrimination because \textit{Sandoval} limits an individual’s judicial options.\textsuperscript{96} Beyond that, an LEP patient’s only recourse against a federal fund recipient who fails to offer needed language services is to file an administrative complaint with the appropriate OCR, which in the healthcare context is the OCR of the Department of Health and Human Services.\textsuperscript{97} Fortunately, no standing requirements are necessary in order for an individual to file a complaint.\textsuperscript{98} So long as an individual files a timely civil rights complaint, then the complaint will

\begin{itemize}
  \item \textsuperscript{91} See Jane Perkins, \textit{Overcoming Language Barriers to Health Care}, Popular Gov’t, Fall 1999, at 38, 42.
  \item \textsuperscript{92} See Paras, supra note 72, at 41.
  \item \textsuperscript{93} See, \textit{e.g.}, Sidney D. Watson, \textit{Health Care in the Inner City: Asking the Right Question}, 71 N.C. L. Rev. 1647, 1669 (1993).
  \item \textsuperscript{96} Alexander v. Sandoval, 532 U.S. 275, 285, 293 (2001).
  \item \textsuperscript{97} Audrey Daly, Comment, \textit{How to Speak American: In Search of the Real Meaning of “Meaningful Access” to Government Services for Language Minorities}, 110 Penn St. L. Rev. 1005, 1023 (2006); Keers-Sanchez, supra note 40, at 568.
\end{itemize}
be reviewed and investigated.\textsuperscript{99} An investigation may include interviews, document review, and site visits.\textsuperscript{100} Then, OCR will issue a closure letter informing the relevant parties whether the alleged discriminatory act constitutes a violation of federal law.\textsuperscript{101} If OCR finds a violation, the offending entity must take affirmative steps to redress its transgression.\textsuperscript{102} For instance, a federal fund recipient may redesign its language assistance policies and procedures or provide notice to LEP clients regarding the availability of language access services.\textsuperscript{103} If the offending entity fails to take action to correct its violation, OCR may refer the matter to the DOJ for enforcement.\textsuperscript{104} Termination of federal funds is usually the punishment of last resort.\textsuperscript{105}

Although laudable, OCR’s attempts to resolve language access-related problems have been inadequate.\textsuperscript{106} Its complaint process neither remedies specific past offenses of the federal fund recipient nor provides a remedy to the wronged individual.\textsuperscript{107} An OCR investigation will only result in reform to the federal fund recipient’s future practices, providing no actual relief to the LEP individual who was the victim of language discrimination.\textsuperscript{108} Additionally, the development and implementation of language assistance policies and procedures may take a

\textsuperscript{99} Daly, \textit{supra} note 97, at 1023; \textit{How to File a Complaint}, \textit{supra} note 98. A complaint is timely if it is filed within 180 days of the date of the alleged discriminatory act. \textit{How to File a Complaint}, \textit{supra} note 98. Often, legal aid organizations representing an LEP individual will file a complaint. Daly, \textit{supra} note 97, at 1024; \textit{see also} Plantiko, \textit{supra} note 38, at 249 (describing when an Ohio legal services organization brought suit on behalf of LEP patients).


\textsuperscript{101} \textit{Id.}

\textsuperscript{102} \textit{Id.}


\textsuperscript{104} \textit{See How Does OCR Investigate a Civil Rights Complaint?}, \textit{supra} note 100; Perkins, \textit{supra} note 23, at 5.

\textsuperscript{105} \textit{See} Perkins, \textit{supra} note 23, at 5.

\textsuperscript{106} \textit{See} Daly, \textit{supra} note 97, at 1024; Khanijou, \textit{supra} note 95, at 866; Peterson, \textit{supra} note 82, at 1451.


\textsuperscript{108} \textit{See id.} Such remedies include the requirement that federal fund recipients develop an LEP service plan or post translated signs notifying LEP patients about the availability of free interpreter services. Perkins, \textit{supra} note 23, at 13.
long time, and it may take additional time before benefits are realized.\(^{109}\)

Additionally, OCR arguably lacks the resources to fulfill its educational and monitoring functions.\(^{110}\) As a result, much of the agency’s energies are directed towards reactionary measures rather than preventative actions.\(^{111}\) Consequently, at the federal level, OCR is an incomplete enforcement mechanism.\(^{112}\) Thus, despite the federal mandate for language access, there is no proper incentive to provide such services because the law and regulations are not closely monitored and enforced by OCR.\(^{113}\) The federal government needs to do significantly more to enforce the language access rights of LEP individuals to ensure that they are given access to needed healthcare.\(^{114}\)

\(^{109}\) Daly, supra note 97, at 1024.

\(^{110}\) See Sidney D. Watson, Reforming Civil Rights with Systems Reform: Health Care Disparities, Translation Services, & Safe Harbors, 9 Wash. & Lee Race & Ethnic Anc. L.J. 13, 25 (2003) (“Chronically underfunded and understaffed, DHHS/OCR’s Title VI enforcement record is dismal.”); see also Detailed Information on the Health and Human Services—Office for Civil Rights Assessment: Program Performance Measures, ExpectMore.gov, http://www.whitehouse.gov/omb/expectmore/detail/10003523.2005.html#performanceMeasures (last visited May 8, 2011) [hereinafter Performance Measures]. As an office, OCR is responsible for the enforcement of several nondiscrimination statutes in addition to the Health Insurance Portability and Accountability Act, which protects individual privacy of health information. See Detailed Information on the Health and Human Services—Office for Civil Rights Assessment: Questions/Answers (Detailed Assessment), ExpectMore.gov, http://www.whitehouse.gov/omb/expectmore/detail/10003523.2005.html#questions (last visited May 8, 2011). The agency has previously acknowledged that it receives more cases than it is able to resolve in a year. See Performance Measures, supra. As a result, the resolution of civil rights cases may be subject to a lengthy delay. See id. Civil rights complaints requiring formal OCR investigation take significantly longer to resolve than complaints that do not require formal investigation. See id. In 2009, only thirty-one percent of civil rights complaints requiring formal investigation were resolved within 365 days. Office for Civil Rights, FY 2011 Online Performance Appendix, U.S. Department of Health & Hum. Services, 4 (2010), http://www.hhs.gov/ocr/office/about/opa2011.pdf.

\(^{111}\) See Daly, supra note 97, at 1024; Peterson, supra note 82, at 1451.

\(^{112}\) See Daly, supra note 97, at 1024; Khanijou, supra note 95, at 866; Peterson, supra note 82, at 1451.


\(^{114}\) See Chen et al., supra note 1, at 365.
III. FILLING IN THE GAPS

A. State Laws

In addition to federal laws, state laws provide additional protection for LEP individuals in the healthcare setting. All fifty states have adopted measures addressing language access in healthcare settings. Moreover, most states have established agencies or offices to tackle a broad range of minority health issues. The variety of state laws addressing language access and discrimination “is the result of a legislative process driven variably by changing demographics, advocacy groups, adverse outcomes due to language barriers, the political climate of each state, and underlying political agenda.” Not surprisingly, states with significant minority populations have led the drive for minority healthcare reform.

Some states, such as California, have required that healthcare providers offer specific language assistance while other states, such as Illinois, have simply encouraged healthcare providers to improve language access. Others link language access to specific health services. A number of other states link language access requirements

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115 Id. at 363. Some local governments have also taken the initiative to ensure language access services for LEP individuals. See, e.g., Language Access Act of 2004, D.C. CODE ANN. §§ 2-1931 to -1936 (LexisNexis 2001). Notably, the D.C. Language Access Act requires government agencies, departments, programs, and services to provide oral language services to LEP individuals and written translations to any non-English speaking community which makes up the lesser of three percent or 500 individuals of the population served. Id. §§ 2-1932 to -1933.


118 Chen et al., supra note 1, at 364.

119 See Ladenheim & Groman, supra note 117, at 153. In particular, the state legislatures of California, Florida, and Louisiana have been extremely proactive in passing minority health legislation. Id.


121 Chen et al., supra note 1, at 364. For example, several states, such as Arkansas, Kansas, Louisiana, Michigan, Minnesota, Nevada, North Dakota, Oklahoma, Texas, and Virginia have enacted “Women’s Right to Know” Acts, which “typically require information about adoption, fetal pain associated with abortion, and possible detrimental effects of abortion to be translated into non-English languages, often at a much lower threshold
to licensing conditions for specific healthcare facilities. Some states, such as California, New Jersey, and Washington, also require healthcare professionals to undergo cultural competency instruction as part of their continuing education. Furthermore, a small number of states are moving to require the certification of healthcare interpreters in an effort to ensure competent interpretation. Overall, such laws have been piecemeal and inconsistent from state to state. Nonetheless, such laws have supplemented federal legislation, broadening the scope of language access rights.

B. Accreditation Programs

Supplementing federal and state efforts, private accreditation agencies have also pushed to expand language access services through their influence over healthcare providers. These agencies not only accredit healthcare organizations after rigorous review, but also establish standards for quality of care in healthcare delivery. Healthcare organizations and insurance plans willingly subject themselves to agency scrutiny and review because accreditation can boost reputation and provide a competitive market advantage. Additionally, in negligence cases, courts have considered these professional accreditation standards as evidence in defining reasonable care.

than required for other interpretation or translation services." Id. New Jersey requires information on breast cancer to be available in Spanish and English. Id.

122 Id.; Lisa C. Ikemoto, Racial Disparities in Health Care and Cultural Competency, 48 St. Louis U. L.J. 75, 113 (2003). For example, in Colorado, New Jersey, and Rhode Island, medical facilities will not be licensed if they do not provide adequate interpretation services. See Chen et al., supra note 1, at 364 & 367 n.17.

123 Perkins & Youdelman, supra note 116, at 5. For instance, New Jersey requires completion of cultural competency instruction as a condition for both the conferment of a medical school diploma and licensure. See N.J. STAT. ANN. § 45:9-7.3 (West 2004).

124 See Chen et al., supra note 1, at 364–65. For example, the Indiana legislature established an independent commission charged with developing training and practice standards for health interpreters and translators. IND. CODE § 16-46-11-1 (2007). Arguably such legislation is an attempt to remedy situations where an inappropriate person, such as a janitor or young child, is pulled in to interpret for the LEP patient. See Esther B. Fein, Language Barriers Are Hindering Health Care, N.Y. TIMES, Nov. 23, 1997, at 1.

125 Chen et al., supra note 1, at 363.

126 Id.

127 See Paras, supra note 72, at 49.

128 Id.


The Joint Commission, formerly known as the Joint Commission on Accreditation of Healthcare Organizations, is the “largest standards-setting and accrediting body in health care” for healthcare providers.\(^\text{131}\) It develops benchmarks that indicate the level at which safe and effective healthcare should be delivered.\(^\text{132}\) In an acknowledgement of the increasing diversity of patients, the Joint Commission initiated a study entitled “Hospitals, Language, and Culture,” which endeavors to understand the current state of healthcare delivery and develop recommendations for hospitals to cater effectively to culturally and linguistically diverse populations.\(^\text{133}\) In particular, the Joint Commission developed recommended standards to “advance the issues of effective communication, cultural competence, and patient-and family-centered care” in hospitals.\(^\text{134}\) Nevertheless, some existing standards already implicate language assistance—for example, one standard requires organizations to ensure effective communication between the patient and organization.\(^\text{135}\)

The National Committee for Quality Assurance (NCQA) is the primary accrediting program for health plans.\(^\text{136}\) Like the Joint Commission, NCQA also develops quality standards.\(^\text{137}\) In order to receive NCQA accreditation, a health plan must undergo a rigorous onsite and offsite survey process that examines many factors, some of which include language access issues.\(^\text{138}\) Factors include the availability of multilingual providers and the inclusion of policies and procedures concerning language services.\(^\text{139}\) In addition, the NCQA publishes the Healthcare Effectiveness Data and Information Set (HEDIS), a per-
formance-measuring tool, which can be used by potential purchasers to assess a health plan.\textsuperscript{140} Several HEDIS measures relate to the health plan’s provision of language assistance services.\textsuperscript{141} For example, health plans must report the number of multilingual clinicians and the number of multilingual member services staff and must also describe available interpreter services.\textsuperscript{142} The NCQA has further encouraged the delivery of language access services through an award program that recognizes “health plans that have implemented initiatives to improve culturally and linguistically appropriate services and reduce health care disparities.”\textsuperscript{143}

\section*{C. Common Law Tort Liability}

Because Title VI of the Civil Rights Act applies to federally funded programs and activities, much of the healthcare industry is subject to its reach.\textsuperscript{144} Yet, one group, private physicians, is outside the reach of Title VI.\textsuperscript{145} Nevertheless, several longstanding common law obligations could be used to require individual providers to offer language assistance services to facilitate communication.\textsuperscript{146} A failure to provide adequate interpretation services could result in potential medical malpractice actions for inadequate medical care, breach of a patient’s privacy rights, and lack of informed consent.\textsuperscript{147}

An LEP patient could sue an individual physician for medical negligence on the basis of inadequate or inappropriate medical care.\textsuperscript{148} Language barriers could furthermore lead to delayed or inaccurate treatment.\textsuperscript{149} When a physician is unable to communicate with an LEP

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\item \textsuperscript{141} See Paras, \textit{supra} note 72, at 53–54.
\item \textsuperscript{142} See id. at 53.
\item \textsuperscript{145} See Bonnyman, \textit{supra} note 82, at 69 (noting that private physicians are not subject to Title VI). Despite the fact that most private physicians receive Medicare payments, they are not considered recipients of federal funds and thus are not legally responsible under Title VI. \textit{Id.} at 69–70; Khanijou, \textit{supra} note 95, at 866.
\item \textsuperscript{146} See Keers-Sanchez, \textit{supra} note 40, at 558–59.
\item \textsuperscript{147} See \textit{id}.
\item \textsuperscript{148} See \textit{id}. at 559.
\item \textsuperscript{149} See Khanijou, \textit{supra} note 95, at 869; Chen, \textit{supra} note 29. For example, an eighteen-year-old man’s statement that he was “intoxicado,” Spanish for nauseated, was treated for a
\end{itemize}
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patient to obtain vital information, the risk of inadequate medical care and subsequent malpractice liability increases.  

Furthermore, physicians may also breach an LEP patient’s common law right to privacy where an ad hoc interpreter is used in lieu of a professionally trained interpreter. Ad hoc interpreters can be family members, friends, hospital support staff, or other patients who are spontaneously called on to facilitate the conversation between doctor and patient. While ad hoc interpreters serve a useful immediate purpose, they almost always lack the requisite confidentiality training to deal with sensitive health issues. Physicians can overcome this potential liability by ensuring that competent, professional interpreters are available to avoid the need to resort to a janitor or family member and risk violating an LEP patient’s right to privacy.  

Informed consent is yet another area where physicians can be held legally responsible for a failure to provide language assistance to LEP patients. The doctrine of informed consent is based on the theory of a patient’s right to self-determination. As such, a physician is required to disclose information regarding the benefits and risks of treatment alternatives in order to facilitate a patient’s decision. Thus, a patient must both know and understand the risks of the relevant treatment or care in order to consent, which can be difficult if language barriers obstruct effective communication. Obtaining genuine informed consent can be a difficult task even with patients who do in fact speak English. An LEP patient’s inability to fully communicate with his or her physician can lead to misunderstandings, which can

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drug overdose for over thirty-six hours before doctors diagnosed a brain aneurysm. Flores, supra note 17, at 230. As a result of this miscommunication, the young man was rendered a quadriplegic. Id. A subsequent lawsuit resulted in a seventy-one million dollar malpractice settlement with the hospital. Id.  

150 See Flores, supra note 17, at 230. 

151 See Keers-Sanchez, supra note 40, at 562. Most states have recognized that disclosure of confidential medical information can constitute an invasion of an individual’s right to privacy. See, e.g., Commonwealth v. Brandwein, 760 N.E.2d 724, 729 (Mass. 2002).  


153 Flores, supra note 17, at 231.  

154 See id.  

155 See Flinn, supra note 130, at 387, 394.  

156 Id. at 387.  

157 Khanijou, supra note 112, at 870.  

158 See Flinn, supra note 130, at 388–89.  

159 See id. at 386 (noting that informed consent can be difficult to obtain from those who are less educated, illiterate, or incarcerated).
then result in a lack of informed consent. Moreover, the use of an ad hoc interpreter who cannot competently translate medical terminology can also result in a lack of informed consent.

The aforementioned common law concepts constitute basic obligations any patient would expect from his or her physician, that is, an expectation of adequate medical care, respect for privacy, and the provision of enough information to make educated decisions. Fortunately for private physicians, they can easily avoid tort liability with LEP patients by proactively providing translation and interpretation services. The provision of language assistance services would seem a small price to pay to prevent any such liability.

IV. A Possible Solution: The California Model

California, in particular, is known for the volume and strength of its laws and policies in ensuring language access in healthcare. California has its own analog to the 1964 Civil Rights Act. California Government Code section 11135(a) states in pertinent part:

No person in the State of California shall, on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state.

Indeed, California’s Title VI analog is far broader than the federal law because it directly addresses language-based discrimination.
implementing regulations define “ethnic group identification” as “the possession of the racial, cultural or linguistic characteristics common to a racial, cultural or ethnic group.” Thus, California’s specific reference to language makes it clear that LEP status is sufficiently equivalent to ethnic group identification to merit similar protections.

In this way, California’s language access legislation augments existing federal legislation by guaranteeing a right to language access. Thus, while there is limited opportunity for an individual to bring a cause of action under Title VI, California’s analog authorizes a private right of action where a covered entity fails to provide language access services. Furthermore, actions with “the purpose or effect of subjecting a person to discrimination on the basis of ethnic group identification” violate California law. As a result, the California law prohibits both intentional and disparate impact discrimination. The issue in Sandoval is no longer relevant, therefore, because California’s legislation expressly provides a cause of action for disparate impact discrimination. The regulations, moreover, require recipients of state funding “to take appropriate steps to ensure that alternative communication services are available to ultimate beneficiaries.” Thus, by accepting state funding, recipients also assume an affirmative duty to provide interpretation and translation services to LEP individuals.

California Government Code section 11135(a) applies to any entity that is operated or funded by the state, as well as to the state itself and its agencies. The law also authorizes any state agency to create an administrative enforcement mechanism and procedure by which it can investigate any alleged violations and take disciplinary actions.

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169 Id. (emphasis added).
170 See id.
171 See Chen et al., supra note 1, at 363, 364.
172 See Perkins & Youdelman, supra note 116, at 5. The statute was amended in 1999 to include a private right of action. Cal. Gov’t Code § 11139 (West 2005). A covered entity includes any program run or financed by the state. Id. § 11135(a).
174 See id. § 98101(i), (j) (specifically noting that “the purpose or effect” of an action can give rise to a discrimination claim).
175 Compare Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (“Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations . . . .”), with Cal. Code Regs. tit. 22, § 98101(i), (j) (explicitly allowing a private right of action for disparate impact claims).
177 See id.
179 Id. §§ 11136–11138.
In addition, California has robust legislation that serves to improve language access for LEP patients.\textsuperscript{180} For example, the Dymally-Alatorre Bilingual Services Act, enacted in 1973, ensures that Californians are able to make effective use of government services to which they are entitled.\textsuperscript{181} This includes requiring state and local agencies to provide documents explaining their services translated into the languages of clients.\textsuperscript{182} Additionally, when agencies serve a “substantial number of non-English speaking people,” they are mandated to employ “a sufficient number of qualified bilingual persons in public contact positions” to service LEP persons.\textsuperscript{183} For state agencies, a “substantial number” is defined as five percent or more of the population served by the state.\textsuperscript{184} State agencies must conduct biennial surveys to determine the number of bilingual staff and the number and percentage of LEP persons served.\textsuperscript{185} Greater discretion is given to local agencies to determine what constitutes a “substantial number” of LEP persons.\textsuperscript{186} The State Personnel Board ensures agency compliance with the Dymally-Alatorre Bilingual Services Act.\textsuperscript{187} The State Personnel Board also provides guidance to agencies seeking to meet their legal obligations to serve LEP individuals.\textsuperscript{188}

Furthermore, the Kopp Act specifically addresses services to LEP patients with respect to healthcare providers in the state.\textsuperscript{189} Passed with an understanding that “access to basic health care services is the right of every resident of the state, and that access to information regarding

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\item \textsuperscript{180} See Chen et al., \textit{supra} note 1, at 363; Perkins \& Youdelman, \textit{supra} note 116, at 5.
\item \textsuperscript{181} See Dymally-Alatorre Bilingual Services Act, CAL. GOV’T CODE § 7291 (West 2008) (providing “for effective communication between all levels of government in this state and the people of this state who are precluded from utilizing public services because of language barriers”).
\item \textsuperscript{182} See id. §§ 7295, 7295.2.
\item \textsuperscript{183} Id. §§ 7292, 7293. What constitutes “a sufficient number of qualified bilingual [staff] persons” is noticeably undefined and at the agency’s discretion. Plantiko, \textit{supra} note 38, at 251 n.81.
\item \textsuperscript{184} CAL. GOV’T CODE § 7296.2.
\item \textsuperscript{185} Id. § 7299.4(b).
\item \textsuperscript{186} Id. § 7296.2 (applying only to section 7292, which governs state agencies, but not to section 7293, which governs local agencies). In 2001, San Francisco passed an “Equal Access to Services” ordinance, which defines a substantial number of LEP persons as 10,000 city residents or five percent of those who use the department’s services. S.F., CAL., ADMIN. Code §§ 91.1, 91.2(j) (effective June 15, 2001), \textit{available at} http://library.municode.com/HTML/14131/level1/CH911AAC.html.
\item \textsuperscript{187} CAL. GOV’T CODE §§ 7299.2–.6.
\item \textsuperscript{188} See Bilingual Services Program, CAL. ST. PERSONNEL BOARD, http://spb.ca.gov/bilingual/index.htm (last visited May 8, 2011).
\item \textsuperscript{189} CAL. HEALTH \& SAFETY CODE § 1259 (West 2008); Paras, \textit{supra} note 72, at 44.
\end{itemize}
basic health care services is an essential element of that right,” the Kopp Act delineated seven discrete obligations for general acute care hospitals, along with two recommended steps. The obligations include (1) adopting a language services policy; (2) ensuring the availability of interpreter services on site or by phone at all hours; (3) notifying LEP patients and families of the availability of interpreter services; (4) identifying a patient’s primary language in hospital records; (5) preparing a list of qualified interpreters; (6) notifying staff to provide interpreters to all patients who request them; and (7) reviewing standardized forms to determine which should be translated. The Kopp Act also urges hospitals to provide non-bilingual staff with picture and phrase sheets in order to communicate with LEP patients and to establish community relations with LEP communities. The state licensing agency for hospitals is authorized to enforce compliance.

To further its extensive efforts to promote language access services, California passed an unprecedented law in 2003. California Senate Bill 853 requires all health and dental insurance plans to provide members with language assistance, in the form of oral interpretation and written translation, when seeking care. Additionally, health insurance plans must provide language access services at all points of patient contact, including clinical encounters, free of charge. This legislation is significant because it reaches beyond government agencies and aid recipients to govern the actions of private actors. Indeed, California is alone in mandating that private insurers comply with its language access laws. As a result, approximately one-third of the state’s twenty-one million health plan members will potentially benefit from this law. California’s Department of Managed Health Care is

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191 Id. § 1259(c)(1)–(7).
192 Id. § 1259(c)(8)–(9).
193 Id. § 1259(e).
194 Barclay, supra note 18.
197 See Chen et al., supra note 1, at 364.
198 Barclay, supra note 18. Although some states have considered similar legislation, Congress has yet to consider the issue seriously. See id.
199 See California Leads the Nation in Patient Health Rights, supra note 196.
responsible for promulgating regulations to ensure compliance. At the same time, health insurers must monitor their own language services programs to track compliance by plans and providers.

V. FOLLOWING CALIFORNIA’S LEAD TO ENSURE A LEGAL RIGHT TO LANGUAGE ACCESS FOR LEP PATIENTS

Given the limited federal protections of LEP patients’ language access rights and California’s progressive work in this area, it is clear that states can and should play an important part in ensuring an individual’s right to language access in healthcare. Already, much work has been done at the state level to dismantle language barriers that adversely affect the delivery of healthcare. The movement at the state level reflects recognition of the primacy of language access services in healthcare. States should adopt California’s legislative model and furthermore ensure that adequate funding is provided to support the implementation and enforcement of language access legislation.

Sandoval severely limited private enforcement of language access rights through the legal system. California has successfully filled the gap left by Sandoval with legislation that prescribes a private cause of action to remedy disparate impact discrimination. While California’s
legislation undeniably helps to further language access rights, it is still insufficient in some respects.\(^{208}\) For instance, Senate Bill 853 only reaches insured individuals, thus creating a gap in the guarantee of language access services for non-insured LEP individuals.\(^{209}\) Recent federal healthcare reform legislation, however, will supposedly provide healthcare coverage to at least two-thirds of the uninsured population in California, thus helping to further close the gap left by Senate Bill 853.\(^{210}\)

Other states should follow California’s example in creating a legal right of language access for LEP patients.\(^{211}\) Although California’s model is admittedly non-exhaustive, it is the nation’s policy leader nonetheless, with the most comprehensive laws on language access.\(^{212}\) Extending the obligation to provide language access services to private actors, such as health plans, in the healthcare industry is a necessary and substantial step towards improving access for LEP patients.\(^{213}\) Additionally, the recognition of a private right of action could bring much-desired relief to individual LEP patients who have been wronged.\(^{214}\) In following California’s lead to ensure a legal right to language access, other states should make sure to replicate the hallmark of California’s far-reaching legislation, that is, its emphasis on the proactive provision of language access services in healthcare settings.\(^{215}\)

**Conclusion**

Language barriers deprive LEP individuals of access to quality healthcare, often at a time when it is most urgently needed. The fact

\(^{208}\) See Plantiko, *supra* note 38, at 256 (calling the Dymally-Alatorre Bilingual Services Act insufficient); *California Leads the Nation in Patient Health Rights, supra* note 196. One scholar notes that California’s Dymally-Alatorre Bilingual Services Act “contains no monitoring provisions for compliance and no enforcement mechanisms.” *Id.* at 256. However, the State Personnel Board is in fact tasked with keeping agencies accountable for their Dymally-Alatorre obligations. *Cal. Govt. Code §§ 7299.2–.6* (West 2008).


\(^{211}\) See Chen et al., *supra* note 1, at 365–66.

\(^{212}\) See Au et al., *supra* note 200, at 3.

\(^{213}\) See *id.*

\(^{214}\) See *Cal. Gov’t Code § 11139* (West 2005); Daly, *supra* note 97, at 1024.

\(^{215}\) See Chen et al., *supra* note 1, at 366; Au et al., *supra* note 200, at 3; Perkins & Youdelman, *supra* note 116, at 5.
that the American health system denies access to millions of people is a serious problem that must be remedied. Increased language services can provide access to critical healthcare services. Furthermore, language services can ensure effective physician-patient communication and lead to improvements in healthcare quality, patient experience, and resource utilization. Thus, more can and must be done to reduce miscommunication due to language differences in healthcare delivery.

Although a federal mandate to provide language access services to LEP patients can be found in Title VI of the Civil Rights Act of 1964, the law has been poorly enforced. California has emerged as a leader in state efforts to improve language access in healthcare by supplementing the legal and enforcement gaps in the federal framework with extensive legislation to further strengthen the legal right to language access. Thus, California should serve as a model for other states in guaranteeing LEP individuals the right to language access in healthcare.
FEMININITY AND THE ELECTRIC CHAIR: AN EQUAL PROTECTION CHALLENGE TO TEXAS’S DEATH PENALTY STATUTE

JESSICA SALVUCCI*

Abstract: Capital punishment in the United States appears to apply to only one class of citizens—men. Despite their significant proportional commission of homicides, women account for less than one percent of executions in America. This Note evaluates this trend in the context of a Fourteenth Amendment equal protection challenge to capital punishment in Texas, America’s staunchest death penalty supporter. It discusses issues of paternalism and gender theory as they relate to the Texas capital punishment statute and its application throughout the legal and political process. Finally, this Note argues that despite a series of constitutional obstacles, the Supreme Court should strike down the Texas death penalty statute based on its invidious gender discrimination.

Introduction

In 1974, Doyle Skillern waited in a nearby car as a friend shot and killed an undercover narcotics agent.¹ Eleven years later, he was executed by the state of Texas for the agent’s murder.² In 1980, Pamela Lynn Perillo robbed a man and strangled him to death after he picked her up as a hitchhiker.³ Her death sentence was overturned; she is currently serving life in a Texas prison but could be eligible for parole in 2014.⁴ At first glance, it seems strange that Skillern was put to death for his peripheral involvement in a homicide, whereas Perillo, who killed a man with her own two hands, escaped with her life and may walk free.

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² Id.
⁴ Fate of Texas Women’s Death Row Inmate May Be in Governor’s Hands, KWTX (Nov. 30, 2004), http://www.kwtx.com/news/headlines/1111972.html.
in a few years. It would, however, be more unusual if Perillo had been executed.

There are more women awaiting execution in the United States than in any other country in the world. Although this statistic may seem to indicate that American women are sentenced to death at an alarming rate, women actually account for less than one percent of people executed in the United States. Since the reinstatement of the death penalty in 1976, only twelve women have been executed. Three of these women were executed in Texas. Texas tends to have the reputation as the most “bloodthirsty” death penalty state and has executed more people than any other state in the nation. But even Texas fails to apply capital punishment equally to its male and female offenders.

5 See id.; Texan Executed for Killing, supra note 1.
6 See, e.g., Women and the Death Penalty, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/women-and-death-penalty (last visited May 8, 2011) (showing that only twelve women have been executed since 1976).
9 See Women and the Death Penalty, supra note 6. Since 1976, 1235 men have been executed. Searchable Execution Database, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/executions (select “m” under “Gender of Person Executed”; then follow “Search by Details” hyperlink) (last visited May 8, 2011); Women and the Death Penalty, supra note 6. The year 1976 is often used as the marker for “modern” capital punishment because of the Supreme Court’s decision in Furman v. Georgia, which effectively placed a moratorium on capital punishment until 1976. See 408 U.S. 238, 239–40 (1972); Streib, supra note 8, at 621–22. Furman effectively invalidated all death penalty statutes and forced states to reevaluate their capital punishment statutes for constitutionality. See Streib, supra note 8, at 621–22. The Court eventually approved certain state death penalty statutes in Gregg v. Georgia, thus lifting the moratorium. See 428 U.S. 153, 169 (1976); Streib, supra note 8, at 621–22.
10 See Women and the Death Penalty, supra note 6 (showing that Texas is tied with Oklahoma for the highest number of women executed).
11 See Kathleen A. O’Shea, WOMEN AND THE DEATH PENALTY IN THE UNITED STATES, 1900–1998, at 329 (1999) (calling Texas the “Death Penalty Capital of the Western World”); Debra Cassens Weiss, Texas High Court Judge Defends Execution Order: We’re Not ‘Bloodthirsty,’ A.B.A. J. (June 19, 2008), http://www.abajournal.com/news/article/texas_high_court_judge_defends_execution_order_were_not_bloodthirsty (quoting Judge Cheryl Johnson’s statement that Texas courts are “always accused of being callous and bloodthirsty”); Women and the Death Penalty, supra note 6 (showing that Texas and Oklahoma have each executed three women since 1976, more than any other state).
Since the reinstatement of the death penalty, Texas has executed 464 men and only three women.\textsuperscript{13}

The gender disparity in Texas’s executions is not due to a mere disparity in the commission of homicides, but is rather due to far more complicated factors.\textsuperscript{14} Although women commit nearly ten percent of death-eligible crimes, they almost never receive the state’s ultimate punishment.\textsuperscript{15} America’s paternalistic view of women has shaped Texas’s views on moral culpability and produced a capital punishment statute that punishes “masculine” rather than “feminine” crimes.\textsuperscript{16} If women do become eligible for death sentences, this paternalism continues to provide protection to female defendants as they are charged, tried, sentenced, and reviewed for clemency.\textsuperscript{17} Women lose this protection only if they stray from feminine norms or breach their duties as wives, mothers, and caretakers.\textsuperscript{18}

This Note will demonstrate that Texas applies its death penalty statute in a way that discriminates against men and violates the Equal Protection Clause of the Fourteenth Amendment. Part I of this Note will give a brief overview of the history of the death penalty and the American government’s paternalistic treatment of women. It will also explore two predominant theories regarding gender and the death penalty and explain why so few women are given death sentences. Part II will evaluate Texas’s death penalty statute by explaining the gender bias inherent in its aggravating factors and mitigating circumstances. Part III will ex-

\begin{footnotes}
\footnotetext[14]{See, e.g., Rapaport, supra note 12, at 585; Streib, supra note 8, at 609 (stating that women receive favorable treatment within the capital punishment system); Women and the Death Penalty, supra note 6.}
\footnotetext[15]{See Women and the Death Penalty, supra note 6 (showing that women account for ten percent of murder arrests but less than one percent of executions).}
\footnotetext[16]{See Tex. Penal Code Ann. § 19.03 (West 2003 & Supp. 2010); Janice L. Kopec, Student Article, Avoiding a Death Sentence in the American Legal System: Get a Woman to Do It, 15 Cap. Def. J. 353, 355 (2003) (explaining that men tend to commit willful killings during the commission of robbery, rape, or abduction, whereas women tend to kill family members and loved ones in the heat of passion).}
\footnotetext[18]{See Shapiro, supra note 17, at 459; Kopec, supra note 16, at 358.}
\end{footnotes}
plore gender discrimination throughout the processes of charging, trying, and sentencing a capital crime. It will also discuss gender bias within considerations of clemency. Part IV will profile the three women that Texas has executed since 1976 and attempt to explain why they have been singled out as the only women deserving of execution in modern Texan history. Part V will argue that the Texas capital punishment statute violates the Equal Protection Clause of the Fourteenth Amendment and discuss and refute oppositions to this argument.

I. HISTORY AND GENDER THEORY

A. History

Since the colonial period in America, more than 20,000 people have been executed by the federal and state governments. Only about 400 of these people, however, have been women. The first legal execution in the United States took place in 1608, but the first execution of a woman did not take place until 1632. Even during a time when executions were commonplace entertainment, the public still found something abhorrent about executing women. In the 1700s, for example, it was standard practice in England to hang and burn immoral criminals. When Margaret Sullivan suffered this fate, however, a local newspaper noted, “There is something inhuman in burning a woman.”

For many years, it was considered acceptable and even natural to treat women more leniently when sentencing them for their crimes. For example, men were historically given death sentences for a variety of offenses, including petty theft, while women were primarily executed only for more serious crimes such as homicide or witchcraft.

19 Thad Rueter, Why Women Aren’t Executed: Gender Bias and the Death Penalty, 23 HUM. RTS. 10, 10 (1996).
20 See id.
22 See O’Shea, supra note 11, at 2–3.
23 See id.
24 See id. at 3. This sympathy did not extend to women of color, especially African American women, who were executed frequently. See Kopec, supra note 16, at 353–54 (showing that forty-seven percent of women executed throughout American history were black).
25 See Kopec, supra note 16, at 353.
26 See Jenny E. Carroll, Note, Images of Women and Capital Sentencing Among Female Offenders: Exploring the Outer Limits of the Eighth Amendment and Articulated Theories of Justice, 75
saw women as feeble creatures that needed to be protected and generally spared them from state-imposed death in the same way women were excused from military service. As one Oregon governor stated after granting clemency to a condemned woman, “When I saw that woman in the penitentiary (the only one there), it made me sick, and so I turned her loose.”

Women who violated their sacred roles as wives and mothers by killing their husbands or children were the exception to the societal unwillingness to execute women. Under English common law, women who killed their husbands could be tried not only for murder but also for treason. Traditionally, women are also punished more harshly than men for the murder of their own offspring. In colonial America, for example, any non-slave woman who killed her illegitimate child for the purposes of concealment would automatically receive a death sentence.

Today, women and men do not receive facially different treatment when being tried, convicted, and sentenced for capital crimes. Nevertheless, many of the historical viewpoints and themes discussed above continue to be an implicit part of the death penalty. Many capital punishment statutes, including the one in Texas, have a disparate effect favoring female offenders. Women also tend to receive more lenient treatment from prosecutors, juries, judges, and politicians.  

Tex. L. Rev. 1413, 1430 (1997) (noting that most women executed throughout American history were convicted of homicide, though seven percent were executed for witchcraft); Kopec, supra note 16, at 353–54.

See Kopec, supra note 16, at 354–55. Some countries, including many former Soviet Bloc nations, completely exempt women from capital punishment or provide mitigation for pregnancy or motherhood. Streib, supra note 8, at 616.

See Rapaport, supra note 12, at 588 (quoting Governor West’s 1908 statement).

See Schmall, supra note 7, at 304.

See id.

See id.

See id.

See Rapaport, supra note 12, at 589; e.g., Tex. Penal Code Ann. § 19.03 (West 2003 & Supp. 2010).

See Schmall, supra note 7, at 304 (detailing the harsh punishments historically given to women who killed their husbands or children); Kopec, supra note 16, at 358–63 (showing that women continue to be most harshly punished for acting contrary to their roles as wives and mothers).

See § 19.03; Kopec, supra note 16, at 355; State by State Database, supra note 13; Women and the Death Penalty, supra note 6.

See, e.g., Shapiro, supra note 17, at 456 (noting that many judges have admitted to treating women with more leniency than men); Streib, supra note 8, at 628 (explaining that politicians are hesitant to advocate for gender equality in the death penalty setting); Kopec, supra note 16, at 356–57 (stating that judges and juries are more likely to view
less, the protections afforded by womanhood can be lost if a woman violates her gender-specific role as a wife, mother, and caretaker. The two sides of this dichotomy have become known as the “chivalry theory” and the “evil woman theory.”

B. The Chivalry Theory

As discussed above, the criminal justice system has long treated women leniently. This is due in part to the paternalistic view that women are weak and passive and thus need male protection. A classic example of paternalism is seen in the case of Ethel Spinelli, a California woman who sat on death row in the 1940s. Before Spinelli’s pending execution, thirty male inmates petitioned the governor to commute her sentence and offered to draw straws and be sent to the gas chamber in her place. The inmates argued,

Mrs. Spinelli’s execution would be repulsive to the people of California; that no woman in her right mind could commit the crime charged to her; that the execution of a woman would hurt California in the eyes of the world; that both the law and the will of the people were against the execution; that Mrs. Spinelli, as the mother of three children, should have special consideration; that California’s proud record of never having executed a woman should not be spoiled.

Women receive more sympathy than men, and their crimes are often excused “as aberrations, caused by a mental defect or some weak-

37 See, e.g., Carroll, supra note 26, at 1422; Kopec, supra note 16, at 358.
39 See supra Part I.A.
41 See Reza, supra note 38, at 183. Spinelli was convicted for ordering the murder of a fellow gang member. O’Shea, supra note 11, at 69.
42 Shapiro, supra note 17, at 457.
43 Id. The governor rejected the inmates’ petition and Spinelli was executed in California’s gas chamber on November 21, 1941. O’Shea, supra note 11, at 68–69.
ness of character or by circumstances beyond their control.” Under the chivalry theory, women are helpless and, like children, the mentally retarded, and the insane, they should not be punished with death.

C. The Evil Woman Theory

Although paternalism affords women a certain amount of protection, a woman can lose this protection if she strays from expected feminine norms. When a woman’s crime violates her role as a wife, mother, or caretaker, a jury may treat her even more harshly than it would a man. Often, being a bad wife or mother is what actually condemns a woman. For example, although domestic homicides typically are considered less serious than other killings, more than half of the women on death row in 2005 were there for killing family members and lovers. In fact, eight of the twelve women executed in the modern era were convicted of killing their husbands, lovers, or children.

These two theories of crime and gender create underlying themes in capital punishment law and practice in Texas. Paternalistic roots

44 Shapiro, supra note 17, at 469.
45 See Rueter, supra note 19, at 11; see also Roper v. Simmons, 543 U.S. 551, 569–75 (2005) (holding that the execution of individuals who were under eighteen years of age at the time they committed a capital crime was unconstitutional); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that the execution of individuals with mental retardation was unconstitutional); Ford v. Wainwright, 477 U.S. 399, 410 (1986) (holding that the execution of a person who is insane was unconstitutional).
46 See Carroll, supra note 26, at 1422; Kopec, supra note 16, at 358.
47 See Schmall, supra note 7, at 310.
48 See Carroll, supra note 26, at 1422; Kopec, supra note 16, at 358.
49 See Streib, supra note 8, at 615, 626. Within the category of “family murder,” another category has emerged for women who kill family members for economic gain, a motivation that allows prosecutors to paint them as “black widows.” See Mary Welek Atwell, Wretched Sisters: Examining Gender and Capital Punishment 110 (2007) (detailing the trial of Betty Lou Beets, in which the defendant was portrayed as a black widow serial killer who preyed upon her husbands for their money); Rapaport, supra note 12, at 583; Schmall, supra note 7, at 302.
50 See Women and the Death Penalty, supra note 6. This includes Velma Barfield (convicted of poisoning her boyfriend to cover up incidences of theft); Judy Buenoano (convicted of murdering her husband for insurance purposes); Betty Lou Beets (convicted of murdering her husband for insurance purposes); Christina Riggs (convicted of smothering her two young children); Wanda Jean Allen (convicted of murdering her lesbian lover); Marilyn Plantz (convicted of hiring her boyfriend to kill her husband); Frances Newton (convicted of murdering her husband and children); and Teresa Lewis (convicted of murdering her husband and stepson for insurance purposes). See generally Atwell, supra note 49 (discussing the twelve women executed in the modern era and their crimes); Women and the Death Penalty, supra note 6.
51 See Reza, supra note 38, at 182–86 (explaining the chivalry and evil woman theories and discussing gender bias in modern capital statutes).
have shaped the Texas death penalty statute, characterizing crimes committed more often by men as the most deserving of harsh punishment and permitting juries to find feminine qualities as the most deserving of mercy—a bias that continues throughout the capital punishment process.  

II. Statutory Bias

Although factoring gender into the scheme of criminal punishment has been commonplace in American history, since the Supreme Court’s decision in *Furman v. Georgia*, favoring or disfavoring either sex in a sentencing scheme violates the Equal Protection Clause of the Fourteenth Amendment. Therefore, death penalty statutes no longer contain any mention or consideration of gender. Despite their facial neutrality, however, most capital statutes, including the one in Texas, are drafted in ways that make it more likely that men will be charged with capital crimes.

State legislatures are responsible for deciding which crimes should be death penalty-eligible. In Texas, one such crime is capital murder, which includes intentional killing, intentional acts which are dangerous to human life, and felony murder. To further narrow these death-

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53 See Furman v. Georgia, 408 U.S. 238, 238 (1972); Rapaport, supra note 12, at 588–89. *Furman v. Georgia* was a consolidation of three death penalty cases. 408 U.S. at 238 (consolidating *Furman v. Georgia*, *Jackson v. Georgia*, and *Branch v. Texas*). The Court found that the imposition of capital punishment in each of the three cases violated the Eighth and Fourteenth Amendments. Id. Each of the five justices in support of the judgment filed his own opinion and some justices suggested that the unconstitutionality was based on the death penalty’s arbitrary or prejudicial application. See id. at 242 (Douglas, J., concurring) (noting that the death penalty violates the Constitution if it allows for prejudicial application); id. at 310 (Stewart, J., concurring) (calling imposition of the death penalty “wanton” and “freakish”).
54 See Streib, supra note 8, at 616. Gender is an express consideration in some state capital punishment statutes but only with regards to pregnant women. Id.
55 See § 19.03; Streib, supra note 8, at 616; Kopec, supra note 16, at 355.
56 See Streib, supra note 8, at 615.
57 § 19.02(b).

A person commits an offense if he:
1. intentionally or knowingly causes the death of an individual;
2. intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or
3. commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to
elible crimes, the Texas statute includes several aggravating factors.\textsuperscript{58} Aggravating factors are indicators of blameworthiness, and a finding of at least one aggravating factor is required for a death sentence.\textsuperscript{59}

Many legislatures also include mitigating factors in their death penalty statutes.\textsuperscript{60} Mitigating factors are circumstances that should cause a jury to afford a certain amount of leniency to a defendant and can justify a sentence of life imprisonment for an offender who might otherwise receive the death penalty.\textsuperscript{61} Interestingly, many of the aggravating factors in capital punishment statutes apply disproportionately to men, and many of the mitigating circumstances apply disproportionately to women.\textsuperscript{62}

A. Aggravating Factors

Texas’s death penalty statute includes the following aggravating factors: murder of a public safety officer or firefighter in the line of duty; murder during the commission of specified felonies (kidnapping, burglary, robbery, aggravated rape, arson, and terroristic threat); murder for hire; multiple murders; murder during a prison escape; murder of a correctional officer; murder of a judge; murder by a state prison inmate who is serving a lifetime sentence for certain offenses; and murder of an individual under six years of age.\textsuperscript{63} All of these factors, commit an act clearly dangerous to human life that causes the death of an individual.

\textit{Id.} One who commits murder as defined in § 19.02(b) is eligible for the death penalty only if at least one aggravating circumstance is present. \textit{See} §§ 12.31, 19.05.

\begin{itemize}
  \item \textsuperscript{58} \textit{See} § 19.03; \textit{Reza, supra} note 38, at 185–86; \textit{infra} Part II.A.
  \item \textsuperscript{59} \textit{See} \textit{Streib, supra} note 8, at 618.
  \item \textsuperscript{60} \textit{See} \textit{id.; Crimes Punishable by the Death Penalty, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/crimes-punishable-death-penalty} (last visited May 8, 2011).
  \item \textsuperscript{61} \textit{See} \textit{Streib, supra} note 8, at 618 (noting that juries find two common mitigating factors—acting under duress or emotional disturbance and acting under the substantial domination of another—more often in women’s cases).
  \item \textsuperscript{62} \textit{See} \textit{id.} at 616–19 (discussing the disparate impact of aggravating and mitigating circumstances in death penalty statutes).
  \item \textsuperscript{63} § 19.03(a). The Texas Penal Code states:
  \begin{itemize}
    \item (a) A person commits an offense if the person commits murder as defined under Section 19.02(b)(1) and:
    \begin{itemize}
      \item (1) the person murders a peace officer or firefighter who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or firefighter;
      \item (2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, arson, obstruction or retaliation, or terroristic threat under Section 22.07(a)(1),(3),(4),(5) or (6);
    \end{itemize}
  \end{itemize}
with the exception of murder of an individual under six years of age, apply predominantly to crimes committed by male defendants.\textsuperscript{64} The commission of felony murder, for example, is a commonly applied aggravating factor both nationally and in Texas.\textsuperscript{65} Nearly eighty percent of inmates on death row in the United States received their sentences after felony murder convictions.\textsuperscript{66} Women, however, commit only six percent of felony murders, a number out of proportion with their percentage of murder arrests generally.\textsuperscript{67} Another commonly occurring aggravating factor in Texas is the commission of murder for hire.\textsuperscript{68} Regardless of the gender of the hirer, men are almost always the contractors in murder for hire cases.\textsuperscript{69} Yet another aggravating factor with a statistical gender disparity is the commission of multiple murders.\textsuperscript{70} While women commit ten percent of

\begin{itemize}
  \item (3) the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration;
  \item (4) the person commits the murder while escaping or attempting to escape from a penal institution;
  \item (5) the person, while incarcerated in a penal institution, murders another:
    \begin{itemize}
      \item (A) who is employed in the operation of the penal institution; or
      \item (B) with the intent to establish, maintain, or participate in a combination or in the profits of a combination;
    \end{itemize}
  \item (6) the person:
    \begin{itemize}
      \item (A) while incarcerated for an offense under this section or Section 19.02, murders another; or
      \item (B) while serving a sentence of life imprisonment or a term of 99 years for an offense under Section 20.04, 22.021, or 29.03, murders another;
    \end{itemize}
  \item (7) the person murders more than one person:
    \begin{itemize}
      \item (A) during the same criminal transaction; or
      \item (B) during different criminal transactions but the murders are committed pursuant to the same scheme or course of conduct;
    \end{itemize}
  \item (8) the person murders an individual under six years of age; or
  \item (9) the person murders another person in retaliation for or on account of the service or status of the other person as a judge or justice of the supreme court, the court of criminal appeals, a court of appeals, a district court, a criminal district court, a constitutional county court, a statutory county court, a justice court, or a municipal court.
\end{itemize}

\textit{Id.}\textsuperscript{64} See infra notes 65–75 and accompanying text.

\textsuperscript{65} See Streib, \textit{supra} note 8, at 617; \textit{Crimes Punishable by the Death Penalty, supra} note 60 (showing that felony murders are death-eligible crimes under most state laws).

\textsuperscript{66} See Kopec, \textit{supra} note 16, at 355.

\textsuperscript{67} See id.; \textit{Women and the Death Penalty, supra} note 6 (showing that women account for ten percent of murder arrests).

\textsuperscript{68} See § 19.03(a)(3); Streib, \textit{supra} note 8, at 616.

\textsuperscript{69} See Streib, \textit{supra} note 8, at 616.

murders generally, they commit only five percent of multiple murders. \footnote{71}{Id.}

Finally, the fact that women are less likely than men to have criminal histories impacts several of the Texas aggravating factors, such as killing by a lifetime inmate, killing during a prison escape, or killing of a correctional officer or judge. \footnote{72}{See § 19.03; \textit{Streib}, supra note 8, at 617–18.} Typically, female killers have not had the prior experience with the penal system necessary to satisfy these factors. \footnote{73}{See \textit{Streib}, supra note 8, at 617–18, 626.} Rather, as discussed above, female offenders are most likely to commit domestic homicides, killing their husbands, lovers, relatives, or children. \footnote{74}{See id. The Texas Penal Code permits leniency in punishment during a capital case if the offender acts “under the immediate influence of sudden passion.” § 19.02(d). Domestic homicides often fall into this category. \textit{See Streib}, \textit{supra} note 8, at 617–18.} Under most current statutory schemes, these domestic homicides are seen as less serious than other types of murders (including felony murder). \footnote{75}{See \textit{Streib}, \textit{supra} note 8, at 615. Defendants who kill family members are punished less harshly than defendants who kill non-family members. \textit{See Schmall, supra} note 7, at 312. Interestingly, it also seems that domestic homicides where the victim is a woman are seen as less serious than domestic homicides where the victim is a man. \textit{See id.} Men who kill their romantic partners are less likely to be charged with first or second degree murder than women who kill their husbands or lovers. \textit{Id.} This reinforces the evil woman theory and makes a frightening statement about the public acceptance of traditional domestic violence. \textit{See id.; supra} Part I.C.}

\textbf{B. Mitigating Circumstances}

Mitigating circumstances are essentially the opposite of aggravating factors because they provide guidance to juries about what makes offenders deserve sympathy and leniency. \footnote{76}{See \textit{Streib}, \textit{supra} note 8, at 618–19.} Most mitigating circumstances also seem to provide more protection to women than they do to men. \footnote{77}{See \textit{id}. (“[J]udges and juries generally are more likely to find duress or emotional disturbance for female offenders than for male offenders in homicide cases.”).} For example, one common mitigating circumstance is the existence of “extreme mental or emotional disturbance,” a trait more often associated with women than men. \footnote{78}{See \textit{id}.} Another consideration is whether the defendant is under the “substantial domination” of another person. \footnote{79}{\textit{Id.}} Juries commonly apply this factor to women because many jurors...
assume that women commit crimes only because of their commitments to their husbands or lovers.\textsuperscript{80} The Texas Penal Code, however, does not lay out specific mitigating factors.\textsuperscript{81} Instead, it contains a “catch-all” provision that allows a jury to consider any and all characteristics of a particular defendant when deciding whether to sentence that defendant to death.\textsuperscript{82} Although seemingly innocuous, such catch-all provisions also discriminate against men because “[j]udges and juries generally are more likely to find sympathetic factors in the lives and backgrounds of women than of men.”\textsuperscript{83} Although this may be explained partially by the reluctance of male defendants to expose vulnerable or sympathetic aspects of their lives, the fact that women receive greater public empathy is undeniable.\textsuperscript{84} In addition, judges and juries are more likely to see women as capable of rehabilitation, an element that often factors into a sentencing decision.\textsuperscript{85}

III. BIAS WITHIN THE LEGAL SYSTEM

Assuming, arguendo, that the Texas death penalty statute is valid on its face, the gender bias inherent in its application may make it un-

\begin{itemize}
  \item \textsuperscript{80} See Schmall, \textit{supra} note 7, at 306.
  \item \textsuperscript{81} See \textsc{Tex. Penal Code Ann.} \textsection{} 19.03 (West 2003 & Supp. 2010). Many states no longer limit a jury to a specific list of mitigating factors because after the Supreme Court decision in \textit{Lockett v. Ohio}, an individualized determination of mitigating factors is constitutionally required. 438 U.S. 586, 608–09 (1978). Interestingly, Lockett, the defendant, was female, a factor that the Supreme Court may have consciously or unconsciously wanted a jury to be able to consider. \textit{See id.} at 589.
  \item \textsuperscript{82} See \textsc{Tex. Code Crim. Proc. Ann.} art. 37.071(e)(1) (West 2006). A capital jury must decide
    \begin{quote}
    \[w\]hether, taking into consideration all of the evidence, including circumstances of the offense, the defendant’s character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.
    \end{quote}
  \textit{Id.}
  \item \textsuperscript{83} See Streib, \textit{supra} note 8, at 619. For example, after the passage of the Violence Against Women Act in 1994, female defendants are able to introduce evidence of battered women’s syndrome during a presentation of mitigating circumstances. O’Shea, \textit{supra} note 11, at 17. More than half of the women on death row in 1999 had been victims of abuse. \textit{See id.}
  \item \textsuperscript{84} See Schmall, \textit{supra} note 7, at 288–89 (explaining that female victims who had abusive childhoods are afforded more sympathy than male victims); Streib, \textit{supra} note 8, at 619 (noting the unwillingness of male defendants to expose sympathetic factors).
  \item \textsuperscript{85} See Kopec, \textit{supra} note 16, at 356.
\end{itemize}
There is overt evidence of gender discrimination throughout all stages of a capital case in Texas—from the decision to prosecute through the trial, sentencing, and clemency proceedings.\(^87\)

A. **Charging a Defendant with a Capital Crime**

Before a jury is faced with the difficulty of hearing a capital case, the district attorney’s office must decide whether to even seek the death penalty.\(^88\) For many prosecutors, this decision comes down to whether the case is winnable, an evaluation that can automatically eliminate some female defendants.\(^89\) “Almost all prosecutors think about their odds of winning the death penalty case . . . and if the defendant is a woman, then the odds are much less.”\(^90\) Therefore, female defendants are at an advantage before the trial even begins.\(^91\)

Furthermore, a prosecutor’s decision may be influenced by the public because “[t]he decision to seek the death penalty is often tied to politics and community outrage rather than to the heinousness of the homicide.”\(^92\) The public tends to have a paternalistic attitude towards women who remain in their stereotypical roles, which may protect women from community outrage and thus from the most serious penalties.\(^93\)

B. **The Trial and Sentencing**

Not only do female defendants benefit from a lower likelihood of being charged with capital crimes, but female defendants also use emo-

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\(^{86}\) See, e.g., Williams v. Currie, 103 F. Supp. 2d 858, 868 (M.D.N.C. 2000) (finding unconstitutional gender bias against a male co-defendant during the trial and sentencing stages of a murder case).

\(^{87}\) See, e.g., Shapiro, supra note 17, at 456 (noting that many judges have admitted to treating women with more leniency than men); Kopec, supra note 16, at 356 (noting that judges and juries are more likely to view women as sympathetic and capable of rehabilitation); S. Carolina Confronts Death Penalty for Women, supra note 17. See generally Rapaport, supra note 17 (discussing gender bias in governors’ decisions to grant clemency).

\(^{88}\) See O’Shea, supra note 11, at 23 (noting that the district attorney holds the power to decide whether to charge a defendant with first-degree murder, offer a plea bargain, submit a first-degree murder charge to a jury, ask for a death sentence, affirm the conviction of a death sentence, and execute a death sentence).

\(^{89}\) See S. Carolina Confronts Death Penalty for Women, supra note 17.

\(^{90}\) Id. (quoting a statement by Professor Victor L. Streib).

\(^{91}\) See id.


\(^{93}\) See id.; supra Part I.B.
tional tactics to gain the sympathy of juries in the courtroom. Many defense attorneys counsel their female clients to cry profusely on the stand, to shake uncontrollably, or to hang their heads in shame. Portraying women as damaged and fragile can be a strong defense tactic because it “lumps women in with the retarded and children by implying that they can’t control their own actions.” For example, women who kill their abusive spouses are represented as helpless victims. Another tactic is to portray a female defendant as traditionally feminine, especially as a mother or grandmother. Even supposedly impartial judges admit to treating women with more leniency and mercy.

Furthermore, mothers and grandmothers defy the typical image of brute murderers and make it difficult for a jury to reconcile these two conflicting images. For example, Dorothea Puente was a grandmother who lived in an adorable home and grew rhododendrons in her front yard when the police found seven corpses buried on her property. Puente had killed the elderly tenants that lived in her boarding house in order to collect their government checks, but she narrowly escaped the death penalty, some say due to her gender and age.

In order to obtain a death sentence, prosecutors must overcome this gender hurdle. One prosecutorial tactic is to “de-feminize” defendants by portraying them as lesbians or gang leaders. In fact, “lesbians are also convicted and sentenced to death at disproportionately high rates” and at least two of the twelve women executed since 1976

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94 See Rueter, supra note 19, at 11; Jack Elliott Jr., Women on Death Row Are Rare: Three Miss. Inmates Facing Execution for Murder Convictions, COMM. APPEAL, Oct. 9, 2007, at B7 (“[D]efense attorneys go to great lengths to make sure jurors will be sympathetic [to female defendants].”).
95 See Rueter, supra note 19, at 11.
96 See id.
97 See id.
98 See, e.g., Elliott, supra note 94; see also Schmall, supra note 7, at 314 (“[S]ociety doesn’t want to be reminded that mothers and grandmothers are destined to die against their will.” (quoting Lane Nelson, Death Watch: Women on the Row, ANGOLITE, Sept.-Oct. 1995, at 17)).
99 See Shapiro, supra note 17, at 456.
101 See id.
102 See id.
103 See id.
104 See Schmall, supra note 7, at 314 (noting that juries have trouble convicting a woman if she is a mother, a widow, attractive, or if she cries on the stand).
105 See Rueter, supra note 19, at 11.
were gay.\footnote{See Shapiro, supra note 17, at 459; Women and the Death Penalty, supra note 6. Wanda Jean Allen was executed in 2001 after killing her gay lover in front of a police station. See Kopec, supra note 16, at 361–62. In 2002, Aileen Wuornos, a former prostitute, was executed for the murders of six of her “customers.” Id. at 362–63. Wuornos’s lesbian lover was used as the prosecution’s chief witness against her. Id. Wuornos’s case received a large amount of media attention—the movie Monster, starring Charlize Theron, tells her story. See Streib, supra note 8, at 611. For both Allen and Wuornos, sexuality played a prominent role during trial, indicating that women are punished more harshly for straying from gender expectations with regards to sexuality. See Kopec, supra note 16, at 361–63.} Furthermore, jurors respond to de-feminization attempts more often when the defendant is an ethnic minority; black women account for two-thirds of executions since the 1700s.\footnote{See Shapiro, supra note 17, at 458.} Finally, the most popular way to de-feminize a female offender is to show that she has violated her duties as a wife, mother, and caretaker.\footnote{See id. at 459; Kopec, supra note 16, at 358.} Juries tend to be more comfortable convicting and sentencing women who have strayed from their expected roles in society.\footnote{See Shapiro, supra note 17, at 458; Kopec, supra note 16, at 358.}

C. Clemency and Commutation

In 1981, Guinevere Garcia confessed to the murder of her infant daughter and received a ten-year prison sentence.\footnote{Schmall, supra note 7, at 294–96.} Four months after her release, she killed her husband and received a death sentence.\footnote{See id.} Garcia refused to appeal and rejected all efforts and assistance from public interest groups.\footnote{See id.} Despite her efforts, she was eventually saved.\footnote{See Rueter, supra note 19, at 10; Schmall, supra note 7, at 296.} Mere hours prior to her scheduled execution, Illinois Governor Jim Edgar commuted Garcia’s sentence to life in prison.\footnote{Schmall, supra note 7, at 285. In a tape-recorded message to the governor, Garcia pleaded: “Do not consider this petition based on the fact that I am a woman. If you grant this petition, you are sending a message to every woman in this state that the death penalty applies only to men.” Id. at 286.} This was his first use of clemency in his five years in office.\footnote{See Rueter, supra note 19, at 10.}

While Texas governors rarely grant clemency, even Texas governors can feel trepidation when sending a woman to her death.\footnote{Id.} Be-
fore the execution of Karla Faye Tucker, former governor George W. Bush received desperate pleas to spare her life. Governor Bush refused to commute her sentence and used the opportunity to make a statement about the equal application of the death penalty. He said, “When I was sworn in as the Governor of Texas, I took an oath of office to uphold the laws of our state, including the death penalty. My responsibility is to ensure our laws are enforced fairly and evenly without preference or special treatment . . . .” Bush’s spokeswoman, Karen Hughes, further stated that “[t]he gender of the murderer did not make any difference to the victims” in an attempt to indicate that the governor made decisions without regard to the gender of the accused.

Despite his seemingly gender-blind view of the death penalty, Bush later admitted in his autobiography that reading the above statement was “one of the hardest things” he had ever done and that awaiting Tucker’s execution “felt like a huge piece of concrete was crushing me.” As governor of Texas, Bush sent 152 inmates to their death, some of whom still claimed actual innocence. It is telling that the minutes spent awaiting the execution of Tucker, an admittedly guilty axe murderer, were the most excruciating of his career.

IV. The Executed Women

Since 1976, Texas has executed only three women: Karla Faye Tucker, Betty Lou Beets, and Frances Newton. All three of these women were cast into the “evil woman” category and therefore lost the protection of the biased Texas system.

row inmate claiming innocence. Olsen, supra. That reprieve went to female defendant, Frances Newton, who was later executed. Id.; infra Part IV.C (discussing Newton’s case).


117 See Bush, supra note 115, at 154.

118 See id.

119 See id. at 145.

120 See id. at 154.


122 Atwell, supra note 49, at 64; Bush, supra note 115, at 155 (“Karla Faye Tucker was pronounced dead at 6:45 P.M. Those remain the longest twenty minutes of my tenure as Governor.”).

123 Women and the Death Penalty, supra note 6.

A. Karla Faye Tucker

Karla Faye Tucker is perhaps the most notorious woman ever to receive the death penalty, in part because she was white, eloquent, and attractive. Tucker had a troubled childhood and was a drug-addicted prostitute at the time of her arrest for the murder of two people. In June of 1983, Tucker, her boyfriend, and another acquaintance decided to break into Jerry Lynn Dean’s home to intimidate him or perhaps to steal motorcycle parts. After breaking into the home, Tucker woke Dean by straddling him before she and her boyfriend struck him several times with a pickaxe. After Dean was dead, Tucker noticed another body in the bed, a woman Dean had met at a bar that evening. Tucker attacked her with the pickaxe as well, allowing her boyfriend to finish the woman off.

The prosecution emphasized Tucker’s later comment that she reached a sexual climax with every swing of the pickaxe. Tucker exhibited a masculine proclivity for sex and violence, and the jury therefore sentenced her to death. While in prison, Tucker stopped using drugs and alcohol, became a devout Evangelical Christian, and eventually married the prison chaplain. Even so, Tucker was the first woman executed in Texas since the Civil War. Directly after her execution, Texan support for the death penalty dropped from eighty-five percent to sixty-eight percent.

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125 See Atwell, supra note 49, at 63; Rapaport, supra note 12, at 591 (“[Tucker’s] wan, pixie-ish good looks, her youthfulness, her wry, self-deprecating humor, and her self-possession, articulateness and thoughtfulness, captivated television audiences.”).
126 Atwell, supra note 49, at 64, 66.
127 Id. at 64–65; Rapaport, supra note 12, at 591.
128 Atwell, supra note 49, at 65.
129 Id. at 65–66.
130 Id. at 66.
131 See id. at 68, 71.
132 See id. at 71.
133 See Rapaport, supra note 12, at 591. Tucker did appear to be the poster-child for reform and, on appeal, she raised a Fourteenth Amendment claim, arguing that although female prisoners are more likely to be rehabilitated, a woman had never been granted clemency on the basis of rehabilitation. Atwell, supra note 49 at 76–77.
134 See Atwell, supra note 49, at 64.
135 Id. at 83. Regarding the drop in support for the death penalty, Texas Poll Director Ty Meighan stated, “Some of it has got to be people re-evaluating their opinion in light of the Karla Faye Tucker execution.” See Kathy Walt, Death Penalty’s Support Plunges to a 30-Year Low: Karla Faye Tucker’s Execution Tied to Texans’ Attitude Change, Houston Chron., Mar. 15, 1998, at A1. This was due in part to the success of Tucker’s public relations campaign. See id. Dianne Clements, president of Justice for All, stated, “They brought her into our living rooms and wanted to make her a part of our lives.” Id.
Tucker’s case is especially interesting because she was sentenced to death when she failed to fit into a feminine role, yet given public sympathy when she conformed.\textsuperscript{136} At the time of her trial, Tucker was a violent and over-sexualized prostitute and thus lost the protection of femininity.\textsuperscript{137} By the time of her execution, however, she had transformed into the loving Christian wife society expected her to be, thus sparking public outrage and disapproval at her fate.\textsuperscript{138}

B. Betty Lou Beets

Betty Lou Beets had been in a series of abusive relationships before shooting and killing her fifth husband, Jimmy Don Beets.\textsuperscript{139} Jimmy was missing for two years before police found his body buried in a sleeping bag in the family’s front yard, alongside the body of one of Beets’s previous husbands.\textsuperscript{140} The prosecution asserted that Beets killed her husbands for the life insurance money and portrayed her as a greedy “black widow” who systematically preyed on her lovers.\textsuperscript{141} But the most shocking offense, the prosecution argued, was that she corrupted her children by employing her adult son and daughter to help hide the two bodies.\textsuperscript{142}

Beets thus defied her role not only as a wife but also as a mother.\textsuperscript{143} She was a “corrupter of the home” who “used her ultimate feminine power—motherhood—to implicate her children in her own wrongdo-

\textsuperscript{136} See Atwell, supra note 49, at 63–83; Shapiro, supra note 17, at 459 (discussing the protections afforded by “ladylike” behavior and the dangers created by rejection of it). On appeal, Tucker argued that the media created an improper bias against female defendants. See Atwell, supra note 49, at 76–77. Because the high profile case spurned discussion about “equal justice,” Tucker argued that she was sentenced to death solely as to send a message of gender equality. See id. Thus, “she would be executed because she was a woman.” Id. at 76.

\textsuperscript{137} See Atwell, supra note 49, at 63–83.

\textsuperscript{138} See Rapaport, supra note 12, at 591; see also Kopec, supra note 16, at 355 (noting that there was “public outcry” after Tucker’s execution).

\textsuperscript{139} See Atwell, supra note 49, at 104–08; Women and the Death Penalty, supra note 6. The fact that Beets was abused by her husband may actually have worked against her, since the state can claim an additional motive of revenge in cases where there is a history of domestic violence. Atwell, supra note 49, at 118. Also, although the state belabored the fact that Jimmy Don Beets was Beets’s fifth husband, the jury was not informed that she was his fourth wife. Id. at 113.

\textsuperscript{140} See Atwell, supra note 49, at 108; Kopec, supra note 16, at 360.

\textsuperscript{141} See Atwell, supra note 49, at 108–10. Beets’s gender made this motive more credible. Id. at 118. “It is easy for a jury to believe a woman (who has no resources or legacy of her own) would kill a man, the rightful owner of the family property.” Id.

\textsuperscript{142} See id. at 109; Kopec, supra note 16, at 360–61.

\textsuperscript{143} See Kopec, supra note 16, at 360–61.
ing.” Beets was executed in 2000 and was the fourth woman executed in the United States since 1976.

C. Frances Newton

Frances Newton was executed on September 14, 2005, and was the eleventh woman to have been executed in the United States since 1976. Newton was sentenced to death for the murders of her husband Adrian, and her two children (Alton, age seven and Farrah, age twenty-one months).

During the trial, Newton was portrayed as “promiscuous and greedy.” The district attorney focused on Newton’s extramarital affair and the fact that she had previously taken out insurance policies on her husband and children. The prosecutor, who had also prosecuted the case against Karla Faye Tucker, painted a picture of a coldhearted woman who wished to collect the insurance money and run off with her lover. The prosecutor’s closing powerfully condemned Newton for betraying the trust of her children. He stated,

What does it tell us about a person that can pick up . . . their own 21-month-old child that they personally bore . . . [and] look that baby in the eye and what do you suppose that little baby, what does a 21-month old baby think towards its mother. Love. That’s all a baby has. . . . What does it tell us about a person who could look in that baby’s eyes and execute them?

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144 Id. During her trial, Beets actually attempted to place blame for the murder on her son, Robbie. Atwell, supra note 49, at 110. The prosecutor used this defense to further attack Beets’s performance as a mother saying, “What kind of a mother would seek to pin a murder on her own child? The female of the species protects the young, above all, above her own life.” Id. at 111.

145 See Women and the Death Penalty, supra note 6.

146 See id.

147 See id. Newton claimed innocence and stated that she and her cousin called the police after returning home and finding that her family had been shot to death. See Atwell, supra note 49, at 208–09. Newton believed that the murders had been committed by a drug dealer to whom her husband owed money. See id. at 212.


149 Id.

150 See id. at 208, 210.

151 See id. at 215.

152 Id.
According to many, a mother’s killing of her young child is the ultimate rejection of feminine identity. The prosecutor’s reference to Newton’s pregnancy highlights a woman’s unique role as the bearer and protector of children. In violating that role, Newton joined Tucker and Beets in rejecting her femininity and condemning herself to a masculine fate.

D. Death Row Today

Ten women are currently on death row in Texas. As is typical in Texas, most of these condemned women have committed “domestic” crimes or crimes that are otherwise at odds with a woman’s stereotypical gender role. In fact, only two of the ten women presently on Texas’s death row earned a place there without targeting vulnerable victims such as children, the mentally retarded, or the elderly.

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153 See Kopec, supra note 16, at 361 (naming infanticide as the “ultimate anti-feminine act”).
157 See Case Summaries for Current Female Death Row Inmates, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/case-summaries-current-female-death-row-inmates (last visited May 8, 2011); Fate of Texas Women’s Death Row Inmate May Be in Governor’s Hands, supra note 4; Offenders on Death Row, supra note 156. The women currently on death row include: Melissa Lucio (convicted of the beating and murder of her daughter); Chelsea Richardson (convicted of murdering two adults while they were in their home); Erica Sheppard (convicted of murdering a woman during an attempt to steal a car); Linda Carty (convicted of the kidnapping and murder of a young woman and the kidnapping of her three-day-old baby); Suzanne Basso (convicted of murdering a mentally retarded man after luring him with promises of marriage); Kimberly McCarthy (a nursing home therapist convicted of murdering a seventy-one-year-old woman); Brittany Holberg (a prostitute convicted of murdering an eighty-year-old client); Darlie Routier (convicted of the stabbing murder of her five-year-old son); Lisa Coleman (convicted of the murder of a nine year old boy); and Cathy Henderson (convicted of the murder of an infant she was responsible for babysitting). See id.
158 See Offenders on Death Row, supra note 156. Only Chelsea Richardson and Erica Sheppard have a different profile. See Kopec, supra note 16, at 358; Offenders on Death Row, supra note 156.
V. THE FOURTEENTH AMENDMENT CHALLENGE

The Fourteenth Amendment guarantees all persons in the United States equal protection of the laws. The application of the death penalty in Texas shows that men may not receive equal protection during the various stages of a capital case in Texas. Some have argued that the best way to attack the death penalty on Equal Protection Clause grounds is to raise the challenge in those states that have capital punishment but have never executed a woman. The case seems even stronger in Texas, however, because even in Texas, a state that has executed more women than almost any other, application of capital punishment may still be unconstitutionally gender biased.

Although facially neutral, Texas’s capital punishment statute has an unconstitutional disparate impact on male offenders. While women commit 10% of homicides, they account for only 0.6% of executions in Texas. This disparity is much too stark to be explainable by other reasoning and amounts to a Fourteenth Amendment violation. There is also implicit discrimination in the Texas death penalty statute itself. The statute uses factors that apply disproportionally to male offenders to determine whether a defendant is death-eligible and per-

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159 U.S. Const. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”)

160 See generally Kopec, supra note 16 (making a similar argument about the unconstitutionality of Virginia’s capital murder statute); supra Parts II–III.

161 See Kopec, supra note 16, at 364 (arguing that Virginia’s death penalty scheme violates the Fourteenth Amendment because no women have been executed in the state since 1976).

162 See id.; State by State Database, supra note 13; Women and the Death Penalty, supra note 6 (showing that Texas and Oklahoma lead the country in female executions).


164 See State by State Database, supra note 13 (showing that Texas has executed 467 people); Women and the Death Penalty, supra note 6 (showing that only three of those people were women, but noting that women commit ten percent of homicides).

165 See Williams v. Currie, 103 F. Supp. 2d 858, 868 (M.D.N.C. 2000); Kopec, supra note 16, at 373. In Williams v. Currie, the petitioner and his male co-defendant received twenty-three- to twenty-seven-year sentences for shooting into various homes and cars, while their female co-defendant, Jamie Forehand, received only an eight-month sentence. 103 F. Supp. 2d at 859–61. Finding that the petitioner’s Fourteenth Amendment rights had been violated, the court noted, “The only truly noticeable difference between Forehand and her two [male] co-defendants is gender. This record is sufficient to allow a finding that gender discrimination accounts for most, if not all, of the more than twenty-year gap between plaintiff’s total sentence and Forehand’s total sentence.” Id. at 868.

166 See § 19.03; supra Part II.
mits unguided consideration of mitigating circumstances, which allows juries to rely on gender-based stereotypes and paternalistic attitudes when making sentencing decisions.\footnote{See \S 19.03; \textit{Tex. Code Crim. Proc. Ann. art. 37.071(e)(1) (West 2006); Streib, \textit{supra} note 8, at 616–20; see also \textit{State v. White (White II)}, 982 P.2d 819, 828 (Ariz. 1999) (allowing a jury to find that being a “caring mother” was a mitigating circumstance in a female co-defendant’s case while rejecting that being a “caring father” was a mitigating circumstance in her husband’s case).}

Furthermore, the Texas statute is unconstitutional not only because of discriminatory application during the initial determination of death eligibility, but also because legal and political actors treat male offenders more harshly.\footnote{See, \textit{e.g.}, Shapiro, \textit{supra} note 17, at 456 (noting that many judges have admitted to treating women with more leniency than men); Kopec, \textit{supra} note 16, at 357 (discussing that judges and juries are more likely to view women as sympathetic and capable of rehabilitation); \textit{S. Carolina Confronts Death Penalty for Women}, \textit{supra} note 17 (explaining that prosecutors often shy away from charging women with capital crimes).} Juries convict women of murder less frequently than they convict men, and they tend to convict women of lesser degrees of murder, which carry lighter sentences.\footnote{See \textit{Shapiro}, \textit{supra} note 17, at 451–52.} Judges, politicians, and the general public also treat women with leniency and purposefully give them protections and considerations to which men are not entitled.\footnote{See \textit{Rapaport}, \textit{supra} note 12, at 584–85 (explaining that the “sheer unusualness” of a female facing capital punishment causes judges, politicians, jurists, and the press to afford a woman’s case “closer scrutiny”); \textit{Shapiro}, \textit{supra} note 17, at 456 (revealing that some judges admit to being knowingly more lenient towards women). There may also be political reasons to treat women with more leniency: George W. Bush, who oversaw more than 120 executions during his governorship, reported “the concern felt in his administration that the execution of a woman would make him and the State of Texas appear inhumane and ‘bloodthirsty.’” \textit{Rapaport}, \textit{supra} note 12, at 585 (quoting \textit{Bush}, \textit{supra} note 115, at 146). Even judges with lifetime tenure worry that ordering the execution of a woman would cause them to lose public support. See id.} In the rare instances when women do receive death sentences, they are even more rarely executed.\footnote{See \textit{Death Sentences in the United States from 1977 by State and by Year, Death Penalty Info. Center}, http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008 (last visited May 8, 2011); \textit{State by State Database}, \textit{supra} note 13; \textit{Women and the Death Penalty}, \textit{supra} note 6. Since the reinstitution of the death penalty in 1976, Texas has meted out 905 death sentences to men and nineteen to women. \textit{See Death Sentences in the United States from 1977 by State and by Year, supr}; \textit{Women and the Death Penalty, supra} note 6. While 464 of those men have been executed, only three of those women have been executed. \textit{See State by State Database, supra} note 13; \textit{Women and the Death Penalty, supra} note 6.} Whereas nearly forty-five percent of men on death row are eventually executed, this figure may be as low as sixteen percent for women.\footnote{See \textit{Death Sentences in the United States from 1977 by State and by Year, supra} note 171; \textit{Executions per Death Sentence, Death Penalty Info. Center}, http://www.deathpenaltyinfo.org/executions-death-sentence (last visited May 8, 2011) (showing that the overall}
nineteen death sentences were imposed upon women in Texas, but only three of those women were actually executed.\textsuperscript{173} This is due in part to the purposeful consideration of gender by governors and judges during the process of granting reversals and stays.\textsuperscript{174}

Despite this potential gender discrimination, an analysis under the Equal Protection Clause of the Fourteenth Amendment is far from straightforward.\textsuperscript{175} Though a gender-based equal protection challenge to the death penalty has the makings of a winning argument, it must first overcome certain obstacles, including level of scrutiny, qualification of male offenders as a suspect class, facial neutrality, real differences, and contradictory precedent.\textsuperscript{176}

A. Level of Scrutiny

The success of a Fourteenth Amendment claim often depends on the standard of review that courts use when evaluating claims by a given group.\textsuperscript{177} For example, while consideration of discrimination against racial and ethnic groups receives strict scrutiny in equal protection challenges, the standard for gender-based challenges is somewhat less rigid, and an intermediate standard is generally applied.\textsuperscript{178}

\begin{itemize}
\item Rate of executions per death sentence in Texas from 1977 to 2007 was 44.7\%); State by State Database, supra note 13; Women and the Death Penalty, supra note 6.
\item See Women and the Death Penalty, supra note 6.
\item See, e.g., Bush, supra note 115, at 155 (showing the Texas governor’s moral struggle with executing a woman); Rapaport, supra note 12, at 585; Shapiro, supra note 17, at 456 (revealing that some judges admit to being more lenient towards women).
\item See, e.g., Shapiro, supra note 17, at 465 (predicting difficulty for men in obtaining status as a suspect class); Kopec, supra note 16, at 373–82.
\item See, e.g., Michael M. v. Superior Court, 450 U.S. 464, 466–67 (1981); Shapiro, supra note 17, at 465; Kopec, supra note 16, at 373–82.
\item See Norman T. Deutsch, Nguyen v. INS and the Application of Intermediate Scrutiny to Gender Classifications: Theory, Practice, and Reality, 30 PEPP. L. REV. 185, 188–95 (2003). There are three recognized levels of judicial scrutiny. Id. at 188. The first, strict scrutiny, requires that a discriminatory law or policy be narrowly tailored to serve a compelling government interest. Id. at 190–91. This has been the standard applied to cases involving classifications based on race or national origin. Id. at 192. The second, intermediate scrutiny, requires that a classification be substantially related to an important government interest. Id. at 191. The third, rational basis, requires only that a classification be rationally related to a legitimate government purpose. Id. at 188–89.
\item See id. at 192–93. Traditionally, courts applied only minimal scrutiny to gender classifications because it was believed that “[w]omen’s proper place was at the center of family life, not the market or politics; and, it was constitutional for states to try to protect them from the vicissitudes of life when they ventured outside the home.” See id. at 220–21. In the 1970s, however, perceptions of a woman’s role began to change, and courts began affording intermediate scrutiny to gender bias claims. See id. at 221–25. Today, it is unclear what the standard of review should be for gender classifications—some courts have applied
ate review requires only that a discriminatory policy be substantially related to an important government interest.\textsuperscript{179} It is possible, however, that courts will apply a stricter standard when hearing a gender-based challenge.\textsuperscript{180} In Frontiero v. Richardson, for example, a military policy allowed the spouses of male military service members to receive benefits more easily than the spouses of female military service members.\textsuperscript{181} The Court found that the government purpose of administrative ease did not pass strict scrutiny and was invalid.\textsuperscript{182} More recently, in United States v. Virginia, the majority opinion held that sex discrimination had to be “exceedingly persuasive” in its justification.\textsuperscript{183} Therefore, one could argue that a discriminatory gender classification would receive at least intermediate scrutiny, if not strict scrutiny.\textsuperscript{184}

It might also be possible that none of this case law or precedent is relevant, based on the principle that “death is different.”\textsuperscript{185} For many years, the U.S. Supreme Court has required additional safeguards for capital cases that are not required for any other criminal trials.\textsuperscript{186} The rationale behind this special treatment is that because taking a human life is the ultimate state sanction, it must be done with as much exactness and deliberation as possible.\textsuperscript{187} Therefore, regardless of the level of scrutiny a gender claim might be given in another scenario, it is pos-

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\textsuperscript{179} See Deutsch, \textit{supra} note 177, at 191.

\textsuperscript{180} See, e.g., VMI, 518 U.S. at 531 (majority opinion); Frontiero v. Richardson, 411 U.S. 677, 690–91 (1973).

\textsuperscript{181} See Frontiero, 411 U.S. at 678.

\textsuperscript{182} Id. at 690–91 (“[W]hen we enter the realm of ‘strict judicial scrutiny,’ there can be no doubt that ‘administrative convenience’ is not a shibboleth, the mere recitation of which dictates constitutionality.”).

\textsuperscript{183} See VMI, 518 U.S. at 531.

\textsuperscript{184} See Deutsch, \textit{supra} note 177, at 270–71.


\textsuperscript{187} See id. at 543.
sible that it would receive a stricter level of scrutiny in a capital punishment context. 188

B. Suspect Class Status

The Fourteenth Amendment is generally seen as a way to protect individuals in historically marginalized groups from discrimination based on their status. 189 Therefore, it is somewhat counterintuitive for men to be considered a suspect class in an equal protection challenge because they are not a historically disadvantaged group. 190 In City of Richmond v. J.A. Croson Co., however, the Supreme Court held that all racial classifications, even those discriminating against white citizens, were subject to the highest standard of scrutiny, a holding that could apply equally to gender discrimination against men. 191

Further, there have been several instances where courts have recognized valid gender bias claims brought by men. 192 In Craig v. Boren, for example, an Oklahoma statute prohibited the sale of certain alcoholic beverages to men under the age of twenty-one and women under the age of eighteen. 193 After applying an intermediate standard of scrutiny, the Supreme Court found that the statute violated the Fourteenth Amendment rights of men between the ages of eighteen and twenty-one. 194 Later, in Orr v. Orr, the Court invalidated a statute that could require men, but not women, to pay alimony in a divorce proceeding, noting, “The fact that the classification expressly discriminates against men rather than women does not protect it from scrutiny.” 195

188 See id. at 559.
190 See Shapiro, supra note 17, at 465; Kopec, supra note 16, at 373.
191 See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493–94 (1989). Croson concerned a city’s policy that thirty percent of all contracting work be given to minority-owned businesses. Id. at 477–78. The Court held that “the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification,” and that the single standard of review for racial classifications should be strict scrutiny. See id. at 493–94.
192 See, e.g., Miss. Univ. for Women v. Hogan, 458 U.S. 718, 723 (1982) (“That this statutory policy discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review.”); Craig, 429 U.S. at 204. In Mississippi University for Women v. Hogan, the Court used an “exceedingly persuasive justification” standard and found that a nursing school policy which prohibited the admission of men was invalid under the Fourteenth Amendment. See 458 U.S. at 720–21, 724, 733.
193 Craig, 429 U.S. at 191–92.
194 See id. at 204.
C. Facial Neutrality and Disparate Impact

Even if men achieve status as a suspect class in the capital punishment context, they must next overcome the difficulties posed by Texas’s facially neutral statute. When evaluating equal protection claims, the Supreme Court has placed its focus on intentional or purposeful discrimination. Thus, statutes creating a disparate impact are valid as long as they were not created with a discriminatory purpose. The Texas death penalty statute does not, on its face, discriminate between men and women. While this makes a constitutional challenge more difficult, it is still possible that the Court will hold that the statute is unconstitutional.

First, it is possible that the disparate impact of the Texas death penalty statute is in fact intentional. As discussed earlier, it is not uncommon for judges or governors to feel more sympathy towards or afford more leniency to female criminals. This prevailing paternalistic attitude could certainly be held by the members of the Texas legislature as well. If the Texas statute was purposefully constructed to encourage convictions for male offenders and protection for female offenders, it would be invalid despite its lack of explicit discriminatory language.

Such purposeful discrimination might also exist in the application of Texas’s death penalty statute and intentional gender discrimination during the pre-trial, trial, or sentencing phases of a capital case might also violate a defendant’s equal protection rights. In Williams v. Currie, for example, a U.S. district court found that a male defendant’s Fourteenth Amendment rights were violated based on a gross disparity between his sentence and that of his female co-defendant. While the

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197 See Arlington Heights, 429 U.S. at 265.

198 See id.

199 See § 19.03.

200 See Kopec, supra note 16, at 375.

201 See, e.g., Bush, supra note 115, at 155 (showing the governor’s moral struggle with executing a woman); Shapiro, supra note 17, at 456 (revealing that some judges admit to being more lenient towards women).

202 See, e.g., Bush, supra note 115, at 154; Shapiro, supra note 17, at 456.

203 See, e.g., Shapiro, supra note 17, at 456; Streib, supra note 8, at 628; supra Part I.B.

204 See Arlington Heights, 429 U.S. at 265.

205 See Williams, 103 F. Supp. 2d at 868; supra Part III.

206 See Williams, 103 F. Supp. 2d at 868.
decision in Williams did not void the relevant punishment statute, a court may find a statute unconstitutional when it is applied in such a discriminatory way.\textsuperscript{207}

D. Real Differences

There are some circumstances in which the state may constitutionally discriminate against one gender on the basis of so-called “real differences.”\textsuperscript{208} In Michael M. v. Superior Court, for example, a California statute that punished men, but not women, for statutory rape was challenged under the Fourteenth Amendment.\textsuperscript{209} The Court found that this discriminatory treatment was justified by the state’s interest in preventing illegitimate teenage pregnancies.\textsuperscript{210} Because women are not biologically capable of impregnating men, the statute was justified by a real difference.\textsuperscript{211}

In contrast, eligibility for execution involves no such real differences.\textsuperscript{212} While there are obviously inherent differences between men and women, there is no logical difference that qualifies men, but not women, to die for their wrongdoings.\textsuperscript{213} Even if a real differences argument were presented, surely no biological difference or state objective is critical enough to justify violating the equal protection rights of a male defendant in a capital case.\textsuperscript{214}

Even if the gender discrepancy in death sentences is the result of real differences in the types of crimes committed by men and women, and even if the aggravating and mitigating factors are constitutional, the

\textsuperscript{207} See Yick Wo v. Hopkins, 118 U.S. 356, 357, 373–74 (1886) (finding that a neutral ordinance requiring permits for laundromat operation could be invalid if enforced in a discriminatory manner); Williams, 103 F. Supp. 2d at 868.

\textsuperscript{208} See Deutsch, supra note 177, at 211.

\textsuperscript{209} See Michael M., 450 U.S. at 466.

\textsuperscript{210} See id. at 467.

\textsuperscript{211} See id. This principle was used again in Country v. Parratt, where a forcible rape statute created harshest penalties for male aggressors who attacked female victims. 684 F.2d 588, 589, 592–93 (8th Cir. 1982). The statute was upheld based on real differences because only female victims of male aggressors can suffer the unique harm of pregnancy. See id.

\textsuperscript{212} See Furman, 408 U.S. at 365 (Marshall, J., concurring) (“There is . . . overwhelming evidence that the death penalty is employed against men and not women. . . . It is difficult to understand why women have received such favored treatment since the purposes allegedly served by capital punishment seemingly are equally applicable to both sexes.”).

\textsuperscript{213} See id.; Commonwealth v. Butler, 328 A.2d 851, 858 (Pa. 1974) (holding that a resentencing act that contained minimum sentences for men and not women violated the Fourteenth Amendment because gender has no rational relationship to parole eligibility).

\textsuperscript{214} See Furman, 408 U.S. at 286–87 (Brennan, J., concurring) (emphasizing the extreme nature of the death penalty as punishment); Butler, 328 A.2d at 858.
statute’s constitutionality is still questionable. Stereotypical conceptions of gender may be taken into account when defining which sorts of crimes are among the worst and which sorts of factors warrant sympathy. For example, according to apparent societal standards, “convenience store robbers who kill store clerks should face the death penalty more often than mothers who kill their children.” Therefore, it is possible that many of the aggravating factors in the Texas statute are ultimately deemed death-worthy only because of their objective maleness.

E. Contradictory Precedent

The Supreme Court has never heard a gender-based equal protection challenge to the death penalty. In McCleskey v. Kemp, however, the Court heard and rejected a race-based equal protection challenge to a death penalty statute. While some argue that this holding makes a gender-based challenge more difficult, McCleskey leaves the door to constitutional challenge open wider than it might originally seem. Also, though some negative precedent has emerged from lower courts, a successful gender-based claim is still quite possible.

1. McCleskey v. Kemp & Challenges to the Death Penalty

In 1987, the Supreme Court heard an equal protection challenge to the death penalty on the basis of race in McCleskey v. Kemp. In support of his argument, the defendant, an African American male, introduced research known as the Baldus Study, which indicated that African American defendants were sentenced to death at disproportionately higher rates than white defendants in the state of Georgia. The Court held that the Fourteenth Amendment was not violated by evidence of a

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215 See Streib, supra note 8, at 615–19; supra Part II.
216 See Streib, supra note 8, at 615–19.
217 Id. at 615.
218 See Id. at 615.
219 See Id. at 615.
222 See, e.g., Spinkellink v. Wainwright, 578 F.2d 582, 616 (5th Cir. 1978); State v. White (White I), 815 P.2d 869, 882–84 (Ariz. 1991), abrogated by State v. Salazar, 844 P.2d 566 (Ariz. 1992); Atwell, supra note 49, at 27; Shapiro, supra note 17, at 462–63; see also infra Part V.E.2.
223 See McCleskey, 481 U.S. at 282–83.
224 See id. at 283, 286; Shapiro, supra note 17, at 429.
statistical racial disparity and that a constitutional violation occurs only when there is purposeful discrimination against a particular defendant on the basis of race.\textsuperscript{225}

Some scholars believe that \textit{McCleskey} has, at least temporarily, closed off Fourteenth Amendment challenges to death penalty statutes by all suspect classes.\textsuperscript{226} The language in \textit{McCleskey} indicates a preoccupation with the slippery slope that could occur if statistically based challenges are accepted as equal protection violations.\textsuperscript{227} Gender bias within the capital punishment system, however, is significantly different from racial bias.\textsuperscript{228} The statistical disparity between condemned men and women is far more drastic than the disparity between Caucasians and African Americans.\textsuperscript{229} In 2000, African Americans made up 12.3\% of the population but accounted for nearly 35\% of executions.\textsuperscript{230} Men, however, make up less than half of the population but account for more than 99\% of executions.\textsuperscript{231} This statistic shows a dramatically disparate impact even after considering that women commit only 10\% of capital crimes.\textsuperscript{232}

Moreover, it is important to note that \textit{McCleskey} was a five to four decision with a strong dissent.\textsuperscript{233} Justice Brennan and his fellow dissenters were disturbed by the fact that the race of a killer and the race of a victim are more determinative than many other details of a crime when predicting whether a defendant will be sentenced to death.\textsuperscript{234}

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{225}] See \textit{McCleskey}, 481 U.S. at 319; Shapiro, \textit{supra} note 17, at 429.
\item[\textsuperscript{226}] See Shapiro, \textit{supra} note 17, at 461–62.
\item[\textsuperscript{227}] See \textit{id.} at 429–30. The slippery slope concern applies to other penalties and to other minority groups. See \textit{McCleskey}, 481 U.S. at 315–18.
\item[\textsuperscript{228}] If we accepted McCleskey’s claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty. Moreover, the claim that his sentence rests of the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender. \textit{Id.} at 315–17 (footnotes omitted).
\item[\textsuperscript{229}] See Kopec, \textit{supra} note 16, at 376.
\item[\textsuperscript{230}] See \textit{id.} at 376–77; \textit{Women and the Death Penalty, supra} note 6.
\item[\textsuperscript{231}] See Kopec, \textit{supra} note 16, at 376.
\item[\textsuperscript{232}] See \textit{id.} at 377.
\item[\textsuperscript{233}] See \textit{Women and the Death Penalty, supra} note 6.
\item[\textsuperscript{234}] See \textit{McCleskey}, 481 U.S. at 282, 320 (Brennan, J., dissenting); Shapiro, \textit{supra} note 17, at 445. Of the four dissenters, only Justices Brennan and Marshall would find that “the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments . . . .” \textit{McCleskey}, 481 U.S. at 320.
\item[\textsuperscript{234}] See \textit{McCleskey}, 481 U.S. at 321 (Brennan, J., dissenting).
\end{itemize}
\end{footnotesize}
The dissenters were not convinced by the majority’s argument that discrimination must be shown in the case at hand and instead felt that such a strong racial disparity was at odds with the concern for rationality in capital sentencing. Justice Blackmun noted that “[d]isparate enforcement of criminal sanctions ‘destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process.’” The dissent further accused the majority of applying an inappropriate standard of scrutiny when evaluating the Fourteenth Amendment challenge, noting that a legitimate state interest is not sufficient when dealing with a life or death matter. Considering the close vote and impassioned minority in *McCleskey*, it is possible that a change in the Court’s composition could result in the overruling of this decision.

2. Gender and the Death Penalty—Lower Court Decisions

While the Supreme Court has yet to hear an equal protection challenge to the death penalty on the basis of gender discrimination, several lower courts have discussed the issue. The resulting decisions consider many of the issues inherent in gender-based challenges to facially neutral statutes. For example, many courts have relied on the

At some point in this case, Warren McCleskey doubtless asked his lawyer whether a jury was likely to sentence him to die. A candid reply to this question would have been disturbing . . . that it was more likely than not that the race of McCleskey’s victim would determine whether he received a death sentence . . . .

*Id.* at 322–23. “The Court’s evaluation of the significance of petitioner’s evidence is fundamentally at odds with our consistent concern for rationality in capital sentencing, and the considerations that the majority invokes to discount that evidence cannot justify ignoring its force.” *Id.* at 322 (arguing that McCleskey should not have to prove racial bias in his case in particular and that fear of encouraging other sentencing challenges is not a valid justification).

*Id.* at 346 (Blackmun, J., dissenting) (quoting *Rose v. Mitchell*, 443 U.S. 545, 555–56 (1979)).

*See id.* at 347–8.

*See id.* at 320 (Brennan, J., dissenting); *Shapiro*, *supra* note 17, at 445.

*See*, e.g., *Spinkellink*, 578 F.2d at 616, 621 (upholding Florida’s death penalty statute despite arguments that it was applied in a discriminatory manner against males in violation of the Equal Protection Clause of the Fourteenth Amendment); *White I*, 815 P.2d at 882–83 (upholding Arizona’s death penalty statute despite a gender-based equal protection challenge); *Atwell*, *supra* note 49, at 27 (noting that the opportunity for a gender-based death penalty challenge has not been foreclosed because the Supreme Court has not yet considered the issue).

*See* *White II*, 982 P.2d at 827–29; *State v. Holsinger*, 563 P.2d 888, 897–98 (Ariz. 1977); *supra* Part V.A–D.
challenged statute’s facial neutrality and examined only the specific circumstances of a defendant’s case.241

In State v. White, Michael White was convicted for murder and appealed his death sentence on several grounds.242 One of White’s grounds for appeal was that his female co-defendant, Susan Johnson, received only life imprisonment for her crime.243 The Arizona Supreme Court rejected White’s equal protection claim, holding that, after an individual evaluation, the sentencing court appropriately found mitigating circumstances only in Johnson’s case.244 Here, the court relied on the facial neutrality of the Arizona death penalty statute and stated, “Male murderers are not singled out for capital punishment. The statute does not, on its face, distinguish between the sexes.”245 Similarly, in Galloway v. State, the male defendant was sentenced to death, whereas the female defendants received plea bargains for lesser sentences.246 Again, the court found no gender-based equal protection violation because the prosecutor evaluated the defendants as individuals before deciding whom to prosecute.247

Courts have also been unwilling to acknowledge the stark gender disparities created by capital punishment schemes.248 In White, for example, the court refused to take into account the fact that although

241 See, e.g., White I, 815 P.2d at 882–84 (finding mitigating factors in female co-defendant’s case and holding that “[t]he statute does not, on its face, distinguish between the sexes”); Holsinger, 563 P.2d at 897–98 (finding defendant who received a death sentence was not denied equal protection of the laws despite the fact that his wife and co-defendant received life imprisonment because the trial court found a mitigating circumstance in the wife’s case and not the defendant’s).

242 See White I, 815 P.2d at 871–73.

243 See id. at 871–73, 882–83.

244 See id. at 882–83. Years later, in a subsequent appeal, the Arizona Supreme Court again considered the sentencing disparity in White’s case. See White II, 982 P.2d at 828–30. The court noted that Johnson was a “caring mother” and took into account the devastating effect a life sentence would have on her young daughter. Id. The court noted that being a “caring father” was not equivalent to being a “caring mother” in this instance. See id. In the prior appeal, the court noted that Johnson’s difficult marriage and divorce were mitigating factors and that all twelve jurors recommended leniency for Johnson. See White I, 815 P.2d at 882–83. This exemplifies the tendency of juries to find sympathetic factors primarily in the lives of females. See White II, 982 P.2d at 828–30; White I, 815 P.2d at 882–83; Streib, supra note 8, at 619.

245 See White I, 815 P.2d at 882–84.


247 See id. In this case, Galloway and his friends hatched a plan to lure a stranger to their motel room to kill and rob him. Id. at *1. The defendant’s girlfriend lured the victim to the motel, where Galloway and a male friend killed him. Id.

248 See, e.g., State v. Banks, 271 S.W.3d 90, 157 (Tenn. 2008); White I, 815 P.2d at 882–84.
women commit ten percent of Arizona homicides, no women had been executed under the current statute.249 Dismissing this data, the court stated, “‘N[either the federal constitution nor this court has ever required that the imposition of the death penalty precisely reflect the composition of the general population.’”250 A statistical argument was also raised in State v. Banks, where a Tennessee death row inmate challenged his sentence on the grounds that Tennessee’s death row housed ninety-two men but only two women.251 The court rejected this argument, finding that the discrimination could be explained on other grounds, such as fewer commissions of capital crimes by women.252

Thus far, American courts have held tightly to the notion that a discriminatory impact does not violate equal protection absent a discriminatory purpose.253 The courts in the aforementioned cases do not consider the potential to preserve the requirement of a discriminatory purpose even in the face of a successful gender-based equal protection challenge to the death penalty.254 Texas’s death penalty statute, although facially neutral, is certainly structured and applied in a way that discriminates against male defendants.255 In the case of a gender-based challenge to Texas’s capital punishment statute, courts should recognize this intentional discrimination and find the statute unconstitutional as a violation of the Fourteenth Amendment.256

Conclusion

With a few rare exceptions, the death penalty effectively applies only to men. Women are condemned to death in American society only

249 See White I, 815 P.2d at 882.
250 Id. (alteration in original) (quoting State v. Richmond, 666 P.2d 57, 66–67 (Ariz. 1983)); see also Kindred v. State, 540 N.E.2d 1161, 1184–85 (Ind. 1989) (finding that a mere showing that no females were sentenced as habitual offenders under an Indiana statute did not constitute an equal protection violation), abrogated by Fajardo v. State, 859 N.E.2d 1201 (Ind. 2007).
251 See Banks, 271 S.W.3d at 157.
252 See id. The court in Banks mentioned in a footnote that “there is a well-documented variance between the types of murders generally committed by men and those generally committed by women.” Id. at 157, n.60. The court, however, declined to expand on this point and did not analyze Tennessee’s gendered understanding of capital crime. See id. at 157.
253 See Shapiro, supra note 17, at 462–63; supra Part V.B–C.
254 See McCleskey, 481 U.S. at 322–23 (Brennan, J., dissenting); Kopec, supra note 16, at 376–77; supra Part III, V.C.
256 See § 19.03; McCleskey, 481 U.S. at 322–23 (Brennan, J., dissenting); Kopec, supra note 16, at 376–77; supra Part III, V.C.
if they blatantly defy feminine stereotypes and thus forfeit the protection that being a woman otherwise affords. The Texas capital punishment statute, in particular, is constructed in a way that permits and even encourages unconstitutional gender discrimination, thereby depriving male defendants of their equal rights to life. Given the extreme gender disparity in the application of the Texas statute, the Supreme Court should distinguish *McCleskey v. Kemp* and hold that the Texas capital punishment statute violates the Equal Protection Clause of the Fourteenth Amendment.
THE CONTINUED ILLEGALIZATION OF
COMPASSION: UNITED STATES v. MILLIS
AND ITS EFFECTS ON HUMANITARIAN
WORK WITH THE HOMELESS

MATTHEW M. CUMMINGS*

Abstract: Every year, more cities enact food sharing restrictions that punish individuals who try to feed the homeless. These laws are often part of a general scheme to solve a city’s homelessness problem by making life so unbearable for homeless men and women that they will be forced to move elsewhere. Humanitarian aid like food sharing, however, is a form of expressive conduct whereby the speaker communicates to a particular audience in need that he or she is willing to care for them. Additionally, the speaker’s conduct may inform observers about a particular humanitarian dilemma or encourage them to become involved. In United States v. Millis, the Ninth Circuit failed to recognize an act of humanitarian aid for traveling immigrants as a form of protected speech, thereby opening the door to the creation of more harmful and unfair laws that suppress humanitarian aid.

Introduction

In United States v. Millis, Daniel Millis violated a federal environmental regulation—50 C.F.R. § 27.94(a)—by leaving half-gallon bottles of water along trails of the Buenos Aires National Wildlife Refuge to prevent needless dehydration deaths of migrants trying to cross the border from Mexico into the United States. He argued that “humani-


1 See United States v. Millis, 621 F.3d 914, 914–16 (9th Cir. 2010); Disposal of Waste, 50 C.F.R. § 27.94(a) (2010). In 1997, the Refuge Improvement Act created the National Wildlife Refuge System in order “to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans.” 16 U.S.C. § 668dd(a)(2) (2006). In administering this system, the Secretary of the Interior is required to ensure the purposes of each refuge are carried out and to “plan and direct the continued growth of the System in a manner that is best designed to accomplish the mission of the System.” Id. § 668dd(a)(4)(C)–(D). In accordance with this mandate, the secretary created federal regulations for the disposal of waste. See Millis, 621 F.3d at 917–18; 50 C.F.R. § 27.94. The regulation prohibits the following conduct:
tarian aid is never a crime,” but is that always the case? As Millis demonstrates, a regulation clearly designed to protect the environment can sometimes unintentionally punish humanitarian efforts. Moreover, some laws may be less benign than they seem and may actually have been passed to prevent humanitarian efforts under the auspices of neutral environmental or public safety regulations. This is precisely the case in several U.S. cities where food sharing restrictions limit the ability of individuals and charities to give food to the homeless. These laws are disguised as regulations to prevent littering or provide for public safety and order but in many cases, they evince “an open hostility” to homeless and indigent populations.

The littering, disposing, or dumping in any manner of garbage, refuse sewage, sludge, earth, rocks, or other debris on any national wildlife refuge except at points or locations designated by the refuge manager, or the draining or dumping of oil, acids, pesticide wastes, poisons, or any other types of chemical wastes in, or otherwise polluting any waters, water holes, streams or other areas within any national wildlife refuge . . . .

50 C.F.R. § 27.94(a). Millis was convicted under this provision for his activities with No More Deaths, “an organization that provides humanitarian aid to migrants,” including the “placement of water in the desert along frequently traveled routes for unlawful entrants into the United States.” Millis, 621 F.3d at 915.

2 See Millis, 621 F.3d at 916.

3 See id. at 914–16 (demonstrating, implicitly, that Millis’s interest in preventing dehydration deaths of migrants conflicts with the government’s interest in protecting one of the country’s ten most threatened wildlife refuges).

4 See generally Feeding Intolerance: Prohibitions on Sharing Food with People Experiencing Homelessness, Nat’l Law Center on Homelessness & Poverty & Nat’l Coalition for the Homeless, 7, 10–17 (Nov. 2007), http://www.nationalhomeless.org/publications/foodsharing/Food_Sharing.pdf [hereinafter Feeding Intolerance] (providing examples of food sharing restrictions that were designed to stop individuals from feeding the homeless).

5 See id. For the purposes of this Comment, the term “homeless” refers to those persons who are “chronically homeless.” See Fact Sheet: Chronic Homelessness, Nat’l Alliance to End Homelessness, 1 (Feb. 2010), http://www.endhomelessness.org/files/1623_file_Fact_Sheet_chronic_2_1_2010.pdf. The Department of Housing and Urban Development defines a “chronically homeless” person as “an unaccompanied homeless individual with a disabling condition who has either been continuously homeless for a year or more, or has at least four (4) episodes of homelessness in the past three (3) years.” Id. at 1 n.4.

6 See Feeding Intolerance, supra note 4, at 7, 10–11 (explaining, for example, that Atlanta’s food sharing restrictions were implemented to “clean up the city,” Dallas’s food sharing restrictions were imposed for food safety and littering concerns, and Baltimore’s food sharing restrictions were enforced for public health reasons); see also D. Matthew Lay, Note, Do Not Feed the Homeless: One of the Meanest Cities for the Homeless Unconstitutionally Punishes the So-Called “Enablers,” 8 Nev. L.J. 740, 757 (2008) (noting that the “justification for the [Las Vegas food sharing] ordinance shifted depending on the circumstances and the only person to provide evidence in support of the ordinance cited largely irrelevant evidence related to “the safety of the homeless . . . and the litter attendant to mobile feedings”).
Although the Ninth Circuit Court of Appeals decided in Millis’s favor, this Comment argues that the court’s decision will enable cities to drive out homeless populations by creating anti-littering or public safety regulations, which will wrongly punish individuals and charities trying to provide the homeless with basic human necessities. Part I discusses the two compelling interests involved in the Millis case and the majority’s unconvincing attempt to protect them. Part II illustrates the challenges facing homeless individuals as well as the similarities between the facts in Millis and the problems facing charitable efforts to help the homeless. Part III explains how the Millis decision protects a city’s ability to enforce food sharing restrictions against individuals and charities that try to feed the homeless. Lastly, Part IV argues that the court could have protected the two compelling interests in Millis—the government’s interest in protecting federal wildlife refuges and Millis’s interest in providing humanitarian aid—by declaring that humanitarian aid is a form of speech protected by the First Amendment.

I. MILLIS: THE DESIRE TO PROTECT TWO COMPelling INTERESTS

In Millis, the Ninth Circuit faced a difficult decision—the court could either uphold a regulation designed to protect the nation’s wildlife refuges or protect Millis’s right to engage in humanitarian aid. In the end, the Ninth Circuit reversed the judgment of the district court, thereby overturning Millis’s conviction. The court based its decision on the ambiguity of the regulation Millis violated, however, and not on the nature of his conduct. The result was an unconvincing majority opinion finding that the word “garbage” in 50 C.F.R. § 27.94(a) was ambiguous. Judge Jay S. Bybee, in dissent, easily refuted this position on a variety of grounds.

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7 See Millis, 621 F.3d at 916 n.2. The court’s focus on statutory construction and its statements in dicta protecting general littering policies may provide a roadmap for cities to codify their anti-homeless ambitions effectively through littering or public safety statutes. See Feeding Intolerance, supra note 4, at 10–17.
8 See United States v. Millis, 621 F.3d 914, 914–16 (9th Cir. 2010).
9 Id. at 918.
10 See id.; Disposal of Waste, 50 C.F.R. § 27.94(a) (2010).
11 See Millis, 621 F.3d at 917.
12 See id. at 919–24 (Bybee, J., dissenting). Judge Bybee found “no need to invoke the rule of lenity” because “[the regulation] can be understood by persons of ordinary intelligence.” Id. at 919. Bybee argued that the majority largely ignored the term “littering” and unnecessarily focused on the term “garbage,” despite the fact that Millis’s citation was for “littering in a National Wildlife Refuge.” See id. at 920. He argued, “[L]eaving plastic bottles in a wildlife refuge is littering under any ordinary, common meaning of the word.” Id.
Millis left water bottles in the refuge because of his involvement with the organization No More Deaths.\textsuperscript{13} No More Deaths seeks to prevent the unnecessary deaths of illegal immigrants crossing the border into the United States by providing them with humanitarian aid.\textsuperscript{14} In 2007 alone, because of the sweltering heat and increased California border security, 218 migrant bodies were found in the deserts of Pima County, Arizona.\textsuperscript{15} One way the organization attempts to mitigate this humanitarian tragedy is to place full bottles of water along frequently traveled immigration routes to help curtail dehydration and exposure deaths.\textsuperscript{16}

On February 22, 2008, Millis and three other No More Deaths volunteers placed bottles of purified water along the trails of the refuge.\textsuperscript{17} Leaving water bottles along the trails of the refuge was not a careless act of littering, but rather a deliberate humanitarian effort to prevent the deaths of migrants.\textsuperscript{18} Nevertheless, Millis and the three other volunteers acted without a permit and a U.S. Fish and Wildlife Service officer

\textsuperscript{13} See id. at 915 (majority opinion).


\textsuperscript{15} See Nicole Santa Cruz, Border Deaths Unabated, L.A. TIMES, Aug. 24, 2010, at A1 (“In 2007, a record 218 bodies were found in Pima County. This year, the death toll could be worse. Already, authorities have recovered the remains of 170 migrants.”).

\textsuperscript{16} See Millis, 621 F.3d at 915. According to the organization’s website, “No More Deaths is an organization whose mission is to end death and suffering on the U.S./Mexico border through civil initiative: the conviction that people of conscience must work openly and in community to uphold fundamental human rights.” History and Mission of No More Deaths, No MORE DEATHS, http://www.nomoredeaths.org/Information/history-and-mission-of-no-more-deaths.html (last visited May 8, 2011). When it was established in 2004, No More Deaths described its organizational mandate as follows:

\textit{To provide water, food, and medical assistance to migrants walking through the Arizona desert; to monitor [U.S.] operations on the border and work to change [U.S.] policy to resolve the “war zone” crisis on the border; and to bring the plight of migrants to public attention. These goals were implemented by recruiting aid programs as well as supporting already-existing ones, by interfaith, humanitarian, peaceful, solidarity-building events, and by establishing camps for assistance, outreach and border monitoring. Under the No More Deaths umbrella, participating groups—staffed by volunteers—abided by clear medical and legal protocols and worked in concert to save human lives.}

\textit{Id.}

\textsuperscript{17} See Millis, 621 F.3d at 915–16.

\textsuperscript{18} See Williams, \textit{supra} note 14; Jones, \textit{supra} note 14.
issued Millis a citation for “Disposal of Waste” on a national wildlife refuge.¹⁹

Without question, the government had a legitimate reason to enforce a strict littering policy.²⁰ The refuge in which Millis was operating is located in Pima County, Arizona, near the Mexican border.²¹ It provides approximately 118,000 acres of “some of the southwest’s rarest habitats for seven endangered species, ten species of concern, and many other native plants and wildlife.”²² Unfortunately, the refuge is in danger because of a lack of funding and the need for rangers to spend eighty to one hundred percent of their time on border control enforcement.²³ The rangers are simply unable to stop littering, off-road vehicle crimes, or other acts capable of destroying the refuge’s fragile habitats.²⁴ By 2008, the destruction had become so widespread that the Buenos Aires National Wildlife Refuge became one of the ten most imperiled national wildlife refuges in the country.²⁵

It was against this factual backdrop that the Ninth Circuit found in Millis’s favor, although the court limited its decision strictly to the wording of 50 C.F.R. § 27.94(a).²⁶ The court reasoned that the term “garbage” within the regulatory scheme was “sufficiently ambiguous . . . that the rule of lenity should apply.”²⁷ The rule of lenity “requires courts to limit the reach of criminal statutes to the clear import of their text and construe any ambiguity against the government.”²⁸ The rule of leniency is

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¹⁹ See Millis, 621 F.3d at 914–16.
²⁰ See Williams, supra note 14; America’s Most Imperiled Refuges: Ten of the Most Vulnerable National Wildlife Refuges, PUB. EMP. FOR ENVTL. RESPONSIBILITY, 11–13 (May 22, 2008) [hereinafter America’s Most Imperiled Refuges], http://www.peer.org/docs/nwr/08_22_5_imperiled_refuges_rpt.pdf (listing the Buenos Aires National Wildlife Refuge as one of the ten most threatened refuges).
²¹ See Millis, 621 F.3d at 919 (Bybee, J., dissenting); Williams, supra note 14; Community Profile: Arivaca, ARIZ. DEPARTMENT OF COMMERCE, 1 (2009), http://www.azcommerce.com/doclib/commune/arrivaca.pdf.
²² America’s Most Imperiled Refuges, supra note 20, at 11; Buenos Aires National Wildlife Refuge, U.S. FISH & WILDLIFE SERVICE, 3 (Oct. 1999), http://library.fws.gov/refuges/buenos_aires.pdf. One of the endangered species in the refuge is the masked bobwhite quail; the Buenos Aires National Wildlife Refuge remains the last habitat for this wild bird within the United States. See Millis, 621 F.3d at 915 (majority opinion).
²³ See America’s Most Imperiled Refuges, supra note 20, at 12 (“Problems on the [U.S.-] Mexican border due to failed U.S. immigration policies are causing great damage to this refuge. Since 2006, over 3500 acres [have] been closed to public use, due to border-related problems.”).
²⁴ See id. at 11–12.
²⁵ Id. at 11.
²⁶ See Millis, 621 F.3d at 918; Disposal of Waste, 50 C.F.R. § 27.94(a) (2010).
²⁷ Millis, 621 F.3d at 918.
²⁸ United States v. Romm, 455 F.3d 990, 1001 (9th Cir. 2006) (citing authorities).
applicable “only where ‘after seizing every thing from which aid can be derived, the Court is left with an ambiguous statute.’”

The court considered the fact that water bottles have value to some people; it also took into account the dictionary definition of “garbage” as “food waste” or “discarded or useless material” and the definition of “discard” as “to get rid of, esp. as useless or unpleasant.” Based on its analysis, the court concluded that it was unclear “whether purified water in a sealed bottle intended for human consumption meets the definition of ‘garbage.’” Therefore, the court found the meaning of “garbage” in 50 C.F.R. § 27.94(a) ambiguous enough to trigger the rule of lenity.

Judge Bybee, however, argued convincingly in his dissent that neither the intent nor the meaning of a regulation prohibiting littering in a wildlife refuge was in any way ambiguous. According to Bybee, the majority overemphasized the term “garbage” when it was clear that the regulation intended to forbid the act of “littering.” Although they contained purified water, Bybee argued, “The bottles are garbage because they are ‘discarded material,’ no matter the bottles’ potential value.” Furthermore, Bybee found that state courts had dismissed claims that the terms “litter,” “garbage,” “waste,” or “refuse” were too vague in a number of previous cases. Bybee’s reasoning is more persuasive and

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29 Millis, 621 F.3d at 917 (quoting United States v. Nader, 542 F.3d 713, 721 (9th Cir. 2008)).
30 See id. (quoting Merriam-Webster’s Collegiate Dictionary 330, 480 (Frederick C. Mish et al. eds., 10th ed. 1996)).
31 See id.
32 See id. at 918.
33 See id. at 919–23 (Bybee, J., dissenting). Judge Bybee stated, “Any item—whether a handbill advertising a land auction or a new high definition TV—brought into the wildlife refuge without the Service’s permission is litter, whether it has intrinsic value or not. It doesn’t belong on the wildlife refuge. The Service couldn’t have been more clear on this.” Id. at 921.
34 See Millis, 621 F.3d at 920 (Bybee, J., dissenting). Millis was cited for “littering in a National Wildlife Refuge” and not for dumping garbage. Id. Millis even testified that refuge workers told him that “leaving ‘water jugs on that trail . . . constituted litter,’ and that he was ‘going to be cited for littering.’” Id.
35 See id. at 921–22. Judge Bybee stated that the key feature of garbage was that it had been discarded: “The idea that garbage is ‘discarded,’ . . . comports with the everyday, common meaning of the term ‘garbage’ and is essential to its definition because it avoids a purely subjective inquiry into the material’s usefulness.” See id. at 921; see also N. Ill. Serv. Co. v. EPA, 885 N.E.2d 447, 552 (Ill. App. Ct. 2008) (“Whether an item has value has no bearing on whether it is discarded.”).
36 See Millis, 621 F.3d at 923 n.6 (Bybee, J., dissenting); see also State v. Clayton, 492 So. 2d 665, 666–67 (Ala. Crim. App. 1986); Sliney v. State, 391 S.E.2d 114, 115 (Ga. 1990); State v. Cox, No. 92WM000017, 1993 WL 65457, at *1 (Ohio. Ct. App. Mar. 12, 1993); State
well-supported than the majority’s opinion, even though it failed to protect Millis’ rights as a humanitarian.\footnote{See Millis, 621 F.3d at 918–24 (Bybee, J., dissenting). Judge Bybee provided several examples of cases where courts did not find the term “garbage” to be unreasonably vague. See id. at 921 & n.2, 923 & n.6; Sliney, 391 S.E.2d at 115; Cox, 1993 WL 65457, at *1; Hood, 600 P.2d at 639; Couch, 2005 WL 3116313, at *3.}

II. The Similarities Between Millis and Charitable Efforts to Feed the Homeless

Millis faced a problem similar to one that individuals and charities feeding the homeless face every day: possible punishment solely for trying to provide basic human necessities to impoverished people.\footnote{See Lay, supra note 6, at 743–47 (discussing the legality of a Las Vegas ordinance that prohibited providing indigent people with food in parks); Feeding Intolerance, supra note 4, at 2; Homes Not Handcuffs: The Criminalization of Homelessness in U.S. Cities, NAT’L LAW CENTER ON HOMELESSNESS & POVERTY & NAT’L COALITION FOR THE HOMELESS, 9 (July 2009), http://www.nationalhomeless.org/publications/crimreport/crimreport_2009.pdf [hereinafter Homes Not Handcuffs] (discussing laws created to punish both the homeless and those who help them).} Unlike in Millis, however, the negative effect that laws have on the provision of humanitarian aid to the homeless is typically not accidental, but intentional.\footnote{See Lay, supra note 6, at 743–47; Feeding Intolerance, supra note 4, at 2; Homes Not Handcuffs, supra note 38, at 9.} Because homelessness can affect tourism, crime, public safety, and the overall local economy, cities often try to enforce laws that minimize the indigent population’s visibility or even force the homeless to move elsewhere.\footnote{See Jason Leckerman, Comment, City of Brotherly Love?: Using the Fourteenth Amendment to Strike Down an Anti-Homeless Ordinance in Philadelphia, 3 U. PA. J. CONST. L. 540, 546 (2001) (explaining that cities perceive the homeless as an obstacle to revival). Enforcement of laws that remove the homeless is most severe during the tourist season. See Donald Saelinger, Note, Nowhere to Go: The Impacts of City Ordinances Criminalizing Homelessness, 13...} Many cities create food sharing restric-
tions in order to deter individuals from assisting the homeless, with the ultimate goal of keeping the homeless out of city parks and public areas.\footnote{See Homes Not Handcuffs, supra note 38, at 14–15.} Unfortunately, these laws only increase hardships for individuals who are already in desperate need of assistance.\footnote{See Leckerman, supra, at 541–42.} Over the years, society’s feelings of sympathy toward the homeless have ranged from indifference, at best, to hostility, at worst.\footnote{See Saelinger, supra note 40, at 545–46.} Many people feel those who are

Geo. J. on Poverty L. & Pol’y 545, 552 (2006). Examples of such heightened enforcement include actions in Reno, Nevada before the annual increase in tourists, in New York City before the 2004 Republican National Convention, and in Little Rock, Arkansas before the opening of the Clinton Presidential Library. \textit{See id.} During tourist season, homeless individuals go to the city parks and tourist attractions because these locations are where the most people are and thus where the homeless are more likely to receive money. \textit{See Leckerman, supra, at 541–42.}

\footnote{See Homes Not Handcuffs, supra note 38, at 14–15.} See Leckerman, supra note 40, at 546 (“Society’s economic and sociological shortcomings help cause and perpetuate homelessness”; Saelinger, supra note 40, at 550 (“[B]y virtue of their diminished access to the opportunities enjoyed by the majority of society, upward economic and social mobility is extremely difficult for the street homeless.”). Many shelters lack beds, forcing the shelters to turn many people away and leaving those people with no choice but to sleep on the streets. \textit{See Hunger and Homelessness Survey: A Status Report on Hunger and Homelessness in America’s Cities}, U.S. CONFERENCE OF MAYORS, 15 (Dec. 2008), http://www.usmayors.org/pressreleases/documents/hungerhomelessnessreport_121208.pdf [hereinafter \textit{Hunger and Homelessness Survey}] (“\textit{C}ities occasionally must turn away individuals and families seeking shelter.”); \textit{see also} Homes Not Handcuffs, supra note 38, at 8–9. According to the U.S. Conference of Mayors, eighteen percent of the homeless population in the United States in 2007 lived on the streets. \textit{See Hunger and Homelessness Survey, supra, at 16.} Sadly, this trend has continued unabated—the number of homeless men and women continues to rise, and the situation is only expected to worsen in light of the foreclosure crisis, a general rise in poverty, and high overall unemployment. \textit{See The Housing Crisis in Los Angeles and Responses to Preventing Foreclosures and Foreclosure Rescue Fraud: Hearing Before the Subcomm. on Hous. and Cmty. Opportunity of the H. Comm. on Fin. Servs., 111th Cong. 10 (2009) [hereinafter \textit{The Housing Crisis}] (statement of Tanya Tull, President and Chief Executive Officer, Beyond Shelter). As a result of current economic conditions, an estimated 1.5 million additional people in California alone may become homeless over the next four years. \textit{Id.} at 43 (statement of Caryn Becker, Policy Counsel, Center for Responsible Lending). At the 2008 U.S. Conference of Mayors, nineteen of the twenty-five cities surveyed reported an increase in homelessness and, on average, the cities reported a twelve percent increase. \textit{See Hunger and Homelessness Survey, supra, at 13.} It is also estimated that at least 840,000 people are homeless on any given day and at least 2.5 to 3.5 million people will experience homelessness within a given year. \textit{Homelessness in the United States and the Human Right to Housing}, NAT’L. LAW CENTER ON HOMELESSNESS & POVERTY, at i (Jan. 14, 2004), http://www.nlchp.org/content/pubs/HomelessnessintheUSandRightstoHousing.pdf. Furthermore, one in every fifty children in America is homeless. \textit{NAT’L CTR. ON FAMILY HOMELESSNESS, AMERICA’S YOUNGEST OUTCASTS: STATE REPORT CARD ON CHILD HOMELESSNESS} 15 (2009), available at http://www.homelesschildrenamerica.org/pdf/rc_full_report.pdf.

\footnote{See Saelinger, supra note 40, at 545–46.} One reason many people support anti-nuisance laws or other laws that punish the behavior of homeless individuals is that people have become tired of caring about the issue. \textit{See id.} at 545 n.5, 554 (referring to this problem as “compassion fatigue”); \textit{see also} Gary Blasi, \textit{And We Are Not Seen: Ideological and Political Barriers to Understanding Homelessness}, 37 AM. BEHAV. SCIENTIST 563, 569–75 (1994) (study-
homeless “choose” to be so. In addition, early efforts to provide homeless men and women with low-income housing and shelters have given way to efforts designed to keep the homeless out of the community because of their effect on local businesses, crime, and property values. The measures cities take to remove the homeless include actions that both directly and indirectly affect the homeless. Measures or laws that directly punish the behavior of the homeless have drastically increased in the last few years; these include anti-nuisance laws, laws that prohibit sleeping, sitting, or storing personal belongings in public spaces, and police sweeps of areas where the homeless generally live.

The homeless are further burdened by laws with indirect effects—for example, some cities have enacted food sharing restrictions that punish individuals and charities for trying to provide food to the homeless. When cities or towns create food sharing restrictions in public

ing the drastic shift in the nature of New York Times articles about the homeless over the course of the 1980s).

See Saelinger, supra note 40, at 558 (noting courts and the public are “increasingly skeptical of the ‘helplessness’ of the homeless”). In reality, homelessness often is not a choice, and homeless people with alcohol or drug problems or mental disorders are sometimes unable to receive the help they need. See id. at 549 n.43. The homeless population’s situation is self-perpetuating—they are frequently excluded from shelters or homeless programs because of their mental health or substance abuse disorders and they are often prevented from acceptance into substance abuse treatment or mental health programs because they are homeless. See id.


See generally Feeding Intolerance, supra note 4 (discussing the impact of food sharing restrictions and suggesting possible alternatives). Major cities that have recently enacted or enforced food sharing restrictions that may, or already do, negatively impact an individual’s or charity’s ability to feed the homeless include the following: Atlanta, Georgia; Baltimore, Maryland; Chattanooga, Tennessee; Cincinnati, Ohio; Dallas, Texas; Denver, Colorado; Fort Lauderdale, Florida; Fort Myers, Florida; Gainesville, Florida; Hempstead, New York; Jacksonville, Florida; Las Vegas, Nevada; Miami-Dade County,
spaces, homeless charities and individual humanitarians are prevented from best utilizing their finite resources to help the people most in need of their services. Similar to the scenario in Millis, charities or religious organizations that focus on providing basic goods need to go where their efforts can have the most significant impact. Most homeless shelters lack the proper resources to feed all those seeking food. Furthermore, many homeless must travel long distances to reach shelters, or they may be unable to reach the shelters at all due to “work conflicts, illness, disability, or lack of adequate public transportation.”

If homeless charities and organizations are forbidden to provide food to the homeless in public spaces and parks because of ostensibly neutral food sharing restrictions, they are unable to fulfill their humanitarian mission.

Nevertheless, many cities restrict efforts to serve the homeless in public places, thereby thwarting such humanitarian activities, for the purpose of preventing the homeless from remaining in the area. Proponents of these laws claim that sharing food with the homeless only enables them to remain homeless. Not only is this justification misguided, but it is also flatly wrong. The cause of a person’s homelessness is more likely tied to a lack of affordable housing, shelter space, available employment, services to help individuals with mental or physical illnesses, or substance abuse treatment services. Providing the homeless with easy access to food greatly increases their chances of survival and allows them to focus on what they need to do to improve their quality of life. Providing food does not promote homelessness.

Florida; Orlando, Florida; Pinellas Park, Florida; Portland, Oregon; San Francisco, California; Santa Monica, California; Sarasota, Florida; Tampa, Florida; West Palm Beach, Florida; and Wilmington, North Carolina. Feeding Intolerance, supra note 4, at 10–18.

49 See Feeding Intolerance, supra note 4, at 6–7.
50 See id.
51 Id. The efforts of food pantries are impeded by the same problems shelters face because most homeless people lack the necessary kitchen equipment to cook the food and many pantries can only give away one package of food per person, per month. Id. at 6.
52 Id. at 7.
53 See id. (“Food sharing programs that reach out to those in public spaces may be the only way some homeless individuals can obtain healthy and safe food.”).
54 See Feeding Intolerance, supra note 4, at 7.
55 See id.
56 See id.
57 See id.
58 See id. (“Depriving a person of food means that she must put all of her energy into obtaining food and less energy on improving other aspects of her life.”).
59 See Feeding Intolerance, supra note 4, at 7.
III. **The Unnecessary Burdens Millis Imposes on Efforts to Feed the Homeless**

The *Millis* decision may make it even more difficult for charities and individuals to provide food or basic provisions to the homeless. The Ninth Circuit’s opinion appears to reflect a desire to protect Millis’s actions without creating a precedent that might hinder the government’s ability to enforce other littering policies. Nevertheless, the decision may negatively, albeit indirectly, affect efforts to provide aid to the homeless in a number of ways. First, the decision focused on the ambiguity of the statute rather than the underlying constitutional reasons for protecting Millis’s humanitarian activity. Second, the decision had a very narrow scope. Third, dicta indicated that Millis could have been charged under a clearer or more general regulation. Lastly, the decision went so far as to provide examples of the kind of regulations under which Millis could have been convicted. Although the decision ultimately overturned Millis’s conviction, it gave cities a blueprint for creating laws that punish individuals providing the homeless with basic human necessities, thereby arming cities with a weapon to wield against the homeless to keep them out of public spaces.
Millis fails to protect humanitarian work because the majority decided the case solely on the ambiguity of the regulation’s wording and not on Millis’s right to help those in need. During his bench trial, Millis admitted to placing the bottles of water in the refuge, but he testified that leaving the bottles of water out was an act of humanitarian aid and, consequently, not a crime. The majority implicitly refused to declare that humanitarian aid is a protected interest but it had no misgivings announcing it would have affirmed Millis’s conviction if the law were a general prohibition on littering. The court also stated, “Millis likely could have been charged under a different regulatory section, such as abandonment of property or failure to obtain a special use permit.” Such dicta communicates to cities that as long as the language of a regulation is clear, it can be enforced against someone trying to provide aid to those in need. Judge Bybee went further in dissent, providing the exact wording of a regulation even the majority agreed it would have upheld. Therefore, although the court struck down part of a regulation that had the secondary effect of punishing humanitarian efforts, the decision will ultimately make it easier for cities to create similar regulations that intentionally punish humanitarian efforts like feeding the homeless.

68 See Millis, 621 F.3d at 918 (focusing only on the rule of lenity issue and thus declining, implicitly, to address issues such as constitutional protection for humanitarian work as a form of expressive conduct).
69 See id. at 916.
70 See id. at 916 n.2. The court declared,

We would have no problem affirming Millis’s conviction if, as [Judge Bybee’s] dissent contends, § 27.94 prohibited littering in a wildlife refuge or disposing of or dumping garbage, refuse sewage, sludge, earth, rocks, or other debris. However, that is not the text of the regulation. Rather than generally prohibiting littering, § 27.94 governs Disposal of Waste.

Id. (internal quotation marks omitted).
71 Id. at 918. In a footnote, the decision listed items that are either important or basic necessities that would be donated to homeless individuals, declaring that abandoning such items would be prohibited. See id. at 918 n.6 (“[W]e do not hold that ‘any number of objects (for example, sleeping bags, packaged food, clothing, flashlights, plastic bags, or shoes) can be left in the . . . refuge.’” (quoting Millis, 621 F.3d at 923 (Bybee, J., dissenting))).
72 See id. at 915–18.
73 See Millis, 621 F.3d at 916 n.2; id. at 919 n.1 (Bybee, J., dissenting).
74 See id. at 916 n.2, 918 (majority opinion); Lay, supra note 6, at 743–47; Feeding Intolerance, supra note 4, at 5–6; Homes Not Handcuffs, supra note 38, at 9.
IV. A Solution to the Millis Problem: Defining Humanitarian Aid as Free Speech

By defining Millis’s actions as expressive conduct—a form of speech entitled to First Amendment protection—the Ninth Circuit could have prevented its decision from burdening or altogether precluding other forms of charity and humanitarian aid.\textsuperscript{75} A reasonable observer would understand that Millis’s conduct was an expression of his dissatisfaction with the United States’ efforts to stop the dehydration deaths of migrants entering the country through the Arizona deserts.\textsuperscript{76} Concededly, 50 C.F.R. § 27.94(a) is a content-neutral regulation supported by an important governmental interest.\textsuperscript{77} The restriction, however, was broader than necessary with respect to the government’s interest.\textsuperscript{78} Additionally, the court could have explained how to word a less restrictive regulation that still managed to protect the government’s interest.\textsuperscript{79} The conduct of Millis and the other No More Deaths volun-

\textsuperscript{75} See Islamic Am. Relief Agency v. Unidentified FBI Agents, 394 F. Supp. 2d 34, 51–54 (D.D.C. 2005) (finding that charitable donations to an organization for humanitarian efforts constituted free speech even if the organization funded terrorism, but upholding an Executive Order restricting such donations because the order passed intermediate scrutiny); Lay, supra note 6, at 756 (arguing that feeding the homeless is speech because of the various political motives).

\textsuperscript{76} See Texas v. Johnson, 491 U.S. 397, 404 (1989) (recognizing expressive conduct as free speech); Williams, supra note 14; Jones, supra note 14. Following the decision, Millis stated, “The day we change our federal border policies to show respect for human life is the day I’ll feel vindicated.” Williams, supra note 14.

\textsuperscript{77} See Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 624 (1994). A regulation is content-neutral if the legislative intent is neither to favor nor disfavor speech. See id. at 624. For a statute to be content-neutral, it must not restrict “either a particular viewpoint or any subject matter that may be discussed.” Hill v. Colorado, 530 U.S. 703, 723 (2000). Because the purpose of the regulation at issue in Millis was to prevent the disposal or abandonment of property in a wildlife refuge—that is, its aim was not to limit a particular viewpoint or subject matter—it could appropriately be considered content-neutral. See United States v. Millis, 621 F.3d 914, 918 (9th Cir. 2010). Also, given the imperiled status of the Buenos Aires National Wildlife Refuge and the government’s desire to prevent further degradation of the habitat, the regulation pursuant to which Millis’s citation was issued furthered an important governmental interest. See America’s Most Imperiled Refuges, supra note 20, at 11–12.

\textsuperscript{78} See United States v. O’Brien, 391 U.S. 367, 376–77 (1968) (holding that a content-neutral regulation must be no more restrictive than necessary); Millis, 621 F.3d at 918 (finding the purpose of the regulatory scheme was “to prevent the disposal or abandonment of unauthorized property on refuge land” and “the structure of the regulatory scheme achieves that end in a number of ways”). The court found that 50 C.F.R. § 27.94(a) “was not intended to be a comprehensive implementation of the Congressional mandate to minimize human impact on wildlife refuges; rather, it formed part of a larger regulatory scheme.” Millis, 621 F.3d at 918.

\textsuperscript{79} See O’Brien, 391 U.S. at 376–77; Millis, 621 F.3d at 918. Millis argued that the regulation was not narrowly tailored because it did “not cover the dissemination of pure water in
teers communicated their dissatisfaction with U.S. immigration policies and their belief that those policies devalue human life.\textsuperscript{80} Although the bottles themselves did not indicate their purpose explicitly, a reasonable observer aware of the problem of exposure deaths in Arizona—an issue that had made headlines across the nation—could infer the meaning of a series of unopened water bottles deliberately left along trails in the desert.\textsuperscript{81} Moreover, Millis communicated his affiliation with No More Deaths by openly displaying a “NoMoreDeaths.org” decal on the vehicle he used to distribute the water bottles.\textsuperscript{82}

Similarly, the act of feeding the homeless in public spaces is a protected form of expressive conduct.\textsuperscript{83} Publicly feeding the homeless communicates to a reasonable observer, or the homeless individual being fed, that individuals should show compassion for those in need by providing them with basic human necessities.\textsuperscript{84}

The government’s interests in protecting the federal wildlife refuges or ensuring public safety and order may properly limit the right to free expression manifested in humanitarian efforts.\textsuperscript{85} For example, 50 C.F.R. § 27.94(a) is a content-neutral regulation and its effect on Millis’s sealed jugs for consumption by humans.” See United States v. Millis, No. CR 08-1211-TUC-CCKJ, 2009 WL 806731, at *4 (D. Ariz. Mar. 20, 2009), rev’d, 621 F.3d 914 (9th Cir. 2010) (citing Schneider v. New Jersey, 308 U.S. 147 (1939)). Furthermore, Millis should not be cited for any water bottles that were found empty because the people who drank the bottles were the actual litterers. See Schneider, 308 U.S. at 162 (finding that anti-littering ordinances, which prohibit leaflet distribution, unconstitutionally infringe free speech rights because “[t]here are obvious methods of preventing littering” such as “the punishment of those who actually throw papers on the streets”). For the same reason, a charity that feeds the poor should not be cited for food left behind by a person the charity served. See id.

\textsuperscript{80} See supra note 16 and accompanying text.
\textsuperscript{81} See Johnson, 491 U.S. at 404 (recognizing expressive conduct as free speech); Williams, supra note 14; Jones, supra note 14. See generally Maria Jimenez, Humanitarian Crisis: Migrant Deaths at the U.S.-Mexico Border, ACLU of SAN DIEGO & IMPERIAL COUNTIES & MEX’S NAT’L COMMISSION OF HUM. RTS. (Oct. 1, 2009), http://www.aclu.org/files/pdfs/immigrants/humanitariancrisisreport.pdf (referring to the problem of border-crossing deaths as a “humanitarian crisis”).

\textsuperscript{82} See Millis, 621 F.3d at 915 (“[Millis] also testified that he had raised the back window when [the officer] approached to make visible his ‘NoMoreDeaths.org’ decal.”). It can also be inferred that the bottles conveyed a message to the immigrants that at least some people were concerned for their well-being. See Spence v. Washington, 418 U.S. 405, 410–11 (1974) (per curiam) (recognizing “the expression of an idea through activity” if it is likely that those looking at the message would understand it).

\textsuperscript{83} See Lay, supra note 6, at 753–58 (arguing that food sharing with the homeless is an expressive form of speech); Homes Not Handcuffs, supra note 38, at 25 (discussing the possibility that courts might find food sharing restrictions infringe upon free speech rights).

\textsuperscript{84} See Lay, supra note 6, at 756.

\textsuperscript{85} See discussion supra Part I.
expression was incidental. Nevertheless, if conduct contains both speech and non-speech elements, even a content-neutral regulation must be struck down if the government’s interest can be achieved by less restrictive means. The regulation at issue in Millis, and city ordinances throughout the United States relating to littering or public health and safety, could achieve their purposes through less restrictive means.

In addition, content-neutral regulations cannot unreasonably limit alternative avenues of communication. If individuals are prohibited from providing water directly to immigrants or giving food to the homeless in public places, then the individuals’ humanitarian messages have no practical significance. Regulations could be written less re-

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86 See O’Brien, 391 U.S. at 376 (finding that a law that incidentally limits free speech can be upheld if it protects “a sufficiently important governmental interest”); Disposal of Waste, 50 C.F.R. § 27.94(a) (2010).

87 See O’Brien, 391 U.S. at 377; see also Lay, supra note 6, at 747 (“When a course of conduct combines speech and non-speech elements, the state may justify incidental limitations on First Amendment freedoms supporting a sufficiently important government interest in regulating the non-speech element.”). The Court in United States v. O’Brien stated,

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377.

88 See Millis, 621 F.3d at 918 (finding that the intent of the regulatory scheme was to prevent the disposal or abandonment of property in a wildlife refuge); Millis, 2009 WL 806731, at *4 (noting defendant’s argument, relying on Schneider v. New Jersey, that the regulation was not narrowly tailored); Williams, supra note 14 (stating that the court “also took note of Millis’ practice of removing empty water bottles he found while on his missions”). For example, 50 C.F.R. § 27.94(a) could distinguish between (1) those who intend to return and retrieve abandoned property but who have either failed to declare that intent or have failed to retrieve the property within a reasonable period of time and (2) those who abandon property with no legitimate purpose and without an intent to return to retrieve the refuse. See Millis, 621 F.3d at 918.

89 See Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) (finding restrictions that infringe speech can only be valid if “they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information”).

90 See Millis, 621 F.3d at 915. Millis’s actions were not unlike the actions of another organization, Humane Borders, to which the U.S. Fish and Wildlife Service granted permission to leave drums of water on the refuge. See id. In fact, Millis’s more direct approach may have been more effective; the arresting officer in Millis testified that one of the drums was roughly two miles away. Id. Such a distance may have been too far or illegal immigrants may have been reluctant to travel to the drums out of fear of getting caught; moreover, these water stations have been systematically vandalized. See id.; Jimenez, supra note 81, at
strictively by providing for simple permit processes, requiring humanitarians to notify park rangers or city authorities of the locations of food or water dispensaries, and requiring the volunteers to return and retrieve leftover bottles or other refuse.\textsuperscript{91} These would not be unreasonable restrictions on humanitarian conduct.\textsuperscript{92}

Thus, prohibiting littering in wildlife refuges achieves governmental interests in the government’s interest in ensuring public health and safety while also preserving humanitarians’ fundamental right of expression.\textsuperscript{93} By recognizing Millis’s humanitarian efforts as expressive conduct protected by the First Amendment, the Ninth Circuit could have created a precedent that would not only protect the government’s legitimate interest, but also shield charitable efforts to help the homeless.\textsuperscript{94} If the act of providing water to immigrants, and by analogy the act of feeding the homeless, were considered forms of free speech, regulations such as 50 C.F.R. § 27.94(a), as well as a significant number of food sharing restrictions, might be invalidated.\textsuperscript{95}

\begin{itemize}
\item \textsuperscript{39} (“[In late 2008], about 40 water stations were vandalized. Volunteers found cut flags, punctured water jugs and, in one case, a burned flag.”).
\item \textsuperscript{91} See Millis, 621 F.3d at 915–16; Williams, \textit{supra} note 14; \textit{Feeding Intolerance, supra} note 4, at 2–19.
\item \textsuperscript{92} See Millis, 621 F.3d at 915–16; Williams, \textit{supra} note 14; \textit{Feeding Intolerance, supra} note 4, at 2–19.
\item \textsuperscript{93} See Millis, 621 F.3d at 914–15; \textit{see also} O’Brien, 391 U.S. at 377 (finding content-neutral regulations that accidentally infringe on speech must be no more restrictive than necessary to further a substantial governmental interest); Schneider, 308 U.S. at 162 (striking down a littering regulation that restricted speech because it was more restrictive than necessary to achieve its purpose); Lay, \textit{supra} note 6, at 753–58 (arguing that food sharing restrictions infringe on free speech).
\item \textsuperscript{94} See Johnson, 491 U.S. at 404 (recognizing expressive conduct as free speech); Millis, 621 F.3d at 914–15 (discussing the purpose of Millis’s actions); Williams, \textit{supra} note 14; \textit{see also} Lay, \textit{supra} note 6, at 743–47 (arguing that the food sharing restriction in Las Vegas violated the \textit{O’Brien} test); \textit{Feeding Intolerance, supra} note 4, at 2–18 (discussing food sharing restrictions that burden humanitarian efforts with the homeless).
\item \textsuperscript{95} See Turner Broad. Sys., Inc., 512 U.S. at 643. As the Supreme Court has noted, “[L]aws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based,” and so laws targeting food sharing might well be considered content based and thus subject to a higher level of scrutiny. \textit{See id.} Even if it were proven that the food sharing restrictions were, in fact, content-neutral, it seems unlikely they would be upheld because they unreasonably limit the efforts to feed the homeless and do not employ the least restrictive means. \textit{See Feeding Intolerance, supra} note 4, at 7–10, 18–19 (suggesting policy recommendations for cities to adopt in place of food sharing restrictions and discussing how “[f]ood sharing programs that reach out to those in public spaces may be the only way some homeless individuals can obtain healthy and safe food”). In addition, many anti-nuisance or begging statutes may be of dubious constitutionality. \textit{See Christine L. Bella & David L. Lopez, Note, Quality of Life—At What Price?: Constitutional Challenges to Laws Adversely Impacting the Homeless, 10 St. John’s J. Legal Comment. 89, 100 (stating that restrictions that regulate begging must meet the content-neutral standard).}
CONCLUSION

The Ninth Circuit in *Millis* could have protected both the humanitarian efforts at stake and the government’s interest in preserving national wildlife refuges if it had declared Millis’s actions to be expressive conduct protected by the First Amendment. Although the court overturned Millis’s conviction, its reasoning allowed for conviction on other grounds. Furthermore, the reasoning in *Millis* offers support for many cities’ food sharing restrictions—laws that unfairly restrict the work of individuals struggling to feed homeless men and women. If the court had decided *Millis* on free speech grounds by finding that 50 C.F.R. § 27.94(a) was content-neutral but not the least restrictive means of advancing an important governmental interest, acts of humanitarian aid would be protected against unreasonable restrictions. Moreover, the majority would have overcome the criticisms found in Judge Bybee’s dissent. Although there was a favorable outcome in *Millis*, the court should have recognized that Millis’s effort to aid migrants was a protected exercise of free expression communicating his compassion for others and urging society to respect the value of human life.

“The homeless have a strong interest in communicating their plight to the general public. Regulations that completely ban expressive conduct deprive a beggar of his or her ability to inform the public that economic and social conditions render it impossible for people to provide for themselves.” *Id.* at 99.
YOUTH RESISTANT TO GANG RECRUITMENT AS A PARTICULAR SOCIAL GROUP IN LARIOŚ v. HOLDER

JAMES RACINE*

Abstract: Central American youth who refuse to join gangs are often subjected to horrific acts of retaliatory violence. Yet, the Board of Immigration Appeals’ introduction of two new requirements for asylum eligibility—visibility and particularity—have quashed the asylum hopes for members of this group. Recently, the First Circuit Court of Appeals adopted the visibility and particularity requirements and, in Larios v. Holder, applied them to deny asylum to youth resistant to gang recruitment. This Comment examines the development of these requirements and argues that there is no legal basis for their application. It further argues that the requirements unreasonably heighten the traditional asylum standard and ultimately concludes that the First Circuit should have rejected visibility and particularity as requirements for asylum, thereby rendering youth resistant to gang recruitment eligible for asylum.

Introduction

Gangs are a serious threat to Central American communities, and especially to young people who refuse to join gangs.1 Courts, however, have been extremely reluctant to grant asylum to this group, possibly


fearing they might open the floodgates to all Central American youth. In *Larios v. Holder*, the First Circuit Court of Appeals recently joined the Board of Immigration Appeals (BIA) and other U.S. circuit courts in denying asylum to youth resistant to gang recruitment. These courts have created a new tool of exclusion by adding to the basic asylum standard two difficult-to-meet requirements—visibility and particularity.

Part I of this Comment provides an introduction to the gang phenomenon in Central America, with a focus on the practice of recruitment. Part II traces the history of asylum law and the development of the new asylum requirements through case law. This Part shows that visibility and particularity were first introduced as factors but were later imposed as requirements. It also shows that visibility has been defined inconsistently, with two very different definitions. Parts III and IV scrutinize the *Larios* court’s and other courts’ application of these requirements to gang-related asylum applications. Part V argues that the First Circuit in *Larios* should have refused to apply visibility and particularity as requirements because they are inconsistent with both international law and U.S. case law and are an unreasonable addition to the traditional asylum standard. This Comment ultimately concludes that the First Circuit should have remanded the case with instructions to apply the traditional test, thereby rendering youth resistant to gang recruitment eligible for asylum.

I. CENTRAL AMERICAN GANGS AND THE DANGER THEY POSE TO YOUTH

By all accounts, gang violence has taken a considerable toll on Central American countries. Young people, like the asylum applicant

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3 See Larios v. Holder, 608 F.3d 105, 109 (1st Cir. 2010); Ramos-Lopez v. Holder, 563 F.3d 855, 856 (9th Cir. 2009); *S-E-G*, 24 I. & N. Dec. at 590.


in *Larios*, are especially vulnerable; most gang members are between twelve and twenty-four years old. Poor urban youth, in particular, are ripe for recruitment and live in communities pervaded by gang violence.

There are many gangs in Central America, but the two largest are Mara Salvatrucha (MS-13) and Barrio 18 (18th Street). At the local level, gangs engage in small-scale crimes such as robbery and drug trafficking. The MS-13 and 18th Street gangs, now international criminal networks after years of rapid growth and expansion, are also involved in arms smuggling, human trafficking, and other large-scale organized crimes. MS-13 and 18th Street are notorious for the brutality they unleash. To consolidate power in neighborhoods, gangs commit especially ghastly acts of violence, even against non-gang members, “to shock the population of a certain area into submission.”

Their size and increasingly “sophisticated” organizational structure has enabled these gangs to gain considerable power and influence. Thus, recruitment of new members is critical to maintaining and in-

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6 Brands, supra note 5, at 25; see Larios v. Holder, 608 F.3d 105, 106 (1st Cir. 2010).
7 Brands, supra note 5, at 25; USAID Bureau for Latin Am. & Caribbean Affairs, *supra* note 5, at 17.
8 *Fact Sheet: Gangs in Guatemala*, GUAT. HUM. RTS. COMM’N/USA, 1, http://www.ghrc-usa.org/Publications/GangFactSheet.pdf (last visited May 8, 2011). Of the estimated 8000 to 14,000 gang members in Guatemala, 18th Street comprises about fifteen percent and MS-13 about eighty percent. Id. The origins of MS-13 can be traced to the 1980s, when thousands of youth fled civil conflicts and immigrated to the United States, where they formed their own gangs to protect themselves from American gangs. *See Central American Gang-Related Asylum: A Resource Guide*, WASH. OFFICE ON LATIN AM., 2 (May 2008), http://www.wola.org/media/Gangs/WOLA_Gang_Asylum_Guide.pdf. When deportation increased in the 1990s, many of these immigrants were sent back to their home countries, where they continued to organize and recruit new people into their gangs. See id.
9 See Brands, supra note 5, at 26.
10 See id.
11 See, e.g., *Honduras Police Find Severed Head*, BBC NEWS (Apr. 9, 2004, 12:17 PM), http://news.bbc.co.uk/2/hi/americas/3613943.stm (describing a particularly gruesome act of violence believed to be committed by either MS-13 or 18th Street).
12 Brands, supra note 5, at 27.
13 See *FARIÑA ET AL.* supra note 1, at 68–71.
creasing power.\textsuperscript{14} MS-13, for example, is constantly recruiting new members.\textsuperscript{15} Although recruitment sometimes involves offering gifts and other enticements, some gangs “rely heavily on forced recruitment to expand and maintain their membership.”\textsuperscript{16} Those who resist recruitment are often subjected to constant harassment and physical abuse and may even be murdered.\textsuperscript{17}

Partly due to sensationalistic accounts of gang violence by the media, Central American countries have increasingly adopted heavy-handed, or \textit{mano dura}, policies to stem gang violence.\textsuperscript{18} Such tactics include involving the military in combating gangs and allowing police to arrest young people who only look the part of gang members.\textsuperscript{19} These policies, however, have been a failure.\textsuperscript{20} They have not reduced the level of violence, and gangs continue to recruit new members.\textsuperscript{21}

\section*{II. \textbf{HISTORY OF ASYLUM LAW AND THE DEFINITION OF A PARTICULAR SOCIAL GROUP}}

An asylum seeker must satisfy the definition of “refugee” laid out in the Immigration and Nationality Act (INA).\textsuperscript{22} The INA provides the following definition for a refugee:

\begin{quote}
[A]ny person who is outside any country of such person’s nationality . . . who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection
\end{quote}

\textsuperscript{14} See \textit{id.} at 72–73. In contrast to other gangs in the 1960s, 18th Street did not discriminate against mixed-race youth, and in 1996 the \textit{Los Angeles Times} reported that “the gang was breaking with tradition by opening recruitment to all youth in a deliberate move to increase its membership.” Immigration & Refugee Bd. of Can., \textit{El Salvador: Activities of the 18th Street/Dieciocho Gang; Gang Recruitment; Treatment of People Who Refuse to Join the Gang}, U.N. HIGH COMM’R FOR REFUGEES (Nov. 22, 2002), http://www.unhcr.org/refworld/dcid/3f7d4e1c15.html.


\textsuperscript{16} UNHCR Gang Guidance Note, \textit{supra} note 2, at 2.

\textsuperscript{17} See FARIÑA ET AL., \textit{supra} note 1, at 88–92; Voss, \textit{supra} note 1, at 239 (describing the forms of retaliation used against resisters to gang recruitment); Julia Preston, \textit{On Gangs, Asylum Law Offers Little}, \textit{N.Y. Times}, June 30, 2010, at A16 (reporting story about young man who refused to join gang, was denied asylum in the United States, and was shot in the face by gang upon returning to El Salvador).


\textsuperscript{19} Id.

\textsuperscript{20} See \textit{id.}

\textsuperscript{21} Id.

of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .

The INA’s definition of refugee is derived from the 1967 U.N. Protocol Relating to the Status of Refugees. The purpose of asylum, reflected in this definition, is to provide protection to people fearing or fleeing from persecution in their home countries. The INA thus allows the government to grant legal status to victims of persecution or those fearing persecution on account of one of the protected grounds.

Asylum applicants who do not fit neatly into one of the more definite categories—political opinion, religion, race, nationality—can apply on the basis of membership in a “particular social group” (PSG). The term is intentionally flexible and is meant to be “read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms.” Thus, youth resistant to gang recruitment have often applied for asylum on the basis of membership in a PSG.

23 Id. The asylum applicant has the burden to prove that he or she is a refugee. Id. § 1158(b)(1)(B).
26 See id.
27 See Sanchez-Trujillo v. INS, 801 F.2d 1571, 1575 (9th Cir. 1986); Guidelines on International Protection: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees, U.N. High Comm’r for Refugees, ¶ 1 (May 7, 2002), http://www.unhcr.org/3d58de2da.pdf [hereinafter UNHCR Guidelines]. Groups that have been recognized as PSGs include families, tribes, occupational groups, and homosexuals. UNHCR Guidelines, supra, ¶ 1.
28 UNHCR Guidelines, supra note 27, ¶ 3. Although the U.N. High Commissioner for Refugees explains that there is no “closed list” of eligible PSGs, a PSG “cannot be interpreted as a ‘catch all’ that applies to all persons fearing persecution.” Id. ¶¶ 2–3.
The INA did not define a PSG, and courts have interpreted the term in different ways. In 1985, the BIA in In re Acosta provided the seminal definition. According to Acosta, the other grounds for asylum in the INA feature “a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed.” Applying the doctrine of *ejusdem generis* (“of the same kind”), the BIA determined that members of a PSG must also share a common, immutable characteristic.

This requirement that members of a PSG must share a common, immutable characteristic that they cannot change or should not be required to change has proven to be very influential; indeed, it has been adopted by all circuit courts of appeals. The test has also received international recognition; the U.N. High Commissioner for Refugees (UNHCR) has adopted it, as have several other countries.

Recently, however, the BIA added two additional requirements to the Acosta framework—visibility and particularity. Visibility and particularity were first introduced by the BIA in In re C-A- and In re A-M-E. Although the BIA affirmed the basic principles announced in Acosta, it explained that the Acosta standard needed elaboration. To

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30 See Hernandez-Montiel v. INS, 225 F.3d 1084, 1091–93 (9th Cir. 2000), overruled by Thomas v. Gonzales, 409 F.3d 1177 (9th Cir. 2005). The Ninth Circuit initially required a “voluntary associational relationship” between a group’s members but now applies that test as an alternative to the test articulated in Acosta. See id. at 1092–93.


32 Id. at 233.

33 See id.

34 See Davlia-Mejia v. Mukasey, 531 F.3d 624, 628 (8th Cir. 2008); Koudriachova v. Gonzales, 490 F.3d 255, 262 (2d Cir. 2007); Castillo-Arias v. U.S. Attorney Gen., 446 F.3d 1190, 1196 (11th Cir. 2006); Niang v. Gonzales, 422 F.3d 1187, 1198–99 (10th Cir. 2005); Lopez-Soto v. Ashcroft, 383 F.3d 228, 235 (4th Cir. 2004); Castellano-Chacon v. INS, 341 F.3d 533, 546 (6th Cir. 2003); Ontunez-Tursios v. Ashcroft, 303 F.3d 341, 352 (5th Cir. 2002); Hernandez-Montiel, 225 F.3d at 1091–93; Lwin v. INS, 144 F.3d 505, 511–12 (7th Cir. 1998); Fatin v. INS, 12 F.3d 1233, 1239–40 (3d Cir. 1993); Ananeh-Firempong v. INS, 766 F.2d 621, 626 (1st Cir. 1985).

35 Benjamin Casper et al., *The Evolution Convolution of Particular Social Group Law: From the Clarity of Acosta to the Confusion of S-E-G.*, in *Immigration Practice Pointers* 565, 566 (Gregory P. Adams et al. eds., 2010); see UNHCR Guidelines, *supra* note 27, ¶ 11; see also Wilkinson, *supra* note 2, at 410 (explaining Canada’s Acosta-informed standard).


38 See C-A-, 23 I. & N. Dec. at 956. The BIA said in C-A-, “[W]e continue to adhere to the Acosta formulation,” but it also referred to Acosta as “the starting point.” Id. at 955–56.
that end, the BIA recognized as an important factor in a PSG analysis the social “visibility” of the proposed group, or “the extent to which members of a society perceive those with the characteristic in question as members of a social group.”\textsuperscript{39} The BIA recognized as another important factor the “particularity” of the proposed group—that is, a PSG must not include terms that “are too amorphous to provide an adequate benchmark for determining group membership.”\textsuperscript{40}

Notwithstanding its desire to add to the \textit{Acosta} standard, in \textit{C-A} and \textit{A-M-E} the BIA merely considered visibility and particularity to be factors in determining a PSG, not requirements.\textsuperscript{41} It was not until two BIA cases in 2008, In re \textit{S-E-G} and In re \textit{E-A-G}, that visibility and particularity were imposed as requirements to be applied in addition to \textit{Acosta}'s fundamental, immutable characteristic test.\textsuperscript{42} In \textit{S-E-G} and \textit{E-A-G}, the BIA again affirmed \textit{Acosta}'s basic principles, adding that visibility and particularity merely give “greater specificity” to and provide “clarification” of the \textit{Acosta} standard.\textsuperscript{43} Yet the BIA in \textit{S-E-G} declared that membership in a PSG requires that the group be socially visible and sufficiently particular.\textsuperscript{44} In neither case did the BIA explain why it converted visibility and particularity from factors to requirements.\textsuperscript{45}

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\textsuperscript{39} See \textit{C-A}, 23 I. & N. Dec. at 951, 957.

\textsuperscript{40} See \textit{A-M-E}, 24 I. & N. Dec. at 76. Assessing “affluent Guatemalans” for particularity, the BIA in \textit{A-M-E} found that the terms “wealthy” and “affluent” are too amorphous to provide an adequate benchmark for determining group membership because, in a generally impoverished country, the “wealthy” could include small business owners and other middle class people, comprising as little as one percent to as much as twenty percent of the population. \textit{Id.} at 73, 76.

\textsuperscript{41} See Casper et al., \textit{supra} note 37, at 566; \textit{see also} \textit{A-M-E}, 24 I. & N. Dec. at 73; \textit{C-A}, 23 I. & N. Dec. at 957.

\textsuperscript{42} See Casper et al., \textit{supra} note 37, at 566–67; \textit{see also} \textit{E-A-G}, 24 I. & N. Dec. at 594; \textit{S-E-G}, 24 I. & N. Dec. at 586. Although \textit{E-A-G} did not explicitly refer to visibility and particularity as requirements, it disqualified the proposed group because it was neither visible nor particular. See 24 I. & N. Dec. at 594.


\textsuperscript{44} \textit{S-E-G}, 24 I. & N. Dec. at 582.

Since the BIA introduced visibility, the concept has been applied inconsistently, with two different definitions.\(^{46}\) The first definition requires that members of the proposed group be visible, in a literal and objective sense, as members of that group to observers.\(^{47}\) The second definition requires that society in general (in the applicant’s country of origin) merely perceive the proposed group as a group.\(^{48}\) Confusion as to the definition of visibility can be traced back to \textit{C-A-}, which seemed to apply the first, objective definition.\(^{49}\) In that case, the BIA defined visibility as the possession of characteristics “that were highly visible and recognizable by others in the country in question.”\(^{50}\) The BIA then denied that confidential informants were a PSG because “the very nature of the conduct at issue is such that it is generally out of the public view.”\(^{51}\) \textit{A-M-E}, in contrast, gravitated toward the second, subjective definition and focused on whether Guatemalan society in general perceived “affluent Guatemalans” as a group.\(^{52}\)

Inconsistency in defining visibility continued in \textit{S-E-G-} and \textit{E-A-G-}.\(^{53}\) In \textit{S-E-G-}, the BIA cited \textit{C-A-} for the proposition that the shared characteristics of the proposed group must be “recognizable and discrete,” but it seemed to apply the subjective (societal perception) definition of visibility in reaching its conclusion.\(^{54}\) In \textit{E-A-G-}, the BIA’s decision alluded to both definitions—it explained that the applicant did not possess “any characteristics that would cause others in [the applicant’s] society to recognize him” as a member of his proposed PSG and also

\(^{46}\) See Benitez Ramos \textit{v}. Holder, 589 F.3d 426, 430 (7th Cir. 2009) (“Often it is unclear whether the Board is using the term ‘social visibility’ in the literal sense or in the ‘external criterion’ sense, or even whether it understands the difference.”).


\(^{48}\) See id. at 54–55. In its brief in \textit{Granados Gaitan \textit{v}. Holder}, the Office of Immigration Litigation of the U.S. Department of Justice distinguished between the two definitions and argued that the second is the true definition; it seemed to ignore, however, case law in which the first definition was applied. See \textit{id.} at 55.

\(^{49}\) See \textit{C-A-}, 23 I. & N. Dec. at 960.

\(^{50}\) \textit{Id.}

\(^{51}\) \textit{Id.}

\(^{52}\) \textit{A-M-E}, 24 I. & N. Dec. at 73–75. In denying the asylum claim, the BIA pointed to the fact that country reports do not suggest that the proposed group experiences more violence or human rights violations than other segments of society, which would create the general social perception that the group is distinct. See \textit{id.} at 74–75.


\(^{54}\) See \textit{S-E-G-}, 24 I. & N. Dec. at 586–88 (holding that the applicant failed to show his proposed group was viewed as a group by society in general due to a lack of evidence showing the proposed group is especially victimized in a violence-ridden country).
observed that the applicant failed to show that his proposed group “[was] seen as a segment of the population in any meaningful re-
spect.” As S-E-G and E-A-G demonstrate, this definitional confusion is especially acute in the application of the requirements to gang-related asylum applications.

III. VISIBILITY AND PARTICULARITY AS APPLIED BY THE BIA AND THE FIRST CIRCUIT TO GANG-RELATED ASYLUM APPLICATIONS

The imposition of visibility and particularity as requirements frustrates the asylum claims of youth resistant to gang recruitment. Along with establishing visibility and particularity as requirements rather than factors, S-E-G and E-A-G are also significant because they mark the first time the BIA addressed resistance to gang recruitment as the basis for an asylum claim. In S-E-G, the applicant’s brothers refused to join MS-13 and, in retaliation, the gang stole money, harassed, beat, and threatened to kill the applicant and her brothers. These were not idle threats—the applicant and her brothers testified that a young boy in the neighborhood was killed for refusing to join the gang. In E-A-G, the applicant, a Honduran teenager, had two brothers who were MS-13 gang members; both were killed by rival gangs before they turned twenty. Consequently, when members of MS-13 attempted to recruit him, he refused to join. The applicant in S-E-G articulated her proposed PSG as “Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership,” or “family members of such Salvadoran youth”; the applicant in E-A-G asked the court to recognize as a PSG “persons resistant to gang membership (refusing to join when recruited).”

56 See infra Part V.
58 See S-E-G, 24 I. & N. Dec. at 584. The BIA noted, “We have not previously addressed whether . . . Salvadoran youths who have resisted gang recruitment . . . constitutes a ‘particular social group’” and that no federal circuit court had yet issued a decision on the matter. See id. at 582.
59 Id. at 580.
60 Id.
62 Id.
63 Id. at 593; S-E-G, 24 I. & N. Dec. at 581.
In both cases, the BIA denied the applicants’ asylum petitions on the grounds that the proposed groups did not qualify as PSGs.64 The applicants failed to show that youth resistant to gang recruitment possess characteristics that make them visible or that such groups are perceived as cohesive social groups by Honduran or El Salvadoran society.65 The BIA reasoned in E-A-G, “There is no showing that membership in a larger body of persons resistant to gangs is of concern to anyone in Honduras, including the gangs themselves, or that individuals who are part of that body of persons are seen as a segment of the population in any meaningful respect.”66

The groups also failed the particularity test because, according to the BIA in S-E-G, youth resistant to gang recruitment “make up a potentially large and diffuse segment of society.”67 Responding to the applicant’s attempt to limit the group to “male children who lack stable families and meaningful adult protection, who are from middle and low income classes, who live in the territories controlled by the MS-13 gang,” the BIA explained that each of these characteristics “remain[ed] amorphous” and was too open to interpretation.68

Although the BIA’s holdings in S-E-G and E-A-G have been challenged, many circuit courts have accepted visibility and particularity, sometimes as factors and sometimes as requirements.69 For example, in

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67 S-E-G, 24 I. & N. Dec. at 585. The BIA concluded that youth resistant to gang recruitment is too broad to qualify as a PSG because “‘[t]here is no unifying relationship or characteristic to narrow this diverse and disconnected group.’” Id. at 586 (quoting Ochoa v. Gonzalez, 406 F.3d 1166, 1171 (9th Cir. 2005)).
68 Id. at 584–85.
69 See, e.g., Contreras-Martinez v. Holder, 346 F. App’x 956, 958 (4th Cir. 2009) (holding that “adolescents in El Salvador who refuse[d] to join the gangs of that country because of their opposition to the gangs’ violent and criminal activities” does not constitute a PSG); Ramos-Lopez v. Holder, 563 F.3d 855, 856 (9th Cir. 2009) (holding that “young Honduran men who have been recruited by the MS-13, but who refuse to join” does not constitute a PSG); Gomez-Benitez v. U.S. Attorney Gen., 295 F. App’x 324, 326 (11th Cir. 2008) (holding that “Honduran schoolboys who conscientiously refuse[d] to join gangs” does not constitute a PSG). The Seventh Circuit Court of Appeals is the only circuit court that has explicitly rejected visibility and particularity as requirements. See Benitez Ramos v. Holder, 589 F.3d 426, 429 (7th Cir. 2009); Gatimi v. Holder, 578 F.3d 611, 616 (7th Cir. 2009). Benitez Ramos v. Holder, however, dealt with former gang members rather than youth resistant to gang recruitment, and Judge Posner in Gatimi v. Holder said he had “no quarrel” with holding that youth resistant to gang recruitment are not a PSG. See Benitez Ramos, 589 F.3d at 428; Gatimi, 578 F.3d at 616. Despite the circuit split, the U.S. Supreme Court recently denied certiorari to a case challenging the BIA’s holdings. See Contreras-Martinez, 346 F. App’x at 958, cert. denied, 130 S. Ct. 3274 (2010). Senator Patrick Leahy of Vermont
Scatambuli v. Holder, the First Circuit Court of Appeals explicitly described visibility and particularity as “factors” that are merely “relevant” to the PSG analysis.⁷⁰ Addressing visibility and particularity for the first time, the First Circuit held that informants who feared retaliation were not a PSG.⁷¹ The court upheld C-A- and A-M-E and noted that the BIA had refined its definition of PSG.⁷² The court in Scatambuli also applied the objective definition of visibility, stating that a PSG is socially visible if its members possess “‘characteristics . . . visible and recognizable by others in the [native] country.’”⁷³

Conversely, in 2009, the First Circuit established in Faye v. Holder that visibility and particularity are requirements for PSG.⁷⁴ Faye also defined visibility according to the subjective definition, requiring that a PSG be perceived as a group by society in general.⁷⁵ The First Circuit adhered to an understanding of visibility and particularity as requirements when, in 2010, it addressed gang-related asylum applications for the first time.⁷⁶ In Mendez-Barrera v. Holder, the First Circuit accepted S-E-G’s analysis, applying visibility and particularity as requirements to deny asylum to “young women recruited by gang members who resist such recruitment.”⁷⁷ Shortly after Mendez-Barrera, the First Circuit again upheld S-E-G- and denied asylum to youth resistant to gang recruitment.⁷⁸

IV. Larios v. Holder

In July 2005, a fourteen-year-old Guatemalan native, Maynor Alonso Larios, fled to the United States.⁷⁹ Later that year, the United States initiated removal proceedings against him for being present in

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⁷⁰ Scatambuli v. Holder, 558 F.3d 53, 59 (1st Cir. 2009).
⁷¹ See id. at 55–56, 59.
⁷² Id. at 59.
⁷³ Id. (alteration in original) (quoting In re C-A-, 23 I. & N. Dec. 951, 960 (B.I.A. 2006)).
⁷⁴ See Faye v. Holder, 580 F.3d 37, 41–42 (1st Cir. 2009) (holding that “women who had a child out of wedlock/are considered adulterers because they gave birth to a child allegedly not their husband’s/have been abused by their husbands” is not a PSG because it is not a socially visible or sufficiently particular group).
⁷⁵ Id. at 41–42.
⁷⁶ Mendez-Barrera v. Holder, 602 F.3d 21, 26 (1st Cir. 2010).
⁷⁷ Id. at 24, 26.
⁷⁸ Larios v. Holder, 608 F.3d 105, 109 (1st Cir. 2010).
⁷⁹ Larios v. Holder, 608 F.3d 105, 106 (1st Cir. 2010).
the country without admission or parole. Larios conceded removability but applied for asylum, claiming he faced persecution as a member of a group of “young Guatemalan men recruited by gang members who resist such recruitment.” The immigration judge (IJ) denied his application for asylum, determining that Larios “failed to establish that he faced future persecution on account of a protected ground,” and ordered his removal to Guatemala. On appeal, the BIA affirmed the IJ’s decision and Larios appealed to the First Circuit Court of Appeals.

In Larios, the First Circuit affirmed both the IJ’s and BIA’s decisions to deny Larios’s application for asylum. Declaring S-E-G- and E-A-G- to be “controlling BIA case law” and bowing to its precedent in Mendez-Barrera, the First Circuit concluded that “youth resistant to gang recruitment” was not a PSG because it did not meet the requirements of visibility and particularity.

In refusing to find a PSG because of a lack of visibility, the First Circuit failed to bring clarity to the concept and applied both definitions of visibility. With respect to objective visibility, the court found no evidence that youth resistant to gang recruitment possessed any “characteristics that render members of the putative group socially visible.” In terms of the group’s subjective visibility, the court declared that it was not “generally recognized in the community as a cohesive group.”

Nor did the First Circuit find the group to be sufficiently particular. The court reasoned,

[I]t is virtually impossible to identify who is or is not a member. There are, for example, questions about who may be considered “young,” the type of conduct that may be considered

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80 Id. at 106–07.
81 Id. at 107, 108.
82 Id. at 107.
83 Id. at 106. On appeal, Larios argued two other points—that the BIA’s procedure of upholding an IJ’s decision without issuing an opinion is unconstitutional and that the BIA’s failure to address his second proposed social group, “street children,” also violated his due process rights. Id. at 108. The First Circuit rejected both arguments, reasoning that the issuance without opinion procedure is “a valid exercise of the Attorney General’s discretion to fashion its own rules of procedure” and that the BIA was not obligated to consider the “street children” group because Larios failed to raise it before the IJ. Id.
84 Larios, 608 F.3d at 109.
85 Id.
86 Id.
87 Id.
88 See id.
89 Larios, 608 F.3d at 109.
“recruit[ment],” and the degree to which a person must display “resist[ance].” These are ambiguous group characteristics, largely subjective, that fail to establish a sufficient level of particularity.90

Summing up its holding, the First Circuit concluded that “because [the] putative social group is neither socially visible nor sufficiently particular . . . the IJ did not err in denying Larios’s claim for asylum based on Larios’s membership in this particular group.”91

V. Criticisms of Visibility and Particularity

As Larios demonstrates, a major barrier to the asylum hopes of youth resistant to gang recruitment is the application of social visibility and particularity as requirements for establishing a PSG.92 As immigrant advocates, the United Nations, and Judge Posner of the Seventh Circuit Court of Appeals have cogently argued, the heightened standard that S-E-G- and E-A-G- introduced contradicts international law, is inconsistent with the traditional Acosta standard and U.S. case law decided under it, and only confuses the PSG analysis with detrimental consequences for deserving applicants.93 Thus, the First Circuit Court of Appeals should not have deferred to the BIA’s decisions in S-E-G- and E-A-G-94.

First, visibility and particularity do not comport with international law.95 The UNHCR has criticized the requirements for not being “in accordance with the text, context or object and purpose of the 1951 Convention and its 1967 Protocol, nor with the [UNHCR’s] Social Group Guidelines.”96 Although the BIA professed to have international support for imposing visibility and particularity as requirements, it misinterpreted the UNHCR guidelines on which it based its claim.97 The guidelines clearly state that visibility is an alternative to the fundamental,

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90 Id. (alteration in original) (quoting Mendez-Barrera v. Holder, 602 F.3d 21, 27 (1st Cir. 2010)).
91 Id.
92 See Larios v. Holder, 608 F.3d 105, 109 (1st Cir. 2010).
93 Casper et al., supra note 35, at 567–69; see Wilkinson, supra note 2, at 413–15.
94 Casper et al., supra note 35, at 567–69; see Wilkinson, supra note 2, at 413–15.
95 See UNHCR Brief, supra note 24, at 9–18; see also Wilkinson, supra note 2, at 413–14.
96 UNHCR Brief, supra note 24, at 4. The UNHCR submitted its amicus brief pursuant to its mandate of supervising the application of international conventions for the protection of refugees. See id. at 1.
97 Id. at 15; see In re S-E-G-, 24 I. & N. Dec. 579, 586 (B.I.A. 2008) (“[T]he 2002 guidelines of the United Nations High Commissioner for Refugees . . . endorse[d] an approach in which an important factor is whether the members of the group are ‘perceived as a group by society.’”); UNHCR Guidelines, supra note 27, ¶ 11.
immutable characteristic test from *Acosta*, not a clarification, elaboration, or addition to it.\(^{98}\) The visibility test, therefore, should only be imposed if the applicant fails the *Acosta* test.\(^{99}\) The requirement of particularity is inconsistent with international law because the apparent purpose of such a requirement is to limit the number of people eligible for asylum.\(^{100}\) This approach contradicts the UNHCR’s guidelines, which assert that “the fact that large numbers of persons risk persecution cannot be a ground for refusing to extend international protection where it is otherwise appropriate.”\(^{101}\)

The addition of visibility and particularity also does not square with *Acosta*’s interpretive methodology, which determined the definition of PSG by identifying the general principle underlying the other protected groups.\(^{102}\) The other protected categories are not subjected to any visibility or particularity limitation.\(^{103}\) For example, a religion can be practiced in private and an unorthodox political opinion may not make its possessor stand out at all, in an objective sense.\(^{104}\) In terms of subjective societal understanding, an applicant’s political opinion or religious beliefs need not be generally recognized by society in order for the applicant to gain asylum.\(^{105}\) Additionally, the size of the group, implicit in the concept of particularity, should not be considered in determining a PSG because a persecuted political opinion, for example, could be held by the majority of a population and yet those who hold it would still be eligible for asylum.\(^{106}\)

\(^{98}\) See UNHCR Brief, *supra* note 24, at 13; UNHCR Guidelines, *supra* note 27, ¶ 11 (“[A] particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society.”).


\(^{100}\) See UNHCR Brief, *supra* note 24, at 17.

\(^{101}\) UNCHR Guidelines, *supra* note 27, ¶ 18. The Ninth Circuit Court of Appeals recently held that all women in Guatemala may constitute a PSG. Perdomo v. Holder, 611 F.3d 662, 669 (9th Cir. 2010). The court stated, “[W]e have rejected the notion that a persecuted group may simply represent too large a portion of a population to allow its members to qualify for asylum,” adding, “the size and breadth of a group alone does not preclude a group from qualifying as [a PSG].” *Id.*

\(^{102}\) See *In re Acosta*, 19 I. & N. Dec. 211, 216 (B.I.A. 1985); Petition for a Writ of Certiorari at 16, Contreras-Martinez v. Holder, 346 F. App’x 956 (4th Cir. 2010) (No. 09-830), 2010 WL 128010 at *16; *supra* Part III.

\(^{103}\) Petition for a Writ of Certiorari, *supra* note 102, at 16; see INA, 8 USC § 1101(a)(42) (2006); Gatimi Brief, *supra* note 45, at 15.

\(^{104}\) Gatimi Brief, *supra* note 45, at 15; see Petition for a Writ of Certiorari, *supra* note 102, at 16.

\(^{105}\) Gatimi Brief, *supra* note 45, at 15; see Petition for a Writ of Certiorari, *supra* note 102, at 16.

\(^{106}\) See UNHCR Guidelines, *supra* note 27, ¶ 18.
The visibility and particularity requirements are also inconsistent with case law decided under the *Acosta* standard.\(^{107}\) As Judge Posner has pointed out, many groups have been recognized as PSGs whose members would not be literally visible.\(^{108}\) For example, homosexuals, women of a certain tribe who have not yet been subjected to female genital mutilation, and former members of the national police have been recognized as PSGs.\(^{109}\) Moreover, the BIA in *S-E-G* and *E-A-G*, although claiming to uphold *Acosta* and *C-A-*, actually transformed visibility and particularity from factors to requirements, without offering justification.\(^{110}\)

The visibility and particularity requirements are also unreasonable and simply confuse the PSG analysis.\(^{111}\) For example, the visibility concept’s lack of definitional clarity has resulted in the application of two very different definitions; the BIA has offered no guidance as to which is the true definition or when to apply one over the other.\(^{112}\) One possible consequence of this confusion is the disqualification of a deserving group that meets one definition of visibility but not the other.\(^{113}\)

The requirements also confuse the definition of a PSG with other elements of the refugee definition.\(^{114}\) Visibility and particularity, for example, are more relevant in showing a well-founded fear of future persecution.\(^{115}\) Applying the literal, objective meaning of visibility is senseless, as Judge Posner pointed out, because it would require victims

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\(^{107}\) See *Gatimi v. Holder*, 578 F.3d 611, 615–16 (7th Cir. 2009).

\(^{108}\) See *id.*


\(^{111}\) *See Wilkinson*, supra note 2, at 413, 415.

\(^{112}\) *See Benitez Ramos v. Holder*, 589 F.3d 426, 430 (7th Cir. 2009); *supra* Part III.

\(^{113}\) *See Wilkinson*, supra note 2, at 413 (“[T]he lack of a clear definition combined with the heightened burden [of the new requirements] changes the balance almost positively in favor of denial of asylum.”). For example, youth resistant to gang recruitment are not visible in the literal, objective sense, but general society may well perceive such youth as a social group. *See UNHCR Brief*, supra note 24, at 25–27. Resisting recruitment is a sign of disrespect to gangs and puts the resister at great risk of retaliation; thus, resistance makes resisters “stand out from the rest of the community” and “set[s] them apart in society.” *See UNHCR Gang Guidance Note*, supra note 2, at 4, 12 (describing the importance of respect for gangs and the risks of showing disrespect). There is also a general societal perception that young, poor men are prime targets for gang recruitment. *See Clare Ribando Seelke, Cong. Research Serv.*, RL 34112, GANGS IN CENTRAL AMERICA 5 (2009), available at http://www.fas.org/sgp/crs/row/RL34112.pdf; *UNHCR Gang Guidance Note*, supra note 2, at 4.

\(^{114}\) *See Gatimi Brief*, supra note 45, at 16–17; *Wilkinson*, supra note 2, at 415.

\(^{115}\) *See Benitez Ramos*, 589 F.3d at 430; *Wilkinson*, supra note 2, at 415.
“who take pains to avoid being socially visible” to instead “pin[] a target to their backs.”

The traditional *Acosta* test is internationally accepted and much more analytically sound than the test created by the BIA in *S-E-G* and *E-A-G*. Thus, the First Circuit Court of Appeals should have joined the Seventh Circuit Court of Appeals in rejecting visibility and particularity as requirements under PSG analysis. Then, the First Circuit should have remanded with instructions to apply the traditional *Acosta* test, thereby making asylum available to youth resistant to gang recruitment, a group for whom “hope is largely absent” in their home countries.

## Conclusion

Youth resistant to gang recruitment deserve the protection from persecution that asylum offers. Refusing to join a gang places bull’s-eyes on the heads of young Central American people, especially those from poor backgrounds. Yet the BIA and most circuit courts of appeals have adopted a heightened standard for asylum that disqualifies this group. This standard—requiring that the proposed group be socially visible and sufficiently particular—is inconsistent with international law and U.S. case law and unreasonably heightens the traditional standard. Thus, the First Circuit Court of Appeals erred in adopting the BIA’s requirements and holding that youth resistant to gang recruitment do not qualify for asylum.

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116 See Benitez Ramos, 589 F.3d at 430.
117 See Wilkinson, supra note 2, at 413–15.
118 See Gatimi, 578 F.3d at 616.