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## Letter from the Editor-in-Chief

As Howard University School of Law's principal scholarly publication, the *Howard Law Journal* features articles on a wide array of timely legal issues from today's leading legal scholars. However, *Howard Law Journal* has the distinction of balancing between being a typical law review and one with a focus on our institution's commitment to social engineering. We do this by featuring articles, voiced from diverse perspectives, which address issues of importance to broad segments of society. We proudly continue this tradition in Volume 55.

This issue opens with Elwin Griffith's article, *The Meaning of Admission and the Effect of Waivers Under the Immigration and Nationality Act*, which explores the varying definitions and potential applications of "admitted" and "admission" within the meaning of sections of the Immigration and Nationality Act, and the impact this conflict has on the courts' interpretations of this statute. Next, Howard University School of Law's own Harold A. McDougall explores how Historically Black Colleges and Universities (HBCUs) can use their resources to assist African American communities best utilize their "Cultural DNA" in addressing problems unique to the African American community in his article, *Reconstructing African American Cultural DNA: An Action Research Agenda for Howard University*. In Robert Luther III's short essay, *Affirmative Action and the First Amendment's Single Minority of One*, he argues that policy makers should acknowledge the dissenting "double minority" perspective on affirmative action—specifically, minorities opposed to affirmative action—just as they embrace the right of individuals to engage in controversial speech via First Amendment protection. Lastly, in W. Burlette Carter's article, *Finding the Oscar*, she traces the path of Hattie McDaniel's lost Academy Award ("Oscar"), which she bequeathed to Howard University, while providing theories on its disappearance, determining its rightful owner by analyzing the governing Wills and Trust law, and positing that the Oscar's true value comes from its symbolic contribution to the black civil rights movement.

Additionally, we are pleased to present three student pieces in this issue. Executive Notes & Comments Editor, Leila R. Siddiky's Note, *Keep the Court Room Doors Closed So the Doors of Opportunity Can Remain Open: An Argument for Maintaining Privacy in the Juvenile Justice System*, argues that, in the interest of justice for our youth, the juvenile justice system must deviate from the current trend of eliminating the confidentiality in juvenile adjudications. Next, Senior Articles Editor, Betselot A. Zeleke's

Comment, *Federal Judges Gone Wild: The Copyright Act of 1976 and Technology, Rejecting the Independent Economic Value Test*, analyzes the circuit split involving the definition of “work” for the purposes of assessing statutory damages in copyright infringement cases. We appreciate Leila and Betselot’s editorial and scholarly contributions to the *Journal*. The third student piece is my own Note, *Romeo and Juliet—A Tragedy of Love by Text: Why Targeted Penalties that Offer Front-end Severity and Back-end Leniency are Necessary to Remedy the Teenage Mass-Sexting Dilemma*, which analyzes the existing remedies for the teenage mass-sexting dilemma and provides a penalty structure that is age-appropriate while still meeting the goals of retribution and individual deterrence.

We hope you find this issue thought-provoking and intellectually stimulating. On behalf of the *Howard Law Journal*, our faculty, and business manager, I proudly present Volume 55, issue 1 of the *Howard Law Journal*.

MARYAM F. MUJAHID  
*Editor-in-Chief*  
2011-2012

# The Meaning of Admission and the Effect of Waivers Under the Immigration and Nationality Act

ELWIN GRIFFITH\*

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\* Tallahassee Alumni Professor of Law, Florida State University College of Law, Tallahassee, Florida. This article was made possible through the summer research program of the Florida State University College of Law.

## INTRODUCTION

The recent call for immigration reform has drawn attention to the intricacies of the Immigration and Nationality Act (“INA”).<sup>1</sup> Since its enactment in 1952,<sup>2</sup> the INA has seen many changes.<sup>3</sup> Congress has done its best to create a statutory framework that responds to changing times, but its efforts have not satisfied everyone. Although the statute is not a model of clarity, it provides a roadmap for controlling the admission<sup>4</sup> and removal of aliens.<sup>5</sup> Even so, the statute creates waivers for some aliens who would ordinarily be inadmissible or removable.

An alien who wants to come to the United States is subject to the grounds of inadmissibility in section 212(a) of the INA.<sup>6</sup> After entry, he is subject to the removal grounds in section 237,<sup>7</sup> and included in those grounds is a stipulation that makes an alien removable if he was inadmissible when he entered.<sup>8</sup> An alien may also be removed if he commits a crime of moral turpitude within five years after the date of his admission.<sup>9</sup> In the latter case, there is frequent disagreement about that date. The problem can arise when an alien enters as a non-immigrant<sup>10</sup> and then adjusts his status to that of a lawful permanent resident.<sup>11</sup> The choice of an admission date then lies between the alien’s original entry and the alien’s subsequent adjustment to permanent status. That date can be significant if a court has to decide

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1. Immigration and Nationality Act (“INA”), 8 U.S.C. §§ 1101-1537 (2006 & Supp. III 2009).

2. *Id.* (originally enacted as Pub. L. No. 82-414, 66 Stat. 163 (1952)).

3. The following were among the important legislative acts: Real ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 231 (2005); Homeland Security Act of 2002, Pub. L. No. 107-296, tit. IV, 116 Stat. 2135; Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, div. C, 110 Stat. 3009 (1996); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214; Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359; Immigration Marriage Fraud Amendments Act of 1986, Pub. L. No. 99-639, 100 Stat. 3537; Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

4. Aliens who are inadmissible under section 212(a) are “ineligible to receive visas and ineligible to be admitted to the United States.” 8 U.S.C. § 1182(a).

5. Section 237(a) sets out the categories of deportable aliens. *See id.* § 1227(a).

6. *Id.* § 1182(a).

7. *Id.* § 1227(a).

8. *Id.* § 1227(a)(I)(A).

9. *Id.* § 1227(a)(2)(A)(i)(I).

10. The Immigration and Nationality Act (“INA”) lists the nonimmigrant classes at 8 U.S.C. § 1101(a)(15).

11. The adjustment mechanism is a convenient way for an alien to avoid the expense and trouble of having to leave the United States in order to become a lawful permanent resident. For example, an alien may be in the United States on a nonimmigrant visa and, he can apply for adjustment while in the country, if he qualifies under the statute. *See* 8 U.S.C. § 1255(a).

whether it is too late to remove the alien. The choice is not as difficult as when an alien enters the United States without inspection and then subsequently adjusts to permanent status.<sup>12</sup> Since the original unlawful entry cannot count as an admission,<sup>13</sup> the question is whether the alien's later adjustment should be recognized as the date of admission instead. This question turns out to be an important one because the statutory definition of "admission" does not say anything about adjustment. The definition calls for an alien's lawful entry after inspection, and courts have had to face the challenge of relating that definition to the alien's adjustment to permanent residence.

The timing of an alien's admission also plays an important role in a section 212(h) waiver.<sup>14</sup> If the alien is convicted of an aggravated felony after his previous admission as a lawful permanent resident, he will not be eligible for the waiver.<sup>15</sup> An alien's eligibility hinges in this context on when admission occurs, and the courts and the Board of Immigration Appeals ("BIA")<sup>16</sup> frequently have to consider the effect of the alien's adjustment on any determination of the alien's admission.<sup>17</sup>

Section 212(h) also provides an opportunity to explore the differences between the procedural and substantive elements of the admission process. The courts have had to consider whether the definition

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12. See *In re Koljenovic*, 25 I. & N. Dec. 219, 225 (B.I.A. 2010) (holding that an alien who entered without inspection was deemed admitted on date of adjustment); see also *In re Rosas*, 22 I. & N. Dec. 616, 619 (B.I.A. 1999).

13. The INA provides that "[t]he terms 'admission' and 'admitted' mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A).

14. Section 212(h)(2) gives the Attorney General the discretion to waive certain grounds of inadmissibility for immigrants. 8 U.S.C. § 1182(h).

15. Section 212(h)(2) of the INA provides in pertinent part as follows:

No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States.

*Id.* § 1182(h)(2).

16. The Board of Immigration Appeals ("BIA") generally hears appeals of decisions by immigration judges. It is an appellate tribunal that is part of the Executive Office for Immigration Review within the United States Department of Justice. See generally 8 C.F.R. §§ 1003.0, 1003.9 (2011) (discussing the organization and powers of the Executive Office for Immigration Review).

17. See, e.g., *Hing Sum v. Holder*, 602 F.3d 1092, 1094 (9th Cir. 2010); *Lemus-Losa v. Holder*, 576 F.3d 752, 754 (7th Cir. 2009); *Zhang v. Mukasey*, 509 F.3d 313, 316 (6th Cir. 2007); *Aremu v. Dep't of Homeland Sec.*, 450 F.3d 578, 582-83 (4th Cir. 2006); *In re Koljenovic*, 25 I. & N. Dec. 219, 221 (B.I.A. 2010).

of admission in section 101(a)(13)(A)<sup>18</sup> dictates that an alien will qualify for relief under section 212(h) only if his previous admission as a permanent resident has been substantively lawful.<sup>19</sup>

Another feature of section 212(h) that has captured the courts' attention is the requirement that a lawful permanent resident must have "lawfully resided continuously for a period of not less than seven years immediately preceding the date of initiation of proceedings to remove the alien from the United States."<sup>20</sup> It is the phrase "lawfully resided" that has offered the greatest challenge and courts have responded by requiring something more than the government's mere tolerance of the alien's presence in the United States.<sup>21</sup>

An immigrant may also seek a waiver of inadmissibility under section 212(k) if he has documentary problems that make him inadmissible.<sup>22</sup> The alien must not have known of his inadmissibility before his departure for the United States.<sup>23</sup> Since the waiver affects only the grounds of inadmissibility relating to documents and labor certification,<sup>24</sup> the immigrant must still satisfy all the other requirements of admissibility. The discussion of this section 212(k) waiver will show how the courts have dealt with the "otherwise admissible" requirement and how a parent's knowledge of the inadmissibility grounds have affected a minor's status.

Finally, this article will discuss former section 212(c) of the INA,<sup>25</sup> which although repealed by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"),<sup>26</sup> continues to occupy the attention of the courts because of the United States Supreme Court's ruling that the section's repeal cannot be applied retroactively to aliens who pleaded guilty to offenses before the IIRIRA went into effect.<sup>27</sup> The significant feature of section 212(c) is that the section

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18. 8 U.S.C. § 1101(a)(13)(A).

19. *Id.* § 1182(h).

20. *Id.*

21. *See Vila v. U.S. Att'y Gen.*, 598 F.3d 1255, 1258 (11th Cir. 2010); *In re Rotimi*, 24 I. & N. Dec. 567, 572 (B.I.A. 2008).

22. Section 212(k) gives the Attorney General the discretion to admit an otherwise inadmissible alien who holds an immigrant visa and who did not know of his inadmissibility before leaving for the United States. 8 U.S.C. § 1182(k).

23. *Id.*

24. Section 212(k) specifically covers the grounds of inadmissibility dealing with labor certification and lack of proper documents. *See id.* § 1182(a)(5)(A); *id.* § 1182(a)(7)(A)(i).

25. INA § 212(c), 8 U.S.C. § 1182(c) (1994).

26. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-597.

27. *See INS v. St. Cyr.*, 533 U.S. 289, 291 (2001).

covered only lawful permanent residents who were returning to the United States.<sup>28</sup> It said nothing about aliens in deportation proceedings, and so when the Second Circuit held in *Francis v. INS*<sup>29</sup> that deportable aliens should be covered whether or not they had ever left the United States, it set the stage for other issues relating to section 212(c).

Most courts<sup>30</sup> and the BIA<sup>31</sup> have taken the position that an alien in deportation proceedings should be eligible for relief only if the deportation ground matches an inadmissibility ground in section 212. This article will discuss this statutory counterpart approach and will contrast it with the Second Circuit's offense-based approach which looks to the specific offense committed by the alien to see if there is a match between removal and inadmissibility provisions.<sup>32</sup> It must be noted here that the Ninth Circuit has seen no reason to stray from the literal section 212(c) language and has taken a different position that makes no attempt at matching, as the other courts have done.<sup>33</sup> It will be interesting to trace the judicial developments that led the Ninth Circuit to abandon *Tapia-Acuna v. INS*,<sup>34</sup> a long standing decision that found no rational basis for excluding deportable aliens from coverage under section 212(c).<sup>35</sup>

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28. The lawful permanent resident was eligible for relief only if he was "returning to a lawful unrelinquished domicile of seven consecutive years." 8 U.S.C. § 1182(c).

29. See *Francis v. INS*, 532 F.2d 268, 269 (2d Cir. 1976) (holding that the BIA's interpretation of section 212(c) was unconstitutional as applied to the alien because it deprived him of the equal protection of the law).

30. Aliens in deportation proceedings are only eligible for relief if the deportation ground matches an inadmissibility ground in section 212. See generally *Aguilar-Ramos v. Holder*, 594 F.3d 701 (9th Cir. 2010); *De la Rosa v. U.S. Att'y Gen.*, 579 F.3d 1327 (11th Cir. 2009); *Koussan v. Holder*, 556 F.3d 403 (6th Cir. 2009); *Gonzalez-Mesias v. Mukasey*, 529 F.3d 62 (1st Cir. 2008); *Caroleo v. Gonzales*, 476 F.3d 158 (3d Cir. 2007).

31. *In re Blake*, 23 I. & N. Dec. 722 (B.I.A. 2005), *rev'd*, *Blake v. Carbone*, 489 F.3d 88 (2d Cir. 2007); *In re Brievea*, 23 I. & N. Dec. 766 (B.I.A. 2005), *aff'd*, *Brievea-Perez v. Gonzales*, 482 F.3d 356 (5th Cir. 2005).

32. See *Blake*, 489 F.3d at 103 (reversing *In re Blake*, 23 I. & N. Dec. at 722 and stating that an alien's eligibility for 212(c) relief depends on whether the offense that makes an alien deportable would make an alien in a similar situation excludable).

33. See *Abebe v. Mukasey*, 554 F.3d 1203, 1205-07 (9th Cir. 2009) (en banc) (holding that a lawful permanent resident is not eligible for section 212(c) relief in a deportation proceeding and such a denial does not violate equal protection).

34. *Tapia-Acuna v. INS*, 640 F.2d 223, 225 (9th Cir. 1981).

35. *Id.* at 225 (holding that "eligibility for § 1182(c) relief cannot constitutionally be denied to an otherwise eligible alien who is deportable under § 1251(a)(11), whether or not the alien has departed from and returned to the United States after the conviction giving rise to deportability").

## I. THE MEANING OF ADMISSION

### A. The Adjustment Context

The terms “admission” and “admitted” occupy a prominent place in the INA.<sup>36</sup> Before Congress amended the INA in 1996,<sup>37</sup> aliens who had not made an entry<sup>38</sup> were subject to the exclusion provisions of section 212,<sup>39</sup> while aliens who had made an entry were subject to the deportation provisions of former section 241.<sup>40</sup> The IIRIRA replaced the definition of “entry” with a new definition relating to “admission,”<sup>41</sup> thus abandoning the idea that any coming of an alien was sufficient to trigger a deportation proceeding, even if an alien entered without inspection. The new language introduced a certain formality to the process by requiring an alien to make a lawful entry after inspection by an immigration officer.<sup>42</sup> The definition of admission seems simple enough, but it leaves open the question of whether it should have the same meaning throughout the INA.

The decision about an alien’s admission is particularly important in the deportation context when an alien has been convicted of an aggravated felony “at any time after admission”<sup>43</sup> or when an alien has committed a crime involving moral turpitude within five years after “the date of admission.”<sup>44</sup> If the alien gains admission in the normal way, after inspection by an immigration officer at a port of entry, the statutory definition of “admission” causes few problems. However, it is not so easy if the alien enters as a nonimmigrant and then

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36. See, e.g., INA § 101(a)(13)(A), 8 U.S.C. § 1101 (a)(13)(A) (2006).

37. See IIRIRA, Pub. L. No. 104-208, 110 Stat 3009-546.

38. The pre-IIRIRA definition of “entry” was “any coming of an alien into the United States,” except that there was an exception for a lawful permanent resident whose departure to a foreign place was not intended. INA § 101(a)(13), 8 U.S.C. § 1101 (a)(13)(1994) (amended 1996).

39. *Id.* § 1182.

40. *Id.* § 1251.

41. See IIRIRA §301(a) (current version at 8 U.S.C. § 1101(a)(13)(A) (2006)).

42. Section 101(a)(13)(A) of the INA provides that “[t]he terms ‘admission’ and ‘admitted’ mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.” INA § 101(a)(13)(A), 8 U.S.C. § 1101(a)(13)(A) (2006).

43. Section 237(a)(2)(A)(iii) of the INA provides that an “alien who is convicted of an aggravated felony at any time after admission is deportable.” *Id.* § 1227(a)(2)(A)(iii).

44. Section 237(a)(2)(A)(i) of the INA provides as follows:

Any alien who (I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and (II) is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable.

*Id.* § 1227 (a)(2)(A)(i).

adjusts his status to that of a lawful permanent resident.<sup>45</sup> In that event, one may ask whether the adjustment should count as an admission.<sup>46</sup> A further complication may arise if an alien enters without inspection, adjusts his status, and then commits a crime.<sup>47</sup> If the statutory definition of “admission” prevails, there is no role for adjustment in this context, and a court must therefore resolve the inconsistency.

The BIA tackled the problem in *In re Shanu*<sup>48</sup> and took the view that section 101(a)(13)(A) does not give an exhaustive definition of the term “admission,” thus in effect recognizing an adjustment as an admission.<sup>49</sup> In *In re Shanu*, the BIA concluded that there was more than one possible admission.<sup>50</sup> The first occurred when the alien entered as a nonimmigrant and the second when the alien later adjusted his status to that of a lawful permanent resident.<sup>51</sup> Since the BIA had to determine whether the alien had committed his crime within five years after the date of admission, it could not answer that question without knowing which admission controlled for statutory purposes.<sup>52</sup>

The BIA relied in part on the Supreme Court’s interpretation of prior statutory language that subjected an alien to deportation if he

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45. Compare *In re Alyazji*, 25 I. & N. Dec. 397, 401, 408 (B.I.A. 2011) (treating adjustment as admission for purposes of INA § 237(a)(2)(A)(i)), with *Zhang v. Mukasey*, 509 F.3d 313, 315-16 (6th Cir. 2007) (rejecting adjustment as admission in the context of section 237 (a)(2)(A)(i) of the INA).

46. This question is particularly intriguing in the context of section 237(a)(2)(A)(i)(I) of the INA when a court has to determine the date of the alien’s admission in order to decide when the five-year period begins to run. See *Zhang*, 509 F.3d at 316 (holding that the date of an alien’s adjustment to lawful permanent residency did not constitute a second admission); *Aremu v. Dep’t of Homeland Sec.*, 450 F.3d 578, 582-83 (4th Cir. 2006) (holding that the date of admission under section 237 (a)(2)(A)(i) was not the date of alien’s adjustment); see also *Abdelqadar v. Gonzales*, 413 F.3d 668, 673-75 (7th Cir. 2005) (holding that alien’s crime did not occur within five years after admission when the alien first enters as nonimmigrant and then later adjusted the immigrant status); *In re Alyazji*, 25 I. & N. Dec. 397, 408 (B.I.A. 2011) (holding that alien was deportable under section 237(a)(2)(A)(i) if he was present in the United States pursuant to an admission that occurred not more than five years before he committed a crime of moral turpitude).

47. See *In re Rosas*, 22 I. & N. Dec. 616, 623 (B.I.A. 1999) (holding that the alien who entered without inspection and then adjusted her status to that of a lawful permanent resident had made an admission pursuant to her adjustment).

48. *In re Shanu*, 23 I. & N. Dec. 754, 756 (B.I.A. 2005).

49. *Id.*

50. *Id.* at 759 (concluding that the alien was removable under section 237(a)(2)(A)(i) if he committed his crime within five years after the date of “any” admission).

51. *Id.*

52. The BIA did not see the need for recognizing only the alien’s first admission date, especially since an alien who adjusted his status under section 245(j) could be found removable under section 237(a)(2)(A)(i) on the basis of a crime committed within ten years after adjusting his status. *Id.* at 759-61. If the BIA had focused on the first admission date, then the ten-year period would have to be measured from the initial admission date, a reading not in concept with the statutory language governing adjustment under section 245(j). *Id.* at 759.

was convicted of a crime involving moral turpitude “prior to entry.”<sup>53</sup> It was the Court’s view that the statutory reference to “entry” covered any entry and was not restricted to just the alien’s first entry.<sup>54</sup> Furthermore, even though the IIRIRA replaced the concept of “entry” with that of “admission,”<sup>55</sup> that change had no effect on the important question about which date should apply to start the five-year period running for an alien’s removal under section 237(a)(2)(A). The BIA was careful to emphasize in *In re Shanu* that adjustment of status also qualifies as an admission in light of the fact that section 101(a)(20) recognizes that an alien who has been given the privilege of residing permanently as an immigrant has been lawfully admitted for permanent residence.<sup>56</sup> Therefore, the BIA conceded in *In re Shanu* that there were two admissions and decided that the alien’s conviction disqualified him from relief because commission of the crime fell within five years of the alien’s adjustment to permanent status.<sup>57</sup>

By recognizing adjustment of status as an admission, the BIA’s decision in *In re Shanu*<sup>58</sup> was consistent with its previous decision in *In re Rosas*.<sup>59</sup> Unlike the five-year provision in *In re Shanu*,<sup>60</sup> the language in *In re Rosas* dealt with the deportability of an alien who was convicted of an aggravated felony “at any time after admission.”<sup>61</sup> The alien in *In re Rosas* had entered without inspection and then later adjusted his status to that of a lawful permanent resident.<sup>62</sup> Since the alien committed his crime after adjustment, the BIA had very little choice in accepting the adjustment as an admission; there was no other admission for the BIA to consider in light of the alien’s previous entry without inspection. Had the BIA not seen the adjustment as an admission, the alien would not have been subject to deportation because there would have been no admission, and section 237(a)(2)(A)(iii) covers an alien’s conviction “at any time after admission.”<sup>63</sup> The *In re Rosas* scenario highlights the problems that would

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53. *Id.* at 762-64 (citing *United States ex rel. Volpe v. Smith*, 289 U.S. 422, 425-26 (1933)).

54. *Id.* at 762.

55. See IIRIRA § 301(a), 8 U.S.C. § 1101(a)(13)(A) (2006).

56. *In re Shanu*, 23 I. & N. Dec. at 760 n.4.

57. *Id.* at 764.

58. *Id.* at 756 (citing *In re Rosas*, 22 I. & N. Dec. 616, 618-19 (B.I.A. 1999)).

59. *In re Rosas*, 22 I. & N. Dec. at 623.

60. In *In re Shanu*, the alien was deportable because he was convicted for committing a crime within five years of the date of admission. *In re Shanu*, 22 I. & N. Dec. at 764; see INA § 237(a)(2)(A)(i)(I), 8 U.S.C. § 1227(a)(2)(A)(i)(I) (2006).

61. 8 U.S.C. § 1227(a)(2)(A)(iii).

62. *In re Rosas*, 22 I. & N. Dec. at 616.

63. In *In re Shanu*, the BIA expressed its sensitivity to this concern as follows:

ensue from rejecting adjustment as an admission because many lawful permanent residents who obtain their permanent status through adjustment would find themselves inadmissible as a result of being physically here without actually being admitted.<sup>64</sup>

That problem did not seem to concern the Sixth Circuit in *Zhang v. Mukasey*<sup>65</sup> when the alien's lawful admission as a student in 1994 was followed by his admission to lawful permanent residence in 2000.<sup>66</sup> When the alien committed his crime in 2001, it was within five years of his adjustment, but more than five years after his initial admission as a student.<sup>67</sup> The court had to decide whether the alien's adjustment controlled for purposes of determining when the five-year period began to run under section 237(a)(2)(A)(i).<sup>68</sup>

The court opted for the alien's date of admission as a student in 1994 because that satisfied the requirement of the alien's lawful entry into the United States after inspection by an immigration officer.<sup>69</sup> The court acknowledged that unlike the alien in *In re Rosas*, the alien in *Zhang* entered the country legally as a student and then changed his status to that of a permanent resident.<sup>70</sup> In *In re Rosas*, the alien originally entered without inspection, and there was only one possible

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In any event, *Matter of Rosas*. . . does not stand for the proposition that adjustment of status should be considered an 'admission' only when failure to do so would lead to an absurd or unreasonable result in a particular case. On the contrary, the potential for unreasonable results was merely a fact marshaled to support our interpretation of the aforementioned statutory language. It is that language, and not the possibility of unreasonable results, that drove our analysis in *Matter of Rosas* and continues to drive it today.

*In re Shanu*, 22 I. & N. Dec. at 758.

64. Section 212(a)(6)(A)(i) provides that "[a]n alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible." INA § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i) (2006). If adjustment is not recognized as an admission in a *Rosas*-type situation, an alien would not only be inadmissible, but he would not be eligible for many benefits that depend on an alien having been admitted. *In re Alyazji*, 25 I. & N. Dec. 397, 399 n.2 (B.I.A. 2011). For example, eligibility for cancellation of removal under section 240A(a) requires an alien to be "lawfully admitted for permanent residence for not less than 5 years." 8 U.S.C. § 1229b(a)(1).

65. *Zhang v. Mukasey*, 509 F.3d 313 (6th Cir. 2007).

66. *Id.* at 314.

67. *Id.* at 315.

68. The allegation was that the alien committed his crime within five years after the date of admission. *See id.* The court had to decide which date controlled. *Id.*

69. The court held that "there [was] only one 'first lawful admission,' and it [was] based on physical, legal entry into the United States, not on the attainment of a particular legal status." *Id.* at 316. The court distinguished *In re Rosas* on the ground that the adjustment was the first lawful entry that the alien had made and the BIA could not use the alien's previous entry without inspection at the beginning of the five-year period. *See id.*

70. *Id.*

event that could qualify as an admission.<sup>71</sup> In terms of a legal entry, the court in *Zhang* had no choice but to find one ““first lawful admission.””<sup>72</sup> The court did not treat the alien’s adjustment as another admission since the alien was already admitted when he came in as a student.

In *Aremu v. Department of Homeland Security*,<sup>73</sup> the Fourth Circuit also chose not to construe an adjustment as an admission under section 237(a)(2)(A)(i). In failing to do so, it vacated the BIA’s order of removal, which the BIA issued in *In re Shanu*.<sup>74</sup> Although conceding that the adjustment process was arguably the equivalent of inspection and authorization by an immigration officer, the court was unwilling to recognize such a change in status as an admission to the United States.<sup>75</sup> After all, the court had before it an explicit definition of the term “admission,” and it did not want to apply that term in a way that seemed inconsistent with that definition.<sup>76</sup> In taking this approach, the court saved for another day a scenario where the alien

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71. *Id.* In *In re Rosas*, the BIA explained as follows:

If the term “admitted”, as used in the IIRIRA, does not include those afforded lawful permanent resident status through the adjustment process, they would be relegated to the same situation as entrants without inspection and would face exposure to removal charges under section 212(a)(6)(A)(i) as aliens who have not been admitted or paroled.

*In re Rosas*, 22 I. & N. Dec. 616, 621 (B.I.A. 1999).

72. *See Zhang*, 509 F.3d at 316. The court in *Zhang* was satisfied that the alien had already been admitted when he came in as a student in accordance with the requirement of being inspected and authorized by an immigration officer. *See id.* at 315-16. The court did not accept the possibility of two admissions. *See id.* The court was unwilling to give deference to the BIA’s position that there could be more than one date of admission because the statute’s plain language dictated otherwise. *See id.* at 315. The court has support for its position. *See Aremu v. Dep’t of Homeland Sec.*, 450 F.3d 578, 579 (4th Cir. 2006) (holding that the alien’s date of admission does not include adjustment of status); *Abdelqadar v. Gonzales*, 413 F.3d 668, 674 (7th Cir. 2005) (holding that the date of admission refers to initial entry); *Shivaraman v. Ashcroft*, 360 F.3d 1142, 1146 (9th Cir. 2004) (holding that for purposes of § 237(a)(2)(A)(i), the date of admission is the date of the alien’s lawful entry).

73. *Aremu*, 450 F.3d at 578.

74. *Id.* at 579, 583. In granting the alien’s petition for review, the court expressed no opinion about whether the adjustment date should be regarded as the date of admission where the alien was never admitted as defined in § 101(a)(13)(A). *See id.* at 583. The court conceded that recognizing adjustment as an admission under such circumstances “might be justified through application of the settled rule that a court must, if possible, interpret statutes to avoid absurd results.” *Id.*

75. *See id.* at 581. The court pointed out that “[a]djustment of status is a method of acquiring status as a permanent resident that is only available to those already within the United States.” *Id.* The court’s point was that a status change could not be categorized as an entry. *Id.*

76. *See id.* at 582; *see also Meese v. Keene*, 481 U.S. 465, 484 (1987) (stating that the statutory definition of a particular term excludes other meanings of the term); 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, *SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION* § 47:7 (7th ed. 2007) (“A definition which declares what a term ‘means,’ excludes any meaning that is not stated.”).

## *The Meaning of Admission*

enters without inspection before his date of adjustment.<sup>77</sup> It was comforting to see the court acknowledge that the date of adjustment “might be justified through application of the settled rule that a court must, if possible, interpret statutes to avoid absurd results.”<sup>78</sup> This was a sign that the court was willing to treat adjustment as an admission under certain circumstances and not to categorize it once and for all as an exclusive procedure divorced from the admission context.<sup>79</sup>

In *Abdelqadar v. Gonzales*,<sup>80</sup> the Seventh Circuit also failed to treat adjustment as an admission within the context of section 237(a)(2)(A)(i), but, on that occasion, the alien had made a lawful entry and then adjusted his status.<sup>81</sup> The court did not understand why the BIA opted for the most recent admission contemplated under section 237(a)(2)(A)(1).<sup>82</sup> The BIA in *In re Rosas* relied on the alien’s adjustment as an admission in the context of section 237(a)(2)(A)(iii).<sup>83</sup> It could not use the alien’s original entry as an admission because that entry was unlawful, and the BIA had nowhere else to go other than to the adjustment date if it wanted to ensure that an illegal entrant did not enjoy an advantage over a lawful immigrant. Therefore, for purposes of section 237(a)(2)(A)(iii), the BIA in *In re Rosas* treated an admission as including an adjustment so as to ensure that an illegal entrant would not avoid the removal provision.<sup>84</sup>

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77. See *Aremu*, 450 F.3d at 583 (citing *Ocampo-Duran v. Ashcroft*, 254 F.3d 1133, 1135 (9th Cir. 2001) (holding that the adjustment date qualifies as admission where the alien enters without inspection)); *In re Rosas*, 22 I. & N. Dec. 616, 623 (B.I.A. 1999) (concluding that reference in section 237(a)(2)(A)(iii) to “after admission” includes both aliens who are “admitted” pursuant to section 101(a)(13)(A) and aliens who are lawfully admitted to permanent residence through adjustment).

78. *Aremu*, 450 F.3d at 583 (citing *Holland v. Big River Minerals Corp.*, 181 F.3d 597, 603 n.2 (4th Cir. 1999)).

79. The court was concerned that its ruling might give an advantage to an alien who enters without inspection and then adjusts his status, because if such an alien left the United States and then came back, that entry would be an admission under section 1101(a)(13)(A). See *id.* at 583 n.6.

80. *Abdelqadar v. Gonzales*, 413 F.3d 668 (7th Cir. 2005).

81. See *id.* at 672-73.

82. The court observed that the BIA had not explained why “admission” in section 237(a)(2)(A)(i) referred necessarily to “the most recent, rather than the initial, entry.” *Id.* at 674.

83. Section 237(a)(3)(A)(iii) provides that “[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable.” INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (2006).

84. By the same token, if the BIA did not recognize adjustment as an admission, an adjusted alien who entered without inspection would never be eligible for relief that is restricted to aliens who have been admitted to the United States. See, e.g., *id.* § 1229b(a)(1)(2006) (requiring an alien to be lawfully admitted for permanent residence for at least five years to be eligible for cancellation of removal).

Despite the BIA's reliance on *In re Rosas* in *Abdelqadar*, the Seventh Circuit was keen to point out that the word "admission" need not have the same meaning throughout the INA and that "the context of the word 'admission' in § [237(a)(2)(A)(i)] differs substantially from its context in § [237(a)(2)(A)(iii)]."<sup>85</sup> The court was unwilling to accept the BIA's finding that the alien in *Abdelqadar* really had two admissions and that the BIA therefore had a choice of which admission should prevail for purposes of section 237(a)(2)(A)(i).<sup>86</sup> The court made it clear that the term "admission" must be read in context and that an admission in one section does not necessarily mean the same thing in another section.<sup>87</sup>

The court interpreted section 237(a)(2)(A)(iii) as distinguishing between crimes committed abroad and those committed in the United States.<sup>88</sup> On the other hand, section 237(a)(2)(A)(i) starts the clock for determining whether an alien has committed a crime within five years after the date of admission.<sup>89</sup> Under this approach, it is not necessary to start the count afresh every time a consumer makes another admission. It was up to the BIA to explain why the last entry should count in deciding the five-year question. After all, section 237(a)(2)(A)(i) refers to the date of admission, thus sending a message that it does not give a choice of dates in this context.<sup>90</sup>

As evidence of its devotion to contextual reading, the Seventh Circuit agreed in *Lemus-Losa v. Holder*<sup>91</sup> that the BIA had acted reasonably in recognizing adjustment of status as an admission under section 212(a)(9)(B)(i)(II), which regards as inadmissible certain aliens who seek admission within ten years after being unlawfully present for one year or more.<sup>92</sup> It was more evidence that the word "admission"

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85. *Abdelqadar*, 413 F.3d at 674.

86. *See id.*

87. *See id.*

88. *Id.*

89. *Id.*

90. It is reasonable to assume that the drafters wanted to reach those aliens who engaged in criminal conduct soon after their arrival in the United States. *See id.* The reference to the date of admission in section 237(a)(2)(A)(i) also suggests that the drafters wanted to concentrate on one date. *Zhang v. Mukasey*, 509 F.3d at 316 (6th Cir. 2007) (holding that there was "only one 'first lawful admission,'" and it was based on the alien's physical entry, not on a particular legal status, like adjustment); *see Shivaraman v. Ashcroft*, 360 F.3d 1142, 1148 (9th Cir. 2003) (concluding that "[t]here can be only one on 'the' date.>").

91. *Lemus-Losa v. Holder*, 576 F.3d 752 (7th Cir. 2009).

92. Section 212(a)(9)(B)(i)(II) provides as follows:

Any alien (other than an alien lawfully admitted for permanent residence) who . . .

could have different meanings depending on the context.<sup>93</sup> The Seventh Circuit's acceptance of the BIA's position in allowing adjustment as an admission in the context of section 212(a)(9)(B)(i)(II) only served to highlight the problem that would arise if "admission" in that section was restricted to entry at the border. An alien entering without inspection might then be able to seek adjustment because he did not seek admission within the meaning of the statute. Recognizing an adjustment as an admission in this context is consistent with *In re Rosas*.<sup>94</sup>

## B. The Inspection Requirement

An alien is not eligible for adjustment under section 245 unless he has been "inspected and admitted or paroled."<sup>95</sup> Under normal circumstances, an immigration inspector will admit an alien at a port of entry after being satisfied that the alien is admissible to the United States.<sup>96</sup> If the inspector allows the alien to enter without asking him any questions, one may wonder whether the necessary statutory inspection has occurred.

In *In re Quilantan*,<sup>97</sup> the alien was an automobile passenger coming into the United States.<sup>98</sup> After speaking to the driver only, the immigration officer allowed the vehicle to enter on the driver's assur-

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(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

INA § 212(a)(9)(B)(i)(II), 8 U.S.C. § 1182(a)(9)(B)(i)(II) (2006).

93. See *Lemus-Losa v. Holder*, 576 F.3d at 757; see also *In re Rodarte*, 23 I. & N. Dec. 905, 908 (B.I.A. 2006) (rejecting contention that reference in section 212(a)(9)(B)(i)(II) to admission applies only to one seeking admission at the border).

94. *In re Rosas*, 22 I. & N. Dec. 616, 623 (B.I.A. 1999). The BIA looked at the overall statutory scheme in *In re Rosas* and held that the "the reference in § 237(a)(2)(A)(iii) of the Act to 'after admission' includes both those aliens who are 'admitted' at the time of entry pursuant to § 101 (a)(13)(A) as well as those who are 'lawfully admitted for permanent residence,' as defined in § 101(a)(20)." *Id.* In a sense, the BIA really did not have a choice here because the alien had entered illegally, and so there was only one date that the BIA could consider an admission, the adjustment date.

95. 8 U.S.C. § 1255(a).

96. As one authority put it, "[t]he inspector will often ask questions about the noncitizen's purpose in coming, how long the noncitizen intends to stay and any other information bearing on admissibility, although the inspector will not usually place the noncitizen under oath." CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 8.05 (2011). The regulation requires that "[e]ach alien seeking admission at a United States port-of-entry . . . present whatever documents are required and must establish to the satisfaction of the inspecting officer that the alien is not subject to removal under the immigration laws." 8 C.F.R. § 235.1(f)(1) (2011).

97. *In re Quilantan*, 25 I. & N. Dec. 285 (B.I.A. 2010).

98. *Id.* at 286.

ance that the driver was a citizen of the United States.<sup>99</sup> Later, the question arose whether the alien was inspected and admitted as the statute required so that he could obtain his adjustment under section 245(a).<sup>100</sup>

A similar situation arose in *In re Areguillin*,<sup>101</sup> and the BIA ruled then that an alien who physically presents herself for inspection satisfies the statutory requirement even though the immigration inspector declines to ask any questions and the alien volunteers no information.<sup>102</sup> In *In re Quilantan*, the inspector did question the alien's driving companion but not the alien.<sup>103</sup> There was no doubt that the immigration official inspected the driver and that he had every opportunity to question the alien. This was not a situation where the alien falsely claimed United States citizenship, thus misleading the inspector into passing up his opportunity to question her as an alien.<sup>104</sup> The BIA in *In re Quilantan* was unwilling to impose an obligation on the alien to speak up about her eligibility for admission, even in the absence of the inspector's curiosity.<sup>105</sup> The obligation ended with the alien's appearance for inspection and if the inspector failed to take advantage of that opportunity, the alien could not be faulted for the inspector's lack of diligence.

This was another situation where the term "admitted" required only procedural regularity with respect to adjustment of status.<sup>106</sup> It is no longer necessary for the alien to be admitted as a "bona fide non-immigrant."<sup>107</sup> When Congress amended the INA in 1960 to elimi-

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99. *Id.*

100. *Id.*

101. *In re Areguillin*, 17 I. & N. Dec. 308 (B.I.A. 1980).

102. *See id.* If the alien secures admission on the basis of a false claim to United States citizenship, he does not satisfy the inspection and admission requirement. *See Reid v. INS*, 420 U.S. 619, 624 (1975) (holding that an alien who enters on a false claim of citizenship "would not only be excludable under § 212(a)(19) if he were detected at the time of his entry, but has also so significantly frustrated the process for inspecting incoming aliens that he is also deportable as one who has 'entered the United States without inspection.'").

103. *In re Quilantan*, 25 I. & N. Dec. at 286.

104. In *Reid*, the immigration inspector did not perform the kind of inspection that he normally would have because the alien claimed citizenship. *See Reid v. INS*, 420 U.S. 619, 624-25 (1975). Therefore, this was not a case where the inspector waived his right to inspect the alien as an alien. As the court pointed out in *Reid*, "[t]he examination to which citizens are subjected is likely to be considerably more perfunctory than that accorded aliens." *Id.*

105. *See In re Quilantan*, 25 I. & N. Dec. at 293 (citing *In re Areguillin*, 17 I. & N. Dec. at 308 (B.I.A. 1980); *In re G*, 3 I. & N. Dec. 136 (B.I.A. 1948)).

106. *In re Quilantan*, 25 I. & N. Dec. at 290.

107. Congress amended the INA in 1958 to provide that "[t]he status of an alien who was admitted to the United States as a bona fide nonimmigrant may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien

nate that requirement,<sup>108</sup> it sent a message that it was satisfied with the mere inspection and admission of the alien, thus opting for procedural regularity instead of compliance with substantive requirements. The new IIRIRA definition of admission did not change that approach.<sup>109</sup> Therefore, for purposes of adjustment, the alien does not have to show that he was substantively eligible for admission in any particular status.<sup>110</sup> It is up to the immigration official to do his inspection as he sees fit, and a lack of thoroughness on his part does not detract from the fact that the alien has presented himself for inspection.

The alien's eligibility for adjustment in a *Quilantan*-type case may be questioned because being "admitted" under section 101(a)(13)(A) requires "lawful entry." However, the term "admitted" must be interpreted in light of other provisions of the INA, and requiring an alien's substantive compliance with the statutory requirement would lead to certain situations that would essentially nullify those other provisions. It would be impossible, for example, for section 237(a)(1)(H) to do its work in providing a waiver to an alien who was admitted through fraud. When Congress amended section 101(a)(13)(A), it also kept section 237(a)(1)(H), granting a waiver of deportation in certain limited cases.<sup>111</sup> This is but one example where Congress recognized that an admission could occur despite the alien's failure to meet substantive requirements. Therefore, there is nothing inconsistent in recognizing the procedural element in section 101(a)(13)(A) for purposes

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lawfully admitted for permanent residence . . . ." Act of Aug. 21, 1958, Pub. L. No. 85-700, 62 Stat. 752 (1958).

108. Congress amended section 245(a) in 1960 to provide that "[t]he status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence . . . ." Act of July 14, 1960, Pub. L. No. 86-648, § 10, 74 Stat. 504, 505 (1960). This amendment replaced the requirement of being a bona fide nonimmigrant with that of being inspected and admitted. *See id.*

109. *See In re Quilantan*, 25 I. & N. Dec. at 291.

110. This interpretation is consistent with the section 237 (a)(1)(H) waiver provision that is available to aliens who gain admission through fraud. By retaining this waiver after amending section 101 (a)(13)(A), Congress indicated that there could be an admission without meeting the substantive requirements. *See Hing Sum v. Holder*, 602 F.3d 1092, 1101 (9th Cir. 2010) (finding that "[p]rocedure, and not substance, is determinative of an 'admission' into the United States under sections 101(a)(13)(A) and 212(h)").

111. Section 237 (a)(1)(H) provides a waiver for certain aliens who were "inadmissible at the time of admission." INA § 237 (a)(1)(H), 8 U.S.C. § 1227(a)(1)(H) (2006). If "admission" has a substantive connotation in this context, the provision would be "internally inconsistent, because an alien could not be both 'admitted' and 'inadmissible' at the time of entry." *In re Quilantan*, 25 I. & N. Dec. at 292.

of the adjustment process because the lawful entry required by that section does not have substantive connotations in that context.

### C. Fixing the Date of Admission

The earlier statutes that preceded section 237(a)(2)(A)(i) allowed for the deportation of an alien who had committed a crime of moral turpitude within five years of entry,<sup>112</sup> and the BIA interpreted that to mean *any* entry.<sup>113</sup> Congress amended the INA in 1990 to make the alien deportable if he committed the crime within five years after the date of entry<sup>114</sup> and, then in 1996 simply replaced the word “entry” with “admission.”<sup>115</sup> Despite these changes, the BIA still continued with its interpretation that an alien covered by the section would be deportable after any admission.<sup>116</sup> It was not until recently that the BIA admitted that the date of admission does not refer to just any admission and that “the statutory phrase ‘the date of admission’ necessarily refers to a *single* date in relation to the pertinent offense.”<sup>117</sup> It was a welcome turn of events given the turmoil created by the BIA’s previous approach. In taking this stand, the BIA clarified that the five-year period does not begin anew every time the alien is admitted.<sup>118</sup>

The BIA took the opportunity in the same case, *In re Alyazji*, to affirm its position that adjustment of status constitutes an admission.<sup>119</sup> Having done that, it still had to answer the alien’s query about which date of admission applies when the alien has been admitted more than once.<sup>120</sup> It was a question that had produced different answers, and the BIA was determined to settle the matter once and for all. It viewed the date of admission as the date “by virtue of which the alien was present in the United States when he committed his crime.”<sup>121</sup> In line with this approach, the alien would be deportable if

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112. See Act of June 27, 1952, Pub. L. No. 82-414, § 241(a)(4), 66 Stat. 163, 204; Immigration Act of 1917, § 19(a), 39 Stat. 874.

113. See *In re Shanu*, 23 I. & N. Dec. 754, 762 (B.I.A. 2005); *In re Sanchez*, 17 I. & N. Dec. 218, 220 (B.I.A. 1980).

114. Immigration Act of 1990, Pub. L. No. 101-649, § 602 (a), 104 Stat. 4078, 5077.

115. IIRIRA, Pub. L. No. 104-208, § 308 (f)(1)(n), 110 Stat. 3009.

116. See *In re Shanu*, 23 I. & N. Dec. at 754.

117. *In re Alyazji*, 25 I. & N. Dec. 397, 405 (B.I.A. 2011).

118. See *id.* at 406.

119. *Id.* at 404.

120. The BIA conceded that “[t]he statutory language does not specify which of an alien’s various admissions should be considered” and found the statute ambiguous on that point. *Id.* at 405.

121. *Id.* at 406 (citation omitted).

he was in the United States as a result of an admission that took place within the five-year period of the date that he committed his crime.<sup>122</sup> On the other hand, he would not be deportable if he committed his crime more than five years after the current admission that brought him to the United States.<sup>123</sup> Even though the BIA recognizes adjustment of status as an admission,<sup>124</sup> it was careful to point out that a new five-year period does not begin when an alien is admitted again by adjusting his status within the United States.<sup>125</sup> The adjustment that produces the new admission merely extends the alien's period of presence without affecting the determination of the date of admission as required by the statute.<sup>126</sup>

The conclusion reached by the BIA in *In re Alyazji* would not dictate the same result in a case where the alien adjusts his status after entering without inspection. In that event, the date of adjustment would start the five-year period running, since there would be no other admission date to which the commission of the crime could be tied.<sup>127</sup>

Another variation of the admission date occurred in *In re Carrillo*.<sup>128</sup> There, the alien was paroled into the United States in 1999 and adjusted his status to that of a lawful permanent resident in 2001 pursuant to the Cuban Refugee Adjustment Act.<sup>129</sup> Since the issue

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122. *Id.*

123. *Id.*

124. See *In re Koljenovic*, 25 I. & N. Dec. 219, 221 (B.I.A. 2010) (finding that adjustment constitutes admission for purposes of section 212(h) where alien originally entered without inspection); *In re Rodarte*, 23 I. & N. Dec. 905, 908 (B.I.A. 2006) (holding that adjustment of status is admission for purposes of section 212(a)(9)(B)(i)(II)); *In re Shanu*, 23 I. & N. Dec. 754, 756 (B.I.A. 2005) (holding that adjustment of status is admission under section 237 (a)(2)(A)(i)).

125. See *In re Alyazji*, 25 I. & N. Dec. at 406. The BIA explained that "such a new admission [by way of adjustment] merely extends an existing period of presence that was sufficient in and of itself to support the alien's susceptibility to the grounds of deportability." *Id.* at 406-07 (citation omitted).

126. The BIA recognized that in tying the date of admission to the time the alien committed his crime, it would incidentally focus sometimes on the alien's first admission. See *id.* at 406 n.6. Nevertheless, the BIA emphasized that it would not focus exclusively on that first admission, lest it fall into the trap of creating problems for aliens who entered years ago, and who remained outside for a long time thereafter before being readmitted. See *id.*

127. If the alien in *In re Alyazji* had adjusted his status in 2006 after entering without inspection in 2005 and committing his crime in 2007, the 2006 adjustment date would have triggered the five-year period. The alien's period of presence would have begun with the date of adjustment and not with his entry without inspection. See *id.* at 408-09 n.9.

128. *In re Carrillo*, 25 I. & N. Dec. 99, 100 (B.I.A. 2009).

129. The Cuban Refugee Adjustment Act allows a Cuban citizen who is admitted to the United States subsequent to January 1, 1959, and who is physically present for two years, to adjust his status to that of a lawful permanent resident. Act of Nov. 2, 1966, Pub. L. No. 89-732, 80 Stat. 1161. The Attorney General records the alien's admission "as of a date thirty months

was whether the alien had committed a crime of moral turpitude within five years after his date of admission, the BIA had to decide whether that date was the parole date or the adjustment date.<sup>130</sup>

The BIA settled on March 4, 1999 as the date of admission, in light of the Cuban Refugee Adjustment Act which required the Attorney General to “create a record of the alien’s admission for permanent residence as of a date thirty months prior to the filing of such an [adjustment] application or the date of his last arrival into the United States, whichever date is later.”<sup>131</sup> The government had hoped to convince the BIA that the adjustment date was the alien’s date of admission because the BIA had already held in *In re Shanu*<sup>132</sup> that the date of admission contemplated by the removal section was when the alien became a lawful permanent resident through adjustment of his status.<sup>133</sup> But, the alien in *In re Carrillo* adjusted his status in accordance with section one of the Cuban Refugee Adjustment Act, which specifically instructed the Attorney General to record the alien’s admission as of a specific date.<sup>134</sup> Consequently, the controlling date was not when the government granted the adjustment, but in fact, the retroactive date mandated by the Act.<sup>135</sup> In *In re Shanu*, the BIA had a choice between the date when the alien entered as a visitor and the date when he adjusted his status, and the BIA chose the latter as the date of admission.<sup>136</sup> In *In re Carrillo*, however, section one of the Cuban Refugee Adjustment Act dictated the date of the alien’s admission, thus establishing when the five years would expire for removal purposes under section 237(a)(2)(A)(i).

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prior to the filing of such an application or the date of his last arrival into the United States, whichever is later.” *Id.*

130. See *In re Carrillo*, 25 I. & N. Dec. at 100.

131. See *id.* (quoting the Cuban Adjustment Act, Pub. L. No. 89-732, § 1, 80 Stat. 1161 (1966)).

132. *In re Shanu*, 23 I. & N. Dec. 754, 760 (B.I.A. 2010) (citation omitted).

133. An alien is deportable if he is convicted of a crime involving moral turpitude committed within five years after the date of admission. INA § 127(a)(2)(A)(i)(I), 8 U.S.C. § 1227(a)(2)(A)(i)(I) (2006). In *In re Shanu*, the BIA held that an alien is deportable under section 237 if he committed the crime within five years after the date of *any* admission. See *In re Shanu*, 25 I. & N. Dec. at 759. In the BIA’s view, an adjustment qualified as an admission. *Id.* at 758.

134. § 1, 80 Stat. at 1161; see also *In re Carrillo*, 25 I. & N. at 100.

135. It was either “as of a date thirty months prior to the filing of [the] application or the date of his last arrival into the United States, which ever is later.” *Id.*

136. The BIA concluded in *Shanu* that an alien is removable if he commits the crime “within 5 years after the date of *any* admission made by that alien, whether it be the first, last, or any other admission.” *In re Shanu*, 23 I. & N. Dec. at 759.

D. Conditional Admission

The date that an alien becomes a lawful permanent resident can be important in another context. In *Gallimore v. Attorney General of the United States*,<sup>137</sup> the question was whether the alien became lawfully admitted for permanent residence in 1994 when he was conditionally admitted<sup>138</sup> or in 1996 when the conditions were removed.<sup>139</sup> The date was important because if the 1996 date controlled, the alien's 1995 conviction made the alien ineligible for section 212(c) relief.<sup>140</sup> If 1994 was the proper date, then the alien would still be eligible for 212(c) relief because his conviction did not occur until 1995.<sup>141</sup>

The Second Circuit seemed dissatisfied that the BIA merely observed, without explanation, the alien's adjustment to lawful permanent residence in 1996 without so much as mentioning section 216 dealing with conditional admission.<sup>142</sup> The court expected the BIA to consider section 216 if the BIA was trying to decide whether the alien was ineligible for a waiver during the two-year conditional period.<sup>143</sup> The court observed that the BIA had instead simply relied on section 245(a)(2) that required an alien to be admissible at the time the alien obtained lawful permanent status and had thus concluded that the 1995 conviction made the alien inadmissible in 1996.<sup>144</sup> It was as if the

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137. *Gallimore v. Attorney Gen. of the U.S.*, 619 F.3d 216 (3d Cir. 2010).

138. *Id.* at 225. An alien obtains lawful permanent resident status by virtue of his marriage to a United States citizen or a lawful permanent resident is admitted on a conditional basis if the marriage takes place less than twenty-four months before the alien obtains that status. INA § 216 (g)(1), 8 U.S.C. §1186a(g)(1)(2006).

139. *Gallimore*, 619 F.3d at 225. During the ninety-day period preceding the second anniversary of the alien's obtaining the status of a lawful permanent resident, the alien and the alien's spouse must submit a petition to the Attorney General requesting removal of the condition. 8 U.S.C. § 1186a(c)(1)(A), (d)(2)(A). After the parties file the petition, they must appear for an interview with an immigration officer. 8 U.S.C. § 1186a(c)(1)(B). If the Attorney General is satisfied that there is no problem with the petition and that there is no reason to question the legitimacy of the marriage, he will remove the condition effective as of the second anniversary following the alien's obtaining the status of a lawful permanent resident. 8 U.S.C. § 1186a(c)(3)(B); *see also* GORDON ET. AL., *supra* note 96, § 42.02.

140. An alien must have lawful permanent resident status to be eligible for relief under section 212(c). If the conviction preceded the alien's admission to that status, then the alien was ineligible because he was inadmissible in light of his conviction. *See Gallimore*, 619 F.3d at 225.

141. An alien must comply with the substantive legal requirements applicable at the time of his admission to permanent residence. *See* 8 U.S.C. § 1182. If the alien in *Gallimore* was admitted in 1994, the subsequent conviction in 1995 would have no effect on his standing as a lawful permanent resident.

142. *See Gallimore*, 619 F.3d at 229.

143. The court suspected that the BIA overlooked the 1994 adjustment date. *Id.* at 226. It observed as follows: "if the BIA simply overlooked the fact that Gallimore's status was adjusted pursuant to § 1186a in 1994—as we strongly suspect is the case — we are not entitled to sustain its decision on grounds the Attorney General articulates *ex post.*" *Id.*

144. *See id.*

BIA did not even consider 1994 as a possible date for the alien's admission to lawful permanent status, but jumped immediately to 1996 as the only date in contention.<sup>145</sup>

The Attorney General argued for deference<sup>146</sup> to the BIA's interpretation that the alien was not lawfully admitted for permanent residence until 1996 when the conditions were removed pursuant to section 216. Even if such deference was ordinarily due, the Second Circuit could hardly give it in this case if the BIA overlooked the alien's 1994 adjustment to lawful permanent residence. The court had difficulty in understanding how the BIA reached its conclusion that the alien was ineligible for section 212(c) relief, and thus the court could not provide a meaningful review of the BIA's decision.<sup>147</sup> If the BIA believed that conditional permanent residents could not benefit from section 212(c) until the Attorney General removed the conditions, it had to give some basis for that conclusion in light of the specific language of section 216 that provides for the removal of the conditions "effective as of the second anniversary of the alien's ob-

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145. By giving the 1994 date short shrift and thus ignoring the significance of the alien's conditional admission, the BIA made it impossible for the court to review the rationale for the BIA's decision. In any event, even if the BIA meant to interpret a conditional admission as depriving an alien of the status of a lawful permanent resident, section 216(c)(3)(B) authorizes the Attorney General to "remove the conditional basis of the parties effective as of the second anniversary of the alien's obtaining the status of lawful admission for permanent residence." INA § 216(c)(3)(B), 8 U.S.C. § 1186a(c)(3)(B) (2006). This language suggests that the alien obtains his status as a permanent resident on the date of initial admission; if not, there could be no second anniversary of his status as such. Furthermore, an alien's period of eligibility for naturalization begins from the date of his initial conditional admission, so that he is regarded from then on as an alien lawfully admitted for the permanent residence. See 8 U.S.C. § 1186a(e). The regulations also support an alien's status as a lawful permanent resident by stating that "[u]nless otherwise specified, the rights, privileges, responsibilities and duties which apply to all other lawful permanent residents apply equally to conditional permanent residents . . ." 8 C.F.R. § 216.1 (2011).

146. In *Chevron v. Natural Resources Defense Council*, the United States Supreme Court formulated a two-step approach to guide the review of interpretations by administrative agencies. *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984). First, if there is no doubt about congressional intent, then both courts and the agency must give effect to the intent. *Id.* If Congress has not covered the specific issue in contention, then a reviewing court must follow the agency's interpretation as long as it is not "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844. The agency's decision must, however, have precedential value in order to merit deference. *United States v. Mead Corp.*, 533 U.S. 218, 226 (2001). For a decision to have precedential value, a three-member panel of the BIA must decide the case. 8 C.F.R. § 1003.1(e)(6)(ii) (2011). In *Gallimore*, the court reacted to the Attorney General's claim of deference by stating that "[i]f the BIA simply overlooked the fact that Gallimore's status was adjusted pursuant to § 1186a in 1994 – as we strongly suspect is the case – we are not entitled to sustain its decision on grounds the Attorney General articulates *ex post*." *Gallimore*, 619 F.3d at 226.

147. *Gallimore*, 619 F.3d at 229. This is why the court had to remand the case for the BIA to take another look. See *id.*

taining the status of lawful admission for permanent residence.”<sup>148</sup> The two-year anniversary relates to the alien’s lawful admission for permanent residence, and the admission to that status, therefore, takes place when the alien first enters the United States or adjusts his status.<sup>149</sup>

Since the BIA ignored the possibility that a conditional permanent resident could meet the definition of “lawfully admitted for permanent residence” in section 101(a)(20), it was not surprising that the Second Circuit deemed it necessary to remand the case so that the BIA could review “all statutory and regulatory provisions potentially bearing on a conditional [permanent resident’s] eligibility for § 212(c) relief.”<sup>150</sup> The BIA’s failure to recognize the relevance of the 1994 date led the BIA astray in dealing with the alien’s eligibility for relief.<sup>151</sup> The court could only do a meaningful review of the BIA’s decision if the BIA first considered the relationship between the conditional scheme of section 216 and the alien’s eligibility under section 212(c).<sup>152</sup>

#### E. Admission in Any Status

The admission issue also arises when an alien seeks cancellation of removal under section 240A and attempts to show that he has satisfied seven years of continuous residence since being “admitted in any status.”<sup>153</sup> In *Garcia-Quintero v. Gonzales*,<sup>154</sup> the Ninth Circuit was

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148. 8 U.S.C. § 1186a(c)(3)(B).

149. A conditional permanent resident has the “right to apply for naturalization (if otherwise eligible), the right to file petitions on behalf of qualifying relatives . . . ; the duty to register with the Selective Service System, when required; and the responsibility for complying with all laws and regulations of the United States.” 8 C.F.R. § 216.1 (2011). A conditional permanent resident therefore enjoys the “rights, privileges, responsibilities and duties” that attach to all other permanent residents. *Id.*

150. *Gallimore*, 619 F.3d at 229. This seemed to be the proper course because “[w]hen the BIA has not spoken on ‘a matter that statutes place primarily in agency hands,’ [the] ordinary rule is to remand to ‘giv[e] the BIA the opportunity to address the matter in the first instance in light of its own experience.’” *Negusie v. Holder*, 555 U.S. 511, 527 (2009) (quoting *INS v. Ventura*, 537 U.S. 12, 16-17 (2002)).

151. *See Gallimore*, 619 F.3d at 226.

152. *See id.* at 227. The Third Circuit wanted the BIA to address the matter first so that the court would have something to review. This seemed to be the right approach since “[a] court of appeals ‘is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.’” *Ventura*, 537 U.S. at 16 (per curiam) (quoting *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)).

153. Section 240 A(a) provides as follows:

The Attorney general may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien (1) has been an alien lawfully admitted for permanent residence for not less than 5 years, (2) has resided in the United States

sympathetic to the alien's position and held that the alien's acceptance into the Family Unity Program<sup>155</sup> constituted "admission in any status" under the cancellation of removal provisions.<sup>156</sup> The court conceded that the alien's enrollment in the program did not meet the strict definition of "admitted" in section 101(a)(13)(A), but observed that neither the Ninth Circuit nor the BIA had followed the literal definition in all circumstances.<sup>157</sup> The court, therefore, found that an entry after inspection and authorization by an immigration officer was not necessary for an admission.<sup>158</sup> The court was encouraged by the BIA's concession in *In re Rosas* that the definition of "admission" does not prescribe the exclusive means by which an alien may be admitted.<sup>159</sup> If the BIA could find room for flexibility in *In re Rosas*, the court saw no need to bind itself to a literal interpretation of the definition in *Garcia-Quintero*.<sup>160</sup>

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continuously for 7 years after having been admitted in any status, and (3) has not been convicted of any aggravated felony.

8 U.S.C. § 1229b(a).

154. *Garcia-Quintero v. Gonzales*, 455 F.3d 1006, 1018-19 (9th Cir. 2006).

155. Congress adopted the Family Unity Program in 1990 to prevent separation of families by giving qualified spouses and children of legalized aliens an indefinite stay of deportation with permission to work. Immigration Act of 1990, Pub. L. No. 101-649, § 301, 104 Stat. 4978. Under that program, an alien must have entered the United States before May 5, 1988. *Id.*; see also GORDON ET AL, *supra* note 96, § 52.07.

156. *Garcia-Quintero*, 455 F.3d at 1018-19.

157. *Id.* at 1015.

158. *Id.* The court had already held in *Cuevas-Gaspar v. Gonzales* that a parent's admission as a lawful permanent resident could be imputed to the parent's minor child for purposes of satisfying the seven-year continuous residence criteria after being "admitted in any status." *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1028 (9th Cir. 2005). Having taken that route in *Cuevas-Gaspar*, the court felt confident about this variation on the admissions theme.

159. See *Garcia-Quintero*, 455 F.3d at 1015, 1021 n.6 (quoting *In re Rosas*, 22 I. & N. Dec. 616, 623 (B.I.A. 1999)). In *In re Rosas*, the BIA explained its position:

[T]he respondent was "admitted" to the United States when her status was adjusted to that of "an alien lawfully admitted for permanent residence" pursuant to section 245A(b) of the Act. Although this change in status does not meet the definition on an "admission" in section 101(a)(13)(A), because entry occurred prior to the determination of admissibility, that definition does not set forth the sole and exclusive means by which admission to the United States may occur under the Act. Admissions also occur after entry through the process of adjustment of status under sections 245 and 245A. Such admissions are explicitly recognized in the language of section 101(a)(20).

*In re Rosas*, 22 I. & N. Dec. at 623.

160. The aliens in *In re Rosas* and *Garcia-Quintero* entered the United States illegally, and therefore they had to look to some other time to determine whether an admission occurred. In *In re Rosas*, the BIA saw the alien's adjustment as the logical time, and, in *Garcia-Quintero*, the Ninth Circuit decided on the alien's entry into the Family Unity Program. Compare *In re Rosas*, 22 I. & N. Dec. at 623 (finding that the alien's adjustment of status "constituted an 'admission' . . . as that term is used in section 237(a)(2)(A)(iii)."), with *Garcia-Quintero*, 455 F.3d at 1019 (holding that "acceptance into the Family Unity Program constitutes 'admitted in any status' for the purposes of cancellation of removal.").

Having decided that the alien was admitted, the court still had to determine whether it was “in any status” as the statute required. The court took its cue from *In re Blancas*,<sup>161</sup> where the BIA allowed an alien to use his status as a nonimmigrant to satisfy the continuous residence requirement<sup>162</sup> by explaining that “status” indicated a certain legal standing that affected aliens who were either immigrants or nonimmigrants.<sup>163</sup> The alien in *In re Blancas* happened to be a nonimmigrant, admitted for only a temporary period on a border crossing card,<sup>164</sup> and the court in *Garcia-Quintero* did not see why a beneficiary of the Family Unity Program (Program) should not have a strong claim to “status” in order to satisfy the continuous residence requirement under section 240A(a)(2).<sup>165</sup> After all, the Program is intended to keep certain aliens in the United States while the government processes their applications for adjustment to lawful permanent residence.<sup>166</sup> It initiates a relationship between such aliens and the United States that everyone expects to culminate in a new alliance for the participants.<sup>167</sup> As evidence of the Program’s goals, the government allows an alien to remain and work without fear of removal while his adjustment application is pending.<sup>168</sup>

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161. *In re Blancas-Lara*, 23 I. & N. Dec. 458 (B.I.A. 2002).

162. *Id.* at 461.

163. The BIA explained as follows: “[s]tatus’ is a term of art, which is used in the immigration laws in a manner consistent with the common legal definition. It denotes someone who possesses a certain legal standing, e.g., classification as an immigrant or nonimmigrant.” *Id.* at 460.

164. *Id.* at 459.

165. The court stated that “it surely would be odd for the BIA to hold that although a non-immigrant temporarily in the United States can accumulate time for cancellation of removal purposes, an FUP beneficiary, who has maintained that status for four years while applying for adjustment to LPR status – the very purpose of the program – cannot.” *Garcia-Quintero*, 455 F.3d at 1017.

166. An alien who qualifies for the Family Unity Program “may not be deported or otherwise required to depart from the United States.” Immigration Act of 1990, Pub. L. No. 101-649, § 301, 104 Stat. 4978, 5029. An alien who is approved for the Program gets “voluntary departure” for two years, 8 C.F.R. § 236.15(c) (2011), which means in this context that the alien can remain while he seeks adjustment to lawful permanent residence. The regulation does not define the term “voluntary departure,” but the term does not have the same connotation when it is used in section 240B, which authorizes the Attorney General to allow an alien to depart voluntarily from the United States instead of being removed. *See* INA § 240B (a)(1), 8 U.S.C. § 1229b(a)(1) (2006). The Program’s view of “voluntary departure” is to keep the immigration authorities at bay while the alien concentrates on regularizing his status in the United States. The alien may even get an extension of voluntary departure. 8 C.F.R. § 236.15(e) (2011).

167. As the name suggests, “the [Program] is designed to help families stay together while the beneficiaries adjust to [lawful permanent resident] status.” *Garcia-Quintero*, 455 F.3d at 1009.

168. The regulations authorize the alien’s employment as follows: “[a]n alien granted benefits under the Family Unity Program is authorized to be employed in the United States and will receive an employment authorization document. The validity period of the employment authori-

It is interesting that an alien is granted the relief of “voluntary departure” during that period. Although that term is also used to allow an alien who is removable to depart voluntarily from the United States,<sup>169</sup> the Program’s voluntary departure designation concentrates on keeping the alien in the United States.<sup>170</sup> In *Garcia-Quintero*, the alien was permitted to remain and work in the United States for two-year renewable periods, all in anticipation of adjusting his status to that of a lawful permanent resident.<sup>171</sup> Therefore, the voluntary departure label does not detract from an alien’s standing, since it merely gives an alien some respite while he regularizes his status in accordance with the regulations. If a Program beneficiary leaves the United States and then returns, he is entitled to be “inspected and admitted in the same immigration status” that he had at the time of his departure.<sup>172</sup> It is evident that the drafters must have thought that a Program beneficiary has some status to which he will return. If not, there would be no “same immigration status.”<sup>173</sup>

The BIA recently acknowledged in *In re Reza-Murillo*<sup>174</sup> that the grant of Program benefits may very well have given status to the alien in that case.<sup>175</sup> Nevertheless, when it came to the question of whether such a grant constituted an admission, the BIA parted company with the Ninth Circuit’s decision in *Garcia-Quintero*. The BIA clung to the literal definition of “admitted” in section 10(a)(13)(A) that requires an alien’s lawful entry after inspection and authorization.<sup>176</sup> In the BIA’s view, the grant of Program benefits to the alien did not involve the alien’s entry into the United States because the alien was already

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zation document will coincide with the period of voluntary departure.” 8. C.F.R. § 236.15(d) (2011).

169. See 8 U.S.C. § 1229c; see also GORDON ET AL, *supra* note 96, § 64.05 (suggesting that allowing an alien to depart voluntarily saves the government the expense of holding full hearings and actually removing the alien from the United States).

170. See *Garcia-Quintero*, 455 F.3d at 1009. The government will even allow an alien to travel abroad without losing his place in the Program. See 8 C.F.R. § 236.16 (2011).

171. *Garcia-Quintero*, 455 F.3d at 1018. The alien renewed his program status in 1995 and finally became a lawful permanent resident in 1998 through adjustment. *Id.* at 100.

172. 8 C.F.R. § 236.16 (2011).

173. See *Garcia-Quintero*, 455 F.3d at 1018.

174. *In re Reza-Murillo*, 25 I. & N. Dec. 296 (B.I.A. 2010).

175. *Id.* at 297. The BIA had already recognized the possibility of a beneficiary under the Family Unity Program having a status. It stated as follows:

[W]e would expect the privilege of residing in this country to be reflected in a recognized status such as that of nonimmigrant, refugee, or asylee, each of which is set out in the statute. The unique nature of the Family Unity Program may qualify as well, given its statutory foundation in section 301 of the Immigration Act of 1990, and its expectation of long-term presence and ultimate regularization of status.

*In re Rotimi*, 24 I. & N. Dec. 567, 576-77 (B.I.A. 2008).

176. See *In re Reza-Murillo*, 25 I. & N. Dec. at 297.

here when he qualified for the Program.<sup>177</sup> But the alien in *In re Rosas* was already in the United States when he adjusted his status, and there was no entry there either.<sup>178</sup> It was just that the alien in *In re Rosas* had entered without inspection, and the BIA had nowhere to go other than the adjustment route if it wanted to find an admission.<sup>179</sup> If the BIA did not classify an adjustment as an admission, an alien who became a lawful permanent resident through adjustment would still be subject to challenge as someone who was never admitted, thus making him not only ineligible for relief under section 240A,<sup>180</sup> but also subject to removal under section 212(a)(6)(A)(i).<sup>181</sup>

In *Garcia-Quintero*, the Ninth Circuit believed that the BIA's approach in *In re Rosas* provided some encouragement for the court to vary from the strict interpretation of section 101(a)(13)(A) that required an entry into the United States.<sup>182</sup> But, in *In re Rosas* the BIA recognized two possibilities: (1) admission at entry under section 101(a)(13)(A); and (2) admission to permanent residence as defined in section 101(a)(20).<sup>183</sup> The alien derived his privilege of residing permanently in the United States from the adjustment available under section 245A. The BIA could not find a similar connection in *In re Reza-Murillo* between the Program and admission, for the only reference to "admitted" or "admission" in the Program regulations appeared in the section requiring a returning alien to be admitted in the same immigration status he had before leaving.<sup>184</sup> While one may interpret that language as indicating a status for the alien, it does not answer the "admitted" question. It is understood that the government may not terminate an alien's Program benefits on the ground that an

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177. See *id.* That "after inspection" language did not prevent the BIA in *In re Rosas* from finding a later admission after the alien had entered without inspection. See *In re Rosas*, 22 I. & N. Dec. 616, 619 (B.I.A. 1999).

178. *Id.*

179. In *In re Rosas*, the BIA conceded that the alien's adjustment to lawful permanent residence did not meet the definition of "admission" in section 101(a)(13)(A) because "entry occurred prior to the determination of admissibility." *Id.* at 623. The drafters did not obviously anticipate the trouble that would ensue from its general definition in section 101(a)(13)(A), since the definitions section starts with the language, "[a]s used in this chapter." INA § 101(a), 8 U.S.C. § 1101(a) (2006).

180. One of the requirements for relief under section 240A is that the alien must have been "lawfully admitted for permanent residence for not less than 5 years." *Id.* § 1229b(a)(1).

181. An alien who is "present in the United States without being admitted . . . is inadmissible." *Id.* § 1182 (a)(6)(A)(i).

182. See *Garcia-Quintero*, 455 F.3d 1006, 1015-16 (9th Cir. 2006).

183. See *In re Rosas*, 22 I. & N. Dec. at 618-19.

184. See *In re Reza-Murillo*, 25 I. & N. Dec. 296, 296 (B.I.A. 2010) (quoting 8 C.F.R. § 236.16 (2011)).

alien is in the United States without being admitted.<sup>185</sup> However, that accommodation does not result in an admission. It simply gives the alien protection while he continues on the road to regularization of his status. The recognition of a status for the alien does not necessarily mean that the alien was admitted in the statutory sense,<sup>186</sup> for while section 240A(a)(2) requires the alien's admission in any status, it is the alien's admission to the United States that is relevant in this context rather than the mere accrual of benefits.

## II. WAIVER UNDER SECTION 212(H)

### A. Eligibility for Relief

In *In re Rosas*, the BIA dealt with removal of an alien on the basis of an aggravated felony conviction "at any time after admission."<sup>187</sup> In deciding when the alien's admission occurred, the BIA was careful to point out that it was not attempting to resolve the meaning of "admission" in other contexts.<sup>188</sup> One of those other contexts is when an alien seeks a waiver of inadmissibility under section 212(h), and then finds that he may be ineligible because he has "previously been admitted to the United States as an alien lawfully admitted for permanent residence . . . [and] since the date of such admission he has been convicted of an aggravated felony."<sup>189</sup>

In *In re Rosas*, it was the post-adjustment conviction that caused problems for the alien.<sup>190</sup> In a section 212(h) context, an alien is ineligible for a waiver if his conviction follows his admission to the United States as an alien lawfully admitted for permanent residence. In *Martinez v. Mukasey*,<sup>191</sup> the Fifth Circuit seemed reassured by the BIA's concession in *In re Rosas* that the BIA was limiting its decision to the use of the term "admission" in section 237(a)(2)(A)(iii) dealing with

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185. See 8 C.F.R. § 236.18(a)(4)(2011). The effect of this provision is to insulate the alien from any problem (with two exceptions) relating to his inadmissibility at entry. The section deals with termination of Program benefits, not admission of the alien. *Id.* § 236.18.

186. An alien's benefits cannot be terminated because the alien is inadmissible under section 212 (a)(6)(A)(i) for being present without being admitted. *Id.* § 236.18(a)(4). This suggests that an alien may be able to obtain benefits despite his inadmissibility on that ground and that the grant of benefits is itself not an admission.

187. INA § 237 (a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (2006).

188. *In re Rosas*, 22 I. & N. Dec. at 623 n.5.

189. 8 U.S.C. § 1182(h).

190. In *In re Rosas*, the alien entered without inspection and then adjusted her status to that of an alien lawfully admitted for permanent residence. *In re Rosas*, 22 I. & N. Dec. at 617. The BIA had to decide whether the alien had gained admission as that term was used in section 237 (a)(1)(H), and was thus whether she was removable. *See id.*

191. *Martinez v. Mukasey*, 519 F.3d 532 (5th Cir. 2008).

removal.<sup>192</sup> In the Fifth Circuit's view, section 212(h) was a different matter, for there was nothing ambiguous about the term in section 212(h).<sup>193</sup> The *Martinez* court distinguished between the definition of "admission" in section 101(a)(13)(A) and an alien's post-entry adjustment of status.<sup>194</sup> The alien in *Martinez* had entered lawfully as a visitor and later adjusted his status to that of a lawful permanent resident, before committing an aggravated felony.<sup>195</sup> While section 101(a)(13)(A) requires lawful entry after inspection, section 212(h) requires lawful entry with permanent resident status. The court, therefore, held that the plain language of section 212(h) did not prevent an alien from seeking a waiver of inadmissibility if he became a lawful permanent resident by adjusting his status.<sup>196</sup>

The court in *Martinez* kept faith with the statutory definition of admission in section 101(a)(13)(A) by tying the alien's admission to the alien's status as a lawful permanent resident, while insisting that the alien's adjustment was a different and separate event.<sup>197</sup> It was not enough, therefore, for ineligibility if the alien committed his crime after being admitted in any capacity. The alien's previous admission had to be as a lawful permanent resident, and while an alien can achieve permanent status either through admission (as defined by section 101(a)(13)(A)), or by adjustment, section 212(h) addresses only admission and not adjustment.

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192. *See id.* at 542 (citing *In re Rosas*, 22 I. & N. Dec at 623 n.5).

193. Relying on the statutory definition of "admitted," the court concluded that "the plain language of § 212(h) reveal[ed] that 'admitted', as employed in § 212(h), includes an alien's lawful entry into this country with permanent-resident status." *Martinez*, 519 F.3d at 544. The court's approach was consistent with the plain meaning rule that prevents a court from giving a statute different meaning "when the language of the statute is clear and not unreasonable or illogical in its operation." 2A SINGER & SINGER, *supra* note 76, § 46:1.

194. The court stated that "'admission' is the lawful entry of an alien after inspection, something quite different, obviously, from post-entry adjustment of status, as done by *Martinez*." *Martinez*, 519 F.3d at 544.

195. *See id.* at 542.

196. *Id.* at 544.

197. The court had to be mindful of the possibility that its interpretation of the statute might lead to an absurd result; it was confident, however, that such an absurdity would not ensue in this case. *See id.* The court was also aware that Congress had attempted to clarify matters by adding language to section 101(a)(13)(A) that would have provided that "[i]n the case of an alien adjusted to the status of an alien lawfully admitted for permanent residence, such alien shall be regarded as having been admitted on the date of such adjustment." *Id.*; Immigration Technical Corrections Act of 1997, H.R. 2413, 105th Cong. § 4(a)(1) (1997). This unsuccessful attempt to include with the statutory definition of "admission" and "admitted" those aliens who had adjusted their status at least suggests that some members of Congress thought that the definition did not include aliens who attained permanent status by adjustment.

In construing the statute, the *Martinez* court found refuge in the plain meaning approach<sup>198</sup> and therefore did not deem it necessary to defer to the BIA's interpretation of section 212(h).<sup>199</sup> Even if there was any lingering ambiguity in section 212(h), the court was willing to construe the statute in favor of the alien because of the drastic nature of a removal proceeding.<sup>200</sup> The court used this canon of construction to bolster its approach, believing that a court should go only so far as necessary to achieve the congressional goal.<sup>201</sup>

The *Martinez* court's adoption of the statute's plain meaning only served to highlight the fact that the adjustment mechanism was missing from the definition of admission in section 101(a)(13)(A).<sup>202</sup> There was an unsuccessful attempt to correct the omission through the Immigration Technical Corrections Act of 1997,<sup>203</sup> but the failure of that legislative initiative still left the impression that some members of Congress were at least concerned that the term "admitted" did not include an alien's post-entry adjustment. The drafters did not help by ignoring the possibilities of mischief when the term appeared in contexts other than section 101(a)(13)(A). They could have recognized the problem by making the section 101 definition applicable unless the context provided otherwise. It was only when the BIA was faced with an alien's entry without inspection in *In re Rosas* that the BIA had to settle for some other interpretation that did not fall strictly within the language of the definition. Had the BIA in *In re Rosas* not opted to treat the alien's adjustment as an admission, the alien would have

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198. With respect to the plain meaning of the statute, the United States Supreme Court has explained as follows:

The meaning of a statute must in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms.

*Caminetti v. United States*, 242 U.S. 470, 485 (1917); see also 2A SINGER & SINGER, *supra* note 76, § 46.1 ("In the absence of a specific indication to the contrary, words used in the statute will be given their common, ordinary and accepted meaning, and the plain language of the statute should be afforded its plain meaning.").

199. As the Supreme Court has said, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). The *Martinez* court saw no ambiguity in the statute and, therefore, felt it owed no deference to the agency. See *Martinez*, 519 F.3d at 544.

200. See *id.*

201. See *id.* (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)).

202. Section 101(a)(13)(A) deals with an alien's lawful entry and not with an alien's adjustment to lawful permanent residence. See INA § 101(a)(13)(A), 8 U.S.C. § 1101(a)(13)(A) (2006).

203. See Immigration Technical Corrections Act of 1997, H.R. 2413, 105th Cong. § 4(a)(1) (1997).

avoided removal because there would have been no admission. The alien would have been in no man's land, subject to the charge that he was never admitted to the United States.<sup>204</sup>

It is possible to fit adjustment into the statutory scheme by recognizing it as a mechanism that ultimately affects an alien's status, rather than as a physical entry into the United States.<sup>205</sup> This is particularly helpful in the context of section 212(h), when an alien who has previously been admitted as an alien lawfully admitted for permanent residence is denied relief if he does not meet the seven-year, continuous residence requirement. The thrust of section 212(h) is to inquire as to whether someone who has secured the status of a lawful permanent resident is eligible for relief.<sup>206</sup> Despite the definition of "admitted" and "admission" in section 101(a)(13)(A), section 212(h) is still able to do its work if one recognizes that the alien's status is the important factor in that section, rather than the alien's entry. Under this interpretation, it should not matter whether an alien attained permanent status pursuant to the normal admission procedure, or through adjustment.<sup>207</sup>

The adjustment section itself contributes to the confusion about admission because it recognizes that it is the alien's status that is adjusted to that of "an alien lawfully admitted for permanent residence."<sup>208</sup> The change in status follows the alien's entry, and so when the adjustment occurs, the section does not pretend that another admission has occurred despite the alien's continuous physical presence in the United States. Section 245 is a conversion mechanism that allows an alien to assume permanent status without leaving the country. If an alien has not already entered lawfully, but nevertheless obtains adjustment of his status, then a court must then decide when his ad-

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204. For example, one who adjusts would not be able to seek cancellation of removal under section 240A because he could not satisfy the seven-year residential requirement after "admission in any status," since there would be no admission. See 8 U.S.C. § 1229b(a)(2).

205. See *In re Rainford*, 20 I. & N. Dec. 598, 601 (B.I.A. 1992). The alien in *In re Rosas* adjusted her status under section 245A(b) to that of an alien lawfully admitted for permanent residence. *In re Rosas*, 22 I. & N. Dec. 616, 616 (B.I.A. 1999).

206. See 8 U.S.C. § 1182(h).

207. In *In re Rosas*, Board Member Rosenberg explained that "an alien who has acquired the status of one 'lawfully admitted for permanent residence' through the process of adjustment of status has not been 'admitted' as defined in section 101(a)(13) of the Act." *In re Rosas*, 22 I. & N. Dec. at 629 (Rosenberg, Board Member, concurring in part and dissenting in part). The question remains whether the alien was admitted in some sense other than that contemplated by section 101(a)(13)(A).

208. 8 U.S.C. § 1255(a). Section 245A(b) allows the Attorney General to adjust the status of "any alien provided lawful temporary resident status under [section 245 A(a)] to that of an alien lawfully admitted for permanent residence. . . ." *Id.* § 1255a(b).

mission occurred. It would be hard to explain how an alien could be a lawful permanent resident without being admitted to that status. This is why in *In re Koljenovic*,<sup>209</sup> the BIA had to recognize the alien's adjustment as the logical equivalent of admission for lawful permanent residence.<sup>210</sup> Otherwise, an alien who entered without inspection could be in the position of enjoying the status of a lawful permanent resident, while at the same time avoiding the limitations of section 212(h) that deny a waiver to such a resident who does not accrue the necessary seven years of continuous residence.

One cannot ignore the fact that section 245(b) requires the Attorney General to record an alien's lawful admission for permanent residence as of the date that the Attorney General approves the application for adjustment.<sup>211</sup> This indicates that the drafters did not intend to tie the alien's physical entry to the alien's status as a lawful permanent resident. This also explains why the BIA in *In re Koljenovic* felt comfortable in recognizing the alien's adjustment date as the defining moment, since the alien, having originally entered without inspection, could not have been lawfully admitted to any status before his adjustment occurred. In *Martinez*, the Fifth Circuit did not look for any statutory equivalent, but preferred instead to rely on the plain meaning of "admitted" in section 101(a)(13).<sup>212</sup> Fortunately, the alien in *Martinez* had originally entered as a visitor and so was already an admitted alien, although not as a lawful permanent resident. One still has to ask whether an alien can be a lawful permanent resident without being accorded that status in some form or fashion.

It is the status of lawful permanent resident that is important in this context, and the Attorney General's recording of that status does not result in an admission as section 101(a)(13)(A) defines that term.<sup>213</sup> Nevertheless, section 212(h) is intended to recognize the importance of having that status and of fulfilling the seven-year, continuous residence requirement, just as the alien would have to do if he sought relief under section 240A.<sup>214</sup>

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209. *In re Koljenovic*, 25 I. & N. Dec. 219 (B.I.A. 2010).

210. *See id.* at 221. The BIA treats the adjusted alien as "assimilated to the position of one seeking to enter the United States." *Id.* (quoting *In re Rainford*, 20 I. & N. Dec. at 601).

211. 8 U.S.C. § 1255(b).

212. *Martinez v. Mukasey*, 519 F.3d 532, 544 (5th Cir. 2008) (insisting on following the literal language of section 101(a)(13)(A), that there must be a lawful entry of an alien after inspection).

213. *See* 8 U.S.C. § 1101(a)(13)(A) (requiring an entry).

214. H.R. REP. NO. 104-828, at 228 (1996) (Conf. Rep.). The Conference Report that accompanied the IIRIRA touched on the relationship between sections 212(h) and 240A as far as the continuous residence requirement was concerned. *See id.* It explained: "[t]he managers intend

## *The Meaning of Admission*

When the Eleventh Circuit joined the fray in *Lanier v. U.S. Attorney General*,<sup>215</sup> it sided with *Martinez* rather than *In re Koljenovic*.<sup>216</sup> In doing so, the court looked to see whether (1) the alien was previously admitted and (2) whether the alien's admission was as a lawful permanent resident.<sup>217</sup> In determining whether the alien met the first condition, the court relied on the definition of the term "admitted" in section 101(a)(13)(A) and could find no room within that section for the adjustment of an alien's status.<sup>218</sup> The court found no ambiguity in section 212(h) because the definition seemed to address only an alien's lawful entry after inspection and said nothing about an alien's post-entry adjustment.<sup>219</sup> Since there was no ambiguity in the text, the court did not give any deference to the BIA's interpretation of section 212(h).<sup>220</sup>

The court did not have any quarrel with the alien's status as an alien "lawfully admitted for permanent residence," since an alien can achieve that status either through entry at the border or by adjustment thereafter.<sup>221</sup> But, the waiver ban applies only to an alien who was previously admitted for permanent residence, and the court went to section 101(a)(13)(A) for an understanding of "admitted" within the context of the alien's previous entry.<sup>222</sup> It looked in vain for any reference to the alien's post-entry adjustment.<sup>223</sup> In this respect, it aligned

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that the provisions governing continuous residence set forth in INA section 240A as enacted by this legislation shall be applied as well for purposes of waivers under INA section 212(h)." *Id.* This reference certainly indicated congressional intent to impose the same continuous residence requirement in both sections. *Id.*

215. *Lanier v. U.S. Attorney Gen.*, 631 F.3d 1363, 1367 (11th Cir. 2011) (following the ruling of *Martinez* and ignoring the ruling of *In re Koljenovic*).

216. *See id.* at 1366.

217. *Id.* at 1366–67 (finding that the statutory bar to relief does not apply to an alien who adjusts to lawful permanent residence while living in the United States); *see also Martinez*, 519 F.3d at 544 (holding that the section 212(h) waiver applies only when the alien is admitted as a lawful permanent resident after being granted permission to enter).

218. *See Lanier*, 631 F.3d at 1366 (citing *Martinez*, 519 F.3d at 544 and *Aremu v. Dep't of Homeland Sec.*, 450 F.3d 578, 581 (4th Cir. 2006) and finding that the specific definition of "admitted" in section 101(a)(13)(A) signaled no reference to adjustment).

219. *Id.* at 1366–67.

220. *Id.* at 1367 n.3 (stating absent any ambiguity, the court was not bound by the rule of *Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984), which would have dictated deference to the agency charged with administering the statute).

221. *Id.* at 1366 (finding that the term "lawfully admitted for permanent residence" recognizes a status that an alien can obtain either through admission at the border or through subsequent admission); *see also Martinez*, 519 F.3d at 546.

222. *See Lanier*, 631 F.3d at 1366–67.

223. *Id.* at 1366. The court treated "admitted" as the action word in section 212(h). *See id.* at 1366–67 (explaining that for the bar to apply, the alien has to achieve his status through section 101(a)(13)(A)).

itself with *Martinez* and *Aremu*, both of which drew a distinction between admission and adjustment of status.<sup>224</sup> The alien in *Lanier* adjusted his status while living in the United States, after entering without inspection.<sup>225</sup> He had no hope, therefore, of meeting the literal definition of “admitted” so clearly set out on section 101(a)(13)(A).<sup>226</sup>

This raises a question about why Congress would have wanted to create special protection for aliens who use the adjustment process to gain permanent residence in the United States. The Fifth Circuit in *Martinez* theorized that Congress may have wanted to take an incremental approach to removing alien criminals from the United States.<sup>227</sup> It was not unreasonable, therefore, for Congress to start with those aliens who took the traditional entry route at a port of entry, thus leaving for another day those aliens who adjusted their status.<sup>228</sup> Another theory was that Congress may have regarded adjusted aliens as deserving the waiver more than traditional entrants.<sup>229</sup> The Eleventh Circuit in *Lanier* accepted this explanation for the distinction between the two groups, while at the same time holding on to its inability to “override the plain, unambiguous text of § 212(h).”<sup>230</sup> If indeed the text was so plain and unambiguous, surely then the court

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224. *Id.* (quoting *Martinez*, 519 F.3d at 544; *Aremu v. Dep’t of Homeland Sec.*, 450 F.3d 578, 581 (4th Cir. 2008)); see also Gerald Seipp, *Federal Case Summaries*, 88 No. 7 INTERPRETER RELEASES 523, 528 (2011).

225. *Lanier*, 631 F.3d at 1365.

226. See INA § 101(a)(13)(A), 8 U.S.C. § 1101 (a)(13)(A)(2006) (stating that admission requires the alien to make a “lawful entry” after inspection by an immigration officer).

227. See *Martinez*, 519 F.3d at 545 (citing *Lara-Ruiz v. INS*, 241 F.3d 934, 947 (7th Cir. 2001)).

228. See *id.* at 545. The *Martinez* court indicated that some members of Congress must have recognized that the term “admitted” did not include adjustment status because the Immigration Technical Corrections Act of 1997 contained an amendment which would have added paragraph (D) to section 101(a)(13) to read as follows: “[i]n the case of an alien adjusted to the status of an alien lawfully admitted for permanent residence, such alien shall be regarded as having been admitted on the date of such adjustment.” Immigration Technical Corrections Act of 1997, H.R. 2413, 105th Cong. § 4(a)(1). That amendment failed, but nevertheless it left open the question about where adjustment fits within the scheme of things. Perhaps Congress was sending a message that adjusted aliens were more deserving of a waiver of inadmissibility. See *Martinez*, 519 F.3d at 545.

229. *Martinez*, 519 F.3d at 536. In *Martinez*, the alien entered the United States when he was twelve and adjusted his status ten years later. *Id.* He later married an American citizen and had two children. *Id.* He had built up certain equities, having lived in the United States for a substantial period even before adjustment. *Id.*

230. *Lanier*, 631 F.3d at 1367 n.4.

did not have to bolster its position by trying to resolve “lingering ambiguities” in the alien’s favor.<sup>231</sup>

In the final analysis, one can interpret the word “admission” to include an alien’s adjustment if one views an alien lawfully admitted for permanent residence as including an alien who adjusted his status as contemplated by section 101(a)(20).<sup>232</sup> That section recognizes that both an alien who makes a physical entry and an alien who adjusts his status may fall within the definition of an alien “lawfully admitted for permanent residence.”<sup>233</sup> The use of the latter phrase does not mean that Congress intended to give the word “admitted” in section 212(h) the same meaning found in the section 101(a)(13)(A) definition. Section 212(h) really addresses an alien’s status as a permanent resident. It is therefore not necessary to restrict the admission scenario to an alien’s entry at the border, since the ultimate objective in a *Koljenovic*-type situation is to determine whether an alien has accrued the required time in status as a lawful permanent resident or in a *Lanier*-type case to question if the alien ran into trouble since assuming that status.<sup>234</sup> It is reasonable, therefore, to give the word “admitted” a broad reading both times it appears in the section 212(h) bar, so that the reference to an alien’s previous admission relates to his status as a permanent resident, however obtained. That would be consistent with the definition of “lawfully admitted for permanent residence,” which recognizes an alien’s status of “having been lawfully accorded the privilege of residing permanently in the United States.”<sup>235</sup>

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231. *Id.* The *Lanier* court had already relied on the statute’s “plain language” and “unambiguous text.” *Id.* at 1366-67. Therefore, it hardly needed to say anything about construing lingering ambiguities because there were none as far as the court was concerned. *See id.* Both *Lanier* and *Martinez* harked back to *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987), where the United States Supreme Court concluded that an alien could show a well-founded fear of persecution without proving that it was more likely than not that he would suffer persecution. But the Court reached that conclusion “without regard to the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.” *Id.*

232. INA § 101(a)(20), 8 U.S.C. § 1101(a)(20) (2006) (providing that “[t]he term ‘lawfully admitted for permanent residence’ means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed”).

233. *See id.*

234. *See Lanier*, 631 F.3d at 1365; *In re Koljenovic*, 25 I. & N. Dec. 219, 219 (B.I.A. 2010). In both *In re Koljenovic* and *Lanier* the aliens entered without inspection and the only possible admission dates as lawful permanent residents were the dates of adjustment. *See Lanier* 631 F.3d at 1365; *In re Koljenovic*, 25 I. & N. Dec. at 219. Even if one is convinced about the incremental approach suggested by *Martinez*, ignoring adjustment as an admission would allow an alien who entered without inspection and then adjusted to lawful permanent residence, to avoid the aggravated felony bar covered in section 212(h) since he would not have been “admitted.” *See In re Koljenovic*, 25 I. & N. Dec. at 224.

235. 8 U.S.C. § 1101(a)(20).

B. Matter of Substance or Procedure

The linguistic challenges of section 212(h) do not end there. In *Hing Sum v. Holder*,<sup>236</sup> an alien argued that he was lawfully admitted even though he had concealed an arrest that predated his entry into the United States.<sup>237</sup> The application of the section 212(h) bar depended on the meaning of “previously been admitted.” If that term was used in the procedural sense, then the bar applied to the alien in *Hing Sum* who managed to pass inspection at a port of entry, even though he was technically inadmissible. If the previous admission had to pass a substantive test, then the alien would not have been lawfully admitted, and so the bar would apply.

The Ninth Circuit<sup>238</sup> and the BIA<sup>239</sup> had already construed the phrase “lawfully admitted for permanent residence” to require an alien’s satisfaction of the substantive requirements for admission to that status. In both those cases, the aliens sought relief from deportation which depended on their status as lawful permanent residents. The aliens could not qualify for relief because they were inadmissible at the time of their admission. In *Hing Sum*, however, the court did not concentrate on the phrase “lawfully admitted for permanent residence,” but rather on the preceding phrase, “previously been admitted to the United States.”<sup>240</sup> That took the court to the definition of admission in section 101(a)(13)(A) that gives meaning to the phrase “previously been admitted” in section 212(h).<sup>241</sup>

The court considered section 101(a)(13)(A) in the context of section 212(h) and concluded that Congress intended to define “admission” in procedural terms.<sup>242</sup> The thinking was that if Congress

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236. *Hing Sum v. Holder*, 602 F.3d 1092 (9th Cir. 2010).

237. *Id.* at 1095.

238. *See Monet v. INS*, 791 F.2d 752, 753 (9th Cir. 1986).

239. *See In re Koloamatangi*, 23 I. & N. Dec. 548, 550 (B.I.A. 2003).

240. *See Hing Sum*, 602 F.3d at 1095.

241. *Id.* The court explained as follows:

The parties . . . have presented us with two possible approaches to this general definition of admission: one procedural in nature and one substantive in nature. If “admission,” or “lawful entry . . . into the United States,” is understood procedurally, in the sense of referring to an inspection and authorization by an immigration officer, § 212(h)’s bar precludes non-citizens, like Sum, who successfully passed themselves off as LPRs at the port of entry, regardless of whether they are admissible in fact. If admission is understood substantively, § 212(h)’s bar precludes only non-citizens who were properly admissible as LPRs at the time of entry, and not individuals like Sum who were admissible through appearance alone.

*Id.* at 1096.

242. *Id.*; *see also Onwuamaegbu v. Gonzales*, 470 F.3d 405, 405-406 (1st Cir. 2006) (finding that the immigrant in the case had been previously admitted as an alien lawfully admitted for

intended a substantive definition of that term, it would not have been necessary to refer to aliens “previously. . . admitted to the United States.”<sup>243</sup> Congress could simply have applied the section 212(h) bar to aliens lawfully admitted for permanent residence without any reference to their previous admission. The absence of a reference to lawfulness in the previous admission phrase suggests that Congress wanted to leave the door open to reach those aliens who gained admission despite their inadmissibility, and who wanted to benefit from their illegal status by seeking relief under section 212(h).<sup>244</sup>

At least one court has interpreted the meaning of the word “previously” in section 212(h). The assignment fell to the Second Circuit in *Dobrova v. Holder*,<sup>245</sup> when the court considered the government’s argument that the word “previously” covers a lawful permanent resident who was admitted “at any time in the indefinite past.”<sup>246</sup> On the other side, the alien took the view that the word was ambiguous because it could mean either what the government suggested or, in the alternative, the “most recent, or last” time the alien entered.<sup>247</sup> If the latter interpretation was correct, the alien in *Dobrova* could not be an “alien who [had] previously been admitted for lawful permanent residence” because his most recent entry was not as a lawful permanent resident.<sup>248</sup>

The court in *Dobrova* looked to the plain meaning of the text and concluded that the word “previously” normally refers not to the most recent action, but to an event that took place sometime in the indefinite past.<sup>249</sup> The court supported this interpretation by observing that the statute denies a waiver to an alien who “has. . . been admitted,” denoting Congress’ intent to include within section 212(h) any previous admission for permanent residence.<sup>250</sup> The language suggests,

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permanent residence, even though he had committed fraud in his application for permanent residence).

243. *Hing Sum*, 602 F.3d at 1097.

244. As the First Circuit noted: “By using the term ‘previously admitted’ rather than (for example) ‘previously and lawfully admitted,’ Congress demonstrated that it specifically intended to penalize those immigrants who sought and gained LPR status only to abuse its benefits.” *Onwuamaegbu*, 470 F.3d at 409; see also *In re Ayala*, 22 I. & N. Dec. 398, 401 (B.I.A. 1998) (noting that “the statute does not either expressly or by implication, distinguish between those whose admission was lawful and those who were previously admitted for lawful permanent residence but are subsequently determined to have been admitted in violation of the law”).

245. *Dobrova v. Holder*, 607 F.3d 297 (2d Cir. 2010).

246. *Id.* at 301.

247. *Id.*

248. See *id.*

249. *Id.*

250. See *id.* at 302.

therefore, that the statute applies not only to aliens who continue to be lawful permanent residents, but also to aliens who were formally lawful permanent residents but lost that status for one reason or another. Therefore, a former permanent resident whose removal terminated his status would still be an alien “who has previously been admitted.”<sup>251</sup> The removal would not change his previous lawful admission. Any other interpretation would allow a lawful permanent resident who was convicted and deported to seek a waiver of inadmissibility on his return, because he would not then be admitted as a lawful permanent resident.

The procedural aspect of admission in section 212(h) finds further support in section 237 covering the classes of deportable aliens.<sup>252</sup> An alien must be “in and admitted”<sup>253</sup> to the United States in order to be removable on any ground, and an alien who was inadmissible at the time of his entry is nevertheless subject to removal.<sup>254</sup> Therefore, an alien who was substantively ineligible for admission but nevertheless gained entry, is still regarded as being admitted in statutory terms. This is why an alien who enters on a fraudulent visa will still be subject to removal even though he entered after inspection and authorization by an immigration officer.<sup>255</sup>

Section 237(a)(1)(H) also provides further evidence that an alien may still be deemed admitted despite his failure to satisfy the substantive requirements for admission. An alien who was “inadmissible at the time of admission” because of fraud may nevertheless qualify for a waiver under certain circumstances, thus confirming that an alien may be regarded as admitted, even by fraudulent means.<sup>256</sup> On the other hand, applying admission substantively would protect aliens who had committed fraud to gain admission, for they would not be subject to any of the removal grounds.

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251. *Id.* An alien’s status as a lawful permanent resident may terminate upon “entry of a final administrative order of exclusion, deportation, or removal.” 8 C.F.R. § 1.1(p) (2011).

252. *See* INA § 237(a)(1)-(6), 8 U.S.C. § 1227(a)(1)-(6) (2006) (defining six classes of deportable aliens).

253. *Id.* § 1227(a).

254. *Id.* § 1227(a)(1)(A).

255. *See* *Emokah v. Mukasey*, 523 F.3d 110, 118 (2d Cir. 2008) (“An alien who enters the United States after inspection and authorization has been ‘admitted’ even if he was, ‘at the time of entry . . . within one or more of the classes of aliens inadmissible by the law.’”).

256. 8 U.S.C. § 1227(a)(1)(H) (explaining that waiver is available to certain aliens who were inadmissible at the time of admission because they committed fraud). An alien is also eligible for a waiver because of his “inadmissibility underlying his removal charge [based on] his inherent misrepresentation, whether innocent or not.” *In re* *Guang Li Fu*, 23 I. & N. Dec. 985, 988 (B.I.A. 2006).

## *The Meaning of Admission*

There is a place for substantive compliance, and it can be found, for example, in the definition of “lawfully admitted for permanent residence.”<sup>257</sup> It was, therefore, no surprise in *Segura v. Holder*<sup>258</sup> when the Ninth Circuit denied a request for section 212(c) relief because the alien was not lawfully admitted for permanent residence, given his prior felony conviction.<sup>259</sup> The government’s mistake in admitting the alien despite his ineligibility did not make the alien’s admission lawful.<sup>260</sup> He was not, therefore, entitled to the status of a lawful permanent resident.

The denial of status as an alien lawfully admitted for permanent residence does not depend on whether the alien engaged in fraud. The modifier “lawfully” denotes more than the absence of fraud. An alien enjoys his lawful status only when the government grants him the privilege of residing permanently in the United States in accordance with the immigration laws.<sup>261</sup> The statutory definition of “lawfully admitted for permanent residence” therefore requires the alien to comply with all the substantive statutory requirements, and he may fail to accomplish that goal even if he does not commit fraud to gain admission.

An alien may fail to qualify for lawful permanent status not only because of fraud, but simply because he may not be otherwise entitled to that status.<sup>262</sup> The alien in *Walker v. Holder*<sup>263</sup> was a mere minor when he benefitted from the misdeeds of a family member, and the government relied on his lack of proper documents to support its re-

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257. 8 U.S.C. § 1101(a)(20). The INA defines ‘lawfully admitted for permanent residence’ as “the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.” *Id.*

258. *Segura v. Holder*, 605 F.3d 1063 (9th Cir. 2010).

259. *Id.* at 1067.

260. *Id.*; *see also* *De la Rosa v. U.S. Dep’t of Homeland Sec.*, 489 F.3d 551, 555 (2d Cir. 2007) (holding that “to be ‘lawfully admitted for permanent residence’ an alien must have complied with the substantive legal requirements in place at the time she was admitted for permanent residence”); *Savoury v. U.S. Attorney Gen.*, 449 F.3d 1307, 1317 (11th Cir. 2006) (stating that “lawfully admitted” means that “the alien’s admission . . . was in compliance with the substantive requirements of the law”); *Arellano-Garcia v. Gonzales*, 429 F.3d 1183, 1187 (8th Cir. 2005) (holding that alien was not lawfully admitted to permanent residence when he obtained that status by mistake and was not otherwise eligible for adjustment); *In re Longstaff*, 716 F.2d 1439, 1441 (5th Cir. 1983) (stating that “the term ‘lawfully’ denotes compliance with substantive legal requirements, not mere procedural regularity, as the definition provided by Congress plainly establishes”).

261. 8 U.S.C. § 1101(a)(20).

262. *See Estrada-Ramos v. Holder*, 611 F.3d 318, 321 (7th Cir. 2010); *Monet v. INS*, 791 F.2d 752, 753-54 (9th Cir. 1986); *In re Koloamatangi*, 23 I. & N. Dec. 548, 550 (B.I.A. 2003).

263. *Walker v. Holder*, 589 F.3d 12 (1st Cir. 2009).

moval order.<sup>264</sup> The alien tried to make his case for relief by explaining that he himself had done no wrong and that he should therefore not suffer because of the actions of somebody else.<sup>265</sup> The alien's argument did not impress the First Circuit because recognizing the alien's status as a lawful permanent resident under these circumstances would have sent a message that third-party fraud could benefit an alien.<sup>266</sup> It was not necessary, therefore, for the alien to commit any fraud in securing his visa. He was originally ineligible for his visa and, therefore, was not entitled to it. Furthermore, it was not necessary for the alien to have any intent to deceive the government.<sup>267</sup>

When the alien in *Savoury v. U.S. Attorney General*<sup>268</sup> tried to secure relief under former section 212(c) as a returning lawful permanent resident, the court held that he was not entitled to return because a previous conviction would have prevented him from obtaining permanent resident status in the first place.<sup>269</sup> It was the government's fault that the alien managed to become a permanent resident because the government had adjusted the alien's status to that of a lawful permanent resident despite that conviction.<sup>270</sup> The alien did not have to engage in fraud for him to be deemed ineligible for consideration under former section 212(c). The alien in *Savoury*<sup>271</sup> had hoped to distinguish himself from the alien in *In re Koloamatangi*, where the alien had obtained his status as a lawful permanent resident through a bigamous marriage.<sup>272</sup> Since there was no fraud in *Savoury*, the alien

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264. *See id.* at 20-21.

265. *Id.* at 20. In *Walker*, the government sought to remove the alien not only because he had committed an aggravated felony, but also because he did not have proper entry documents when he entered. *Id.* (citing 8 U.S.C. § 1182(a)(7)(A)(i)(I) (2006)).

266. *Id.* The court made the point that "if Petitioner was considered to have been lawfully admitted for permanent residence, then the fraud or misrepresentation of third parties applying on his behalf would be encouraged." *Id.*

267. *Id.* (noting that requiring an alien to have valid documents does not require an alien's intent to deceive). Several courts have held that fraud and misrepresentation are not the only grounds for refusing to recognize an alien's lawful admission for permanent residence. The alien may simply not have been statutorily entitled to that status. *Estrada-Ramos v. Holder*, 611 F.3d 318, 321 (7th Cir. 2010) (citing *De la Rosa v. U.S. Dep't of Homeland Sec.*, 489 F.3d 551, 554-55 (2d Cir. 2007)).

268. *Savoury v. U.S. Attorney Gen.*, 449 F.3d 1307 (11th Cir. 2006).

269. *Id.* at 1313.

270. *See id.* at 1317. The alien argued without success that the government had waived its right to seek removal because it approved his adjustment to lawful permanent residence with full knowledge of his conviction. *Id.* The court responded: "To recognize such a defense would give the INS the right to amend the requirements that Congress has set forth in the immigration laws, something that we are not willing to do." *Id.*

271. *Id.*

272. *Id.* at 1315. In *In re Koloamatangi*, the alien's marriage was "knowingly bigamous." *In re Koloamatangi*, 23 I. & N. Dec. 548, 549 (B.I.A. 2003).

argued that he was entitled to his lawful status because it was not his fault that the government had overlooked his conviction in granting his adjustment.<sup>273</sup> This argument did not succeed, since the alien's lawful status did not depend solely on a finding of fraud. The lawfulness of the alien's status as a permanent resident depended on the statutory requirements and not on whether there was "administrative inadvertence or error."<sup>274</sup>

The aliens in both *Koloamatangi*<sup>275</sup> and *Savoury*<sup>276</sup> tried to find refuge in the regulatory language that provided for the termination of an alien's lawful admission for permanent residence upon "entry of a final administrative order of exclusion, deportation, or removal."<sup>277</sup> This was particularly important in *Koloamatangi* where the alien had satisfied the five-year residence requirement before the BIA issued a final order against him.<sup>278</sup> The effect of the regulation was to terminate an alien's status as a permanent resident at the end of the administrative route, and not to confer lawful status in the first place. Therefore, if an alien did not initially meet the requirements for lawful residence, it was not necessary to consider whether he had lawful status for the required period.<sup>279</sup>

### C. Lawful Residence for Seven Years

An alien who has been previously admitted as an alien lawfully admitted for permanent residence cannot get relief under section 212(h) if he has not lawfully resided in the United States for not less than seven years immediately preceding removal proceedings.<sup>280</sup> The

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273. *Savoury*, 449 F.3d at 1314 n.2.

274. *Id.*

275. *In re Koloamatangi*, 23 I. & N. Dec. at 549.

276. *Savoury*, 449 F.3d at 1307.

277. 8 C.F.R. § 1.1(p) (2011).

278. *In re Koloamatangi*, 23 I. & N. Dec. at 549. The alien needed four years of lawful permanent residence to qualify for cancellation of removal under section 240A(a). *Id.* The alien argued that his permanent residence could end only upon entry of a final administrative order of exclusion or deportation. *Id.* The only problem was that there was no lawful admission. *Id.* at 550. The regulation providing for the termination of an alien's lawful permanent residence codified the decision that an alien's permanent residence, once lawfully obtained, ended with a final administrative order. *Motions and Appeals in Immigration Proceedings*, 61 Fed. Reg. 18,900 (Apr. 29, 1996) (discussing the decision in *In re Lok*, 18 I. & N. Dec. 101 (B.I.A. 1981)). The regulation did not convert an unlawful residence into one that was lawful, but was intended to provide finality in immigration proceedings. *Id.*

279. *In re Koloamatangi*, 23 I. & N. Dec. at 551. The BIA in *In re Koloamatangi* explained as follows: "The instant case is different, because here the respondent obtained his permanent resident status fraudulently and was therefore never 'lawfully' accorded the status required to establish eligibility for cancellation of removal under section 240A(a)." *Id.*

280. INA § 212(h), 8 U.S.C. § 1182(h) (2006).

phrase “lawfully resided” has been of concern because an alien who remains in the United States while his application for adjustment is pending will argue that during that period, his residence is lawful because he could not remain without the government’s approval.

In *In re Rotimi*,<sup>281</sup> the BIA considered the phrase “lawfully resided” ambiguous and thus looked to the legislative history for some explanation of the term.<sup>282</sup> The Conference Report accompanying the IIRIRA shows that Congress intended to apply the continuous residence requirement to both section 240A (cancellation of removal) and section 212(h).<sup>283</sup> Section 240A<sup>284</sup> provides relief for aliens who have seven years of continuous residence after being admitted in any status, suggesting that relief is not restricted to a specific class.<sup>285</sup> The use of the phrase “lawfully reside” in section 212(h) likewise suggests that the government must take some action on the alien’s case, although section 212(h) does not insist that the alien’s residence be linked to a specific status.

It is noteworthy, too, that although a continuous residence requirement is a feature of both sections 240A and 212(h), an alien may still satisfy that requirement under section 240A if he falls out of status after admission.<sup>286</sup> On the other hand, section 212(h) requires seven years of lawful residence, thus not allowing an alien to qualify for relief if he is out of status during any part of that period.<sup>287</sup>

In *In re Rotimi*, the alien applied for asylum before his authorized stay as a visitor expired, but his application was denied.<sup>288</sup> The alien wanted to use the period during the pendency of his asylum application as a period of lawful residence to satisfy part of the seven-year

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281. *In re Rotimi*, 24 I. & N. Dec. 567 (B.I.A. 2008).

282. *Id.* at 572.

283. H.R. REP. NO. 104-828, at 228 (1996) (Conf. Rep.).

284. In the case of permanent residents, the Attorney General may cancel removal if the alien “(1) has been an alien lawfully admitted for permanent residence for not less than 5 years, (2) has resided in the United States continuously for 7 years after having been admitted in any status, and (3) has not been convicted of any aggravated felony.” 8 U.S.C. § 1229b(a).

285. See *In re Blancas*, 23 I. & N. Dec. 458, 459 (B.I.A. 2002) (holding that an alien’s period of residence after being admitted as a nonimmigrant counts for purposes of section 240A(a)(2)). It does not matter if the alien falls out of status after admission. See *id.* at 461.

286. *Id.* at 460-61. The BIA explained in *In re Blancas* that “Congress could easily have written section 240A(a)(2) to include maintenance of status as a prerequisite for relief, but it chose only to require 7 years of continuous residence after admission to the United States.” *Id.* at 461.

287. Compare 8 U.S.C. § 1182(h) (requiring that the alien “lawfully resided” for not less than seven years), with 8 U.S.C. § 1229b(a)(2) (allowing eligibility for relief if the alien “has resided” continuously for seven years after admission in any status).

288. *In re Rotimi*, 24 I. & N. Dec. 567, 568 (B.I.A. 2008).

requirement, but the BIA was looking for more than an application. It relied on the definition of “lawfully admitted for permanent residence” in section 101(a)(20) to emphasize that when an alien achieves that status, the government has conferred on him the privilege of remaining permanently in the United States.<sup>289</sup> Therefore, an alien requires actual approval to enjoy that privilege, not merely an application.<sup>290</sup> The Eleventh Circuit reached a similar result in *Vila v. U.S. Attorney General*,<sup>291</sup> when the alien wanted the court to recognize him as a lawful permanent resident from the time that his visa petition was approved. In the alien’s view, his situation was a little different from that in *In re Rotimi*, where the alien had filed a petition that had not yet been approved.<sup>292</sup> The court in *Vila* viewed the approved visa petition as merely a necessary step in the application process for adjustment of status, thus not giving rise to lawful resident status until the government had approved the application for adjustment.<sup>293</sup>

It is significant, however, that the INA recognizes an alien as not being unlawfully present while his asylum application is pending.<sup>294</sup> At least for inadmissibility purposes, this statutory language protects an alien from exclusion based on unlawful presence. It was this lack of similar language in section 212(h) that convinced the BIA in *In re Rotimi* that the alien did not have a claim of lawful residence before the approval of his application.<sup>295</sup> This is understandable, given the fact that the authorities did not take any action to grant the alien a specific status until they had made a decision about his application, and his status was the important consideration.

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289. *See id.* at 575-76.

290. *Id.* at 574. The BIA noted that the alien’s “submission of asylum and adjustment applications did not change the fact that his status as a nonimmigrant visitor had ended.” *Id.* at 577.

291. *See generally* *Vila v. U.S. Atty. Gen.* 598 F.3d 1255 (11th Cir. 2010) (holding that the BIA was not in error when it ruled that *Vila* was ineligible for relief under section 212(h) because he did not lawfully reside continuously in the United States for the seven years that preceded the initiation of his removal proceedings).

292. *See id.* at 1258.

293. *Id.*

294. *See* INA § 212(a)(9)(B)(iii)(II), 8 U.S.C. § 1182 (a)(9)(B)(iii)(II) (2006).

295. *Rotimi*, 24 I. & N. Dec. at 574. The court explained as follows:

Congress carved out a special exception for the limited purpose of section 212(a)(9) inadmissibility, without which an alien’s presence as an *applicant* for asylum would be deemed unlawful after the expiration of any *authorized* period of presence. Section 212(h) does not contain any similar exception for asylum applicants, and the special exception confined to section 212(a)(9) does not warrant a broader application to change the meaning of ‘lawful’ residence for section 212(h) waiver eligibility.

*Id.*

This is not to say that a court has never recognized an alien's lawful residence under section 212(h) before a decision has been made on the alien's application for an immigration benefit. The Ninth Circuit was more generous in *Yepez-Razo v. Gonzales*<sup>296</sup> when it recognized an alien as lawfully residing in the United States during the pendency of her application under the Family Unity Program.<sup>297</sup> The BIA in *In re Rotimi* acknowledged that "[t]he unique nature of the Family Unity Program may qualify" the alien as having lawful residence during the application process because of the Program's "expectation of long-term presence and ultimate regularization of status."<sup>298</sup> Nevertheless, unlike the court in *Yepez-Razo*, the BIA was not convinced by the Family Unity Program example, at least to the extent that the alien's lawful residence derived from an "inability to deport an alien coupled with the alien's eligibility for work authorization."<sup>299</sup> An alien beneficiary under the Program receives special exemption from the unlawful presence provision in the INA.<sup>300</sup> Although similar language did not impress the BIA in *In re Rotimi*, the court in *Yepez-Razo* saw the combination of the language forbidding deportation of Family Unity beneficiaries and that excluding such beneficiaries from the unlawful presence provision as important factors in favoring the lawfulness of the alien's residence.<sup>301</sup> Therefore, unlike the BIA in *In re Rotimi*, the Ninth Circuit examined the underlying purpose of the statute, taking into account the fact that the Program's protections were intended to be "effective from the date on which the application was filed."<sup>302</sup> In a sense, therefore, the situation in *Yepez-Razo* was more than a temporary reprieve from removal. The Program provided a logical framework for regularizing

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296. *Yepez-Razo v. Gonzales*, 445 F.3d 1216 (9th Cir. 2006).

297. *Id.* at 1219. The Immigration Reform and Control Act of 1986 granted legalization to certain aliens who resided unlawfully in the United States since January 1, 1982. INA, Pub. L. No. 99-603, § 201, 100 Stat. 3359, 3394 (1986). Thereafter, Congress adopted the Family Unity Program to protect certain family members of legalized aliens by allowing them to stay indefinitely and work while they tried to regularize their status. *See* Immigration Act of 1990, Pub. L. No. 101-649 § 301, 104 Stat. 4978.

298. *Rotimi*, 24 I. & N. Dec. at 576-77.

299. *Id.* at 577. For example, an alien's appeal to the BIA from a removal order stays the removal order during the time allowed for the appeal. 8 C.F.R. § 1003.6(a) (2011). The alien would not be regarded as lawfully residing in the United States during the stay. *Id.*

300. INA § 212(a)(9)(B)(iii)(III), 8 U.S.C. § 1182 (a)(9)(B)(iii)(III) (2006). The statute provides that "[n]o period of time in which the alien is a beneficiary of family unity protection pursuant to section 301 of the Immigration Act of 1990 shall be taken into account in determining the period of unlawful presence in the United States under clause (i)." *Id.*

301. *See Yepez-Razo*, 445 F.3d at 1219.

302. *Id.* (quoting 8 C.F.R. § 236.15(c) (2011)).

the alien's status, but the question still remains whether this constituted lawful residence. In reality, the government's restraint and encouragement in this context do not result in the conferment of lawful residence.

### III. WAIVER UNDER SECTION 212(K)

#### A. Eligibility for Relief

Section 212(k)<sup>303</sup> is another provision that allows the Attorney General to admit certain inadmissible aliens who possess an immigrant visa. Like some other statutory provisions, this section gives the Attorney General the opportunity to use his discretion in admitting an alien who cannot meet the labor certification or other documentary requirements for admission.

The recent case, *Kyong Ho Shin v. Holder*,<sup>304</sup> provides an example of the application of section 212(k). There, aliens gained their lawful resident status through their mother, who had obtained her permanent status through a scheme involving fraudulent alien registration cards.<sup>305</sup> The court had to determine whether the mother's fraud affected the validity of the aliens' visas.<sup>306</sup> The aliens could not persuade the court that they were lawfully admitted for permanent residence because they had qualified for their visas as the unmarried son or daughter of a mother who had not complied with the substantive requirements of the statute.<sup>307</sup> The grant of permanent status to the mother was void ab initio simply because she had obtained the visa through a fraudulent scheme.<sup>308</sup> As a result, there was no merit to the contention that the mother retained her status as a lawful permanent resident until her removal order became final.<sup>309</sup> There is a

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303. 8 U.S.C. § 1182(k). Section 212(k) provides as follows:

Any alien, inadmissible from the United States under paragraph (5)(A) or (7)(A)(i) of subsection (a) . . . , who is in possession of an immigrant visa may, if otherwise admissible, be admitted in the discretion of the Attorney General if the Attorney General is satisfied that inadmissibility was not known to, and could not have been ascertained by the exercise of reasonable diligence by, the immigrant before the time of departure of the vessel or aircraft from the last port outside the United States and outside foreign contiguous territory or, in the case of an immigrant coming from foreign contiguous territory, before the time of the immigrant's application for admission.

*Id.*

304. *Kyong Ho Shin v. Holder*, 607 F.3d 1213 (9th Cir. 2010).

305. *Id.* at 1215.

306. *See id.*

307. *See id.* at 1217.

308. *Id.*

309. *Id.* Under ordinary circumstances, when the government is trying to remove an alien, the alien's status as a lawful permanent resident terminates upon entry of a final order of depor-

difference between allowing an alien to retain her legal status until the end of the removal proceedings and concluding that an alien was not lawfully admitted in the first place. In *Kyong Ho Shin*, the aliens' mother was never lawfully admitted, and thus the aliens could not validate their own derivative claims by depending on the continuation of their mother's status until her final order of removal.<sup>310</sup>

The aliens in *Kyong Ho Shin* were still eligible for relief despite their mother's plight.<sup>311</sup> They were inadmissible under section 212(a)(7)(A)(i) because they did not have valid visas when they entered.<sup>312</sup> However, the aliens at least had immigrant visas, and section 212(k) seemed to demand no more.<sup>313</sup> The court observed that the statute did not say anything about the validity of the visas; otherwise the aliens would not be seeking a waiver of inadmissibility in the first place.<sup>314</sup> Since the aliens' visas were issued without compliance with the statute, the relief offered by section 212(k) covered the inadmissibility ground relating to invalid documents under section 212(a)(7)(A)(i)(II).<sup>315</sup>

The aliens were also "otherwise admissible," taking into consideration all grounds other than the invalidity of the visas. The issue of invalidity relates to the first requirement of section 212(k) that an alien must be inadmissible under section 212(a)(7)(A)(i), and it cannot be linked to the "otherwise admissible" requirement to deny the alien relief. If this were not so, the alien's invalid visa would operate to make redundant the word "otherwise" under the third element of section 212(k).<sup>316</sup> After all, the statute intends to give the Attorney General the discretion to forgive an alien's inadmissibility on the stated grounds, and it would be inconsistent to use the very same grounds against the alien by claiming that he is not "otherwise admissible".

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tation. 8 C.F.R. § 1001.1(p) (2011). The aliens in *Shin* had hoped that their mother's status continued as a lawful permanent resident when they obtained their own visas. *Kyong Ho Shin*, 607 F.3d at 1217.

310. *Id.* at 1218.

311. *Id.* at 1221.

312. *Id.* at 1219. An alien who is not in possession of a valid visa is inadmissible. INA § 212(a)(7)(A)(i)(I), 8 U.S.C. § 1182(a)(7)(A)(i)(I) (2006).

313. The section 212(k) waiver requires that an alien seeking relief must be in "possession of an immigrant visa." 8 U.S.C. § 1182(k).

314. *See Kyong Ho Shin*, 607 F.3d at 1219.

315. *See id.*

316. *See id.* at 1219-20.

In *Kyong Ho Shin*, the government also tried to create doubt about whether the aliens were otherwise admissible since a United States consul did not properly issue visas to them.<sup>317</sup> The mother's status was void ab initio because of the original fraud through which the mother secured her alien registration card, and so the government made the point that the aliens' derivative visas did not qualify the aliens for relief under section 212(k).<sup>318</sup> The court was careful to point out that "[t]he substantive flaw in the Shins' visas [was] a precondition, rather than a bar, to their seeking section 212(k) relief."<sup>319</sup> The aliens obtained their visas in the normal way, at a consulate abroad, and did not engage in any fraud to get them.<sup>320</sup> It is true that they were not entitled to their visas, but section 212(k) covers inadmissibility based on the invalidity of an alien's immigration documents. There is nothing in the section that limits relief to the situation where an alien's visa must be valid when issued but subsequent events make the alien inadmissible by the time he seeks admission to the United States. This is why section 212(k) merely requires an alien to be in possession of an immigrant visa, as distinguished from a valid immigrant visa.

#### B. Problems of Imputation

Although section 212(k) provides welcome relief for many an alien, it can also provide disappointment in some contexts. If a parent knows that she is ineligible for admission but gains admission anyway, her child may be unable to use section 212(k) because the parent's knowledge of the problem may be imputed to the child. In *Senica v. INS*,<sup>321</sup> the mother knew that she and her children were not entitled to the visas they claimed, but the Ninth Circuit would not grant relief to the children under section 212(k) because the court imputed to the children the parent's knowledge of the irregularity.<sup>322</sup> In doing so, the court followed BIA precedent about imputation<sup>323</sup> and emphasized the "illogical consequences" that would ensue from allowing a child to

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317. *Id.* at 1220. The INA defines the term "immigrant visa" as one "properly issued by a consular officer at his office outside of the United States to an eligible immigrant under the provisions of this chapter." 8 U.S.C. § 1101(a)(16).

318. *Kyong Ho Shin*, 607 F.3d at 1220.

319. *Id.*

320. *Id.* at 1220.

321. *Senica v. INS*, 16 F.3d 1013 (9th Cir. 1994).

322. *See id.* at 1016.

323. *See id.* (citing *In re Aurelio*, 19 I. & N. Dec. 458 (B.I.A. 1987)).

remain untouched by a parent's knowledge of disqualifying factors relating to the visa.<sup>324</sup> The court favored imputation because if not, parents of minor children could file fraudulent applications on behalf of their minor children and then seek a derivative benefit through them if the government later discovered the fraud.<sup>325</sup> Surely Congress did not intend to make every child automatically eligible for section 212(k) relief, and thus there had to be a way of treating a parent's knowledge of the child's ineligibility for admission to the United States.

In *Senica*, the children conceded that they were removable because they did not have valid entry documents, and so the only question was whether the BIA was correct in imputing to the children the parent's knowledge about the children's ineligibility for admission.<sup>326</sup> After all, the children were seeking a waiver that required them to show that they did not know about their inadmissibility and that they could not have found out about it before they entered the United States.<sup>327</sup>

In *Singh v. Gonzales*,<sup>328</sup> the case for imputation rested on different grounds, and the Sixth Circuit did not take the same approach as the Ninth Circuit in *Senica*.<sup>329</sup> While the aliens in *Senica* were ineligible for admission because of invalid documents and therefore removable on that basis,<sup>330</sup> in *Singh*, the government sought the alien's removal because of the parents' fraud.<sup>331</sup> The Sixth Circuit would not impute the parents' fraudulent conduct to the child and distinguished the imputation of such conduct from imputation relating to mere ineligibility for admission, which may not involve fraud at all.<sup>332</sup> In *Singh*, the parents were subject to a permanent bar from the United States because of their fraud, and the court was concerned that imputing

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324. *Id.*

325. *Id.*

326. *Id.* at 1015.

327. *Id.* The court explained that "[t]he children applied for waivers under §212(k) as immigrants who were unaware of their ineligibility for admission and who could not have discovered the ineligibility by exercise of reasonable diligence." *Id.*

328. *Singh v. Gonzales*, 451 F.3d 400 (6th Cir. 2006).

329. In *Senica*, the court imputed a parent's knowledge to a child in determining whether the child knew of her ineligibility for admission. *Senica*, 16 F.3d at 1016. In *Singh*, the court refused to impute the parent's fraud to the child. *Singh*, 451 F.3d at 409.

330. *See Senica*, 16 F.3d at 1014.

331. *See Singh*, 451 F.3d at 402.

332. *See id.* at 406-07. The Sixth Circuit was conscious of the stringent scrutiny normally used by the BIA in examining allegations of fraud simply because of the possibility of a permanent bar from the United States. *See id.* at 408 (quoting *In re Y-G-*, 20 I. & N. Dec. 794, 797 (B.I.A. 1994)).

those acts to the child would subject the child to the same fate for acts that she did not commit.<sup>333</sup>

The court in *Singh*<sup>334</sup> was not persuaded by BIA precedent that a parent's intent to abandon permanent resident status in the United States may be imputed to an accompanying child.<sup>335</sup> There was nothing unusual or illegal about parents changing their residence, and imputing the intent to do this was surely different from imputing the intent to commit fraud.<sup>336</sup> The BIA therefore did not announce a general rule that it was permissible to impute a parent's intent to a child under all circumstances. The parent's intent to deceive should not be routinely accommodated with the same enthusiasm as if the parents were merely resuming residence in their native land.

In *In re Aurelio*,<sup>337</sup> an alien was unsuccessful in getting a section 212(k) waiver because she did not use reasonable diligence to ascertain the effect of her father's death on her eligibility for immigrant status.<sup>338</sup> Once the father died, the visa petition that he had filed for his daughter was automatically revoked; the alien was no longer eligible for entry on an immigrant visa.<sup>339</sup> But, the BIA also denied a waiver to the daughter's son who was supposed to enjoy the same visa status as his alien mother, and the BIA reached this conclusion without specifically acknowledging that the mother's knowledge of her ineligibility for a visa would be imputed to that son.<sup>340</sup> The court in

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333. The court drew a distinction between mere ineligibility for admission and fraudulent conduct. See *Singh*, 451 F.3d at 409. The case for imputation is much stronger when there is no fraud. If there is no imputation in the case of fraud, it does not necessarily mean that a parent will later benefit from the relationship with the child because section 212(k) is a discretionary remedy and the Attorney General would always keep the fraud in mind when deciding whether the parent should get relief. See INA § 212(k), 8 U.S.C. § 1182(k) (2006).

334. See *Singh*, 451 F.3d at 407.

335. In *In re Zamora*, 17 I. & N. Dec. 395 (B.I.A. 1980), the alien had to return to Mexico with his parents because of the father's illness, after they had resided in the United States for a few years as lawful permanent residents. When he tried to return some nine years later, he was excluded and the BIA held that the parents' intent to abandon their permanent resident status should be imputed to the accompanying child. *Id.* at 397; see also *In re Huang*, 19 I. & N. Dec. 749, 750 n.1 (B.I.A. 1988) (imputing parents' abandonment of their resident status to their child).

336. The court in *Singh* explained the difference this way:

We do not read *Zamora* as announcing a general rule that all kinds of intent can be imputed from a parent to a child. And with good reason: Imputing the intent to engage in a perfectly lawful act—such as leaving the United States to return to one's native country—is far different from imputing the intent to commit fraud. Fraudulent conduct carries heightened moral and legal culpability and is sanctioned both civilly (as an intentional tort) and criminally (by state and federal laws).

*Singh*, 451 F.3d at 407.

337. *In re Aurelio*, 19 I. & N. Dec. 458 (B.I.A. 1987).

338. *Id.* at 463.

339. *Id.* at 459. (citing 8 C.F.R. § 205.1(a) (1982)).

340. The BIA reasoned as follows:

*Senica* later explained that although the BIA in *In re Aurelio* did not deal specifically with the son's status, it had implicitly imputed to the son the mother's failure to investigate the effect of her sponsor's death on her eligibility for an immigrant visa.<sup>341</sup> The Sixth Circuit in *Singh* read *In re Aurelio* the same way, finding that "the only possible imputation was of the appellant's 'failure to investigate' her continued eligibility for the visa."<sup>342</sup> It was not ready to take the leap from imputation of ineligibility to imputation of fraud.<sup>343</sup> The failure to impute fraud does not necessarily give a parent the gateway to sponsorship by the protected child, because any relief is at the Attorney General's discretion, and it is hard to see how any defrauding parent would actually benefit in such circumstances.

#### IV. THE LINGERING IMPACT OF SECTION 212(C)

##### A. The Basic Challenge

Section 212(c)<sup>344</sup> is a provision that has rescued many aliens. Although it was repealed in 1996,<sup>345</sup> it continues to be available as a discretionary remedy to aliens who pleaded guilty to their crimes and who would have been eligible for section 212(c) relief under the law in effect when they made their plea agreement.<sup>346</sup> By its terms, section 212(c) applied only in exclusion proceedings because it specifically covered lawful permanent residents who were returning to a lawful

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Since the female applicant knew about her father's death for some time before she received her visa, she could easily have inquired about its impact on her visa application. Under the circumstances present in this case, we conclude that the female applicant failed to exercise reasonable diligence in ascertaining her admissibility to the United States as a fourth-preference immigrant. We therefore find that the immigration judge properly denied the applicants' section 212(k) waiver request.

*In re Aurelio*, 19 I. & N. Dec. at 463. The BIA specifically referred to the mother's failure to act, which resulted in denial of relief to both the mother and the son. The BIA made no reference to the son's conduct, but by also denying him relief, it left little doubt that the imputation rule was operative here.

341. See *Senica v. INS*, 16 F.3d 1013, 1016 (9th Cir. 1994).

342. *Singh v. Gonzales*, 451 F.3d 400, 408 (6th Cir. 2006) (citing *Senica*, 16 F.3d at 1016).

343. See *id.* at 409. The *Singh* court concluded that "the BIA's history of imputing parents' knowledge of their ineligibility for admission or their intent to abandon LPR status to their minor children does not establish a reasonable basis for imputing fraudulent conduct to their children." *Id.*

344. Former section 212(c) of the INA provided relief in certain cases to "[a]liens lawfully admitted for permanent residence . . . who are returning to a lawful unrelinquished domicile of seven consecutive years." INA § 212(c), 8 U.S.C. § 1182(c) (1994).

345. IIRIRA repealed section 212(c). See Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-546, 3009-597 (1996).

346. *INS v. St. Cyr.*, 533 U.S. 289, 326 (2001).

domicile of seven years.<sup>347</sup> This limitation to exclusion proceedings was the troublesome feature that later gained attention for section 212(c) in the waiver context.<sup>348</sup>

As a signal of later developments, the BIA solved one early problem in *In re G-A*-<sup>349</sup> by allowing section 212(c) relief *nunc pro tunc* for an alien facing deportation who had been readmitted to the United States even though he was excludable at the time.<sup>350</sup> The BIA was sympathetic to the notion that an alien in this position who was readmitted through no fault of his own should not be in any worse position than an alien whom the inspectors had stopped at the border.<sup>351</sup>

This decision set the stage for future developments. In *Francis v. INS*, the Second Circuit was faced with a situation where a lawful permanent resident who had never left the United States found himself in deportation proceedings with little hope for section 212(c) relief because he was not a returning resident.<sup>352</sup> The court sustained the alien's equal protection challenge because it saw no rational justification for distinguishing in section 212(c) terms between an alien who became deportable, left the country, and then returned, and a deportable alien who never left the country at all.<sup>353</sup> The court, therefore, found that the alien was eligible to apply for section 212(c) relief even

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347. One must have the status of a lawful permanent resident. The INA defines the term "lawfully admitted for permanent residence" as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." INA § 101(a)(20), 8 U.S.C. § 1101 (2006). One, the INA does not define the term "domicile." The term has a broader meaning than "residence" because it requires intent. See 6 GORDON ET AL., *supra* note 96, § 74.04[2][b][i].

348. See *Gonzalez v. INS*, 996 F.2d 804, 806 (6th Cir. 1993) (stating that section 212(c) relief also applies to deportation of a lawfully admitted alien with an unrelinquished domicile of seven consecutive years); *Lozada v. INS*, 857 F.2d 10, 11 n.1 (1st Cir. 1988) (citing *Francis v. INS* for the proposition that section 212(c) was not restricted to aliens who leave the country); *Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976) (holding that section 212(c) was unconstitutional as applied to the lawful permanent resident who was denied relief in a deportation proceeding); *In re Silva*, 16 I. & N. Dec. 26, 30 (B.I.A. 1976) (holding that a waiver may be granted to permanent resident regardless of whether he leaves the United States following the act which makes him deportable).

349. *In re G-A*-, 7 I. & N. Dec. 274 (B.I.A. 1956).

350. See *id.* at 276.

351. See *id.*

352. *Francis*, 532 F.2d at 273. Eligibility under the literal statutory language was limited to aliens "returning to a lawful unrelinquished domicile of seven consecutive years." 8 U.S.C. § 1182(c).

353. See *Francis*, 532 F.2d at 273. The court noted: "[I]f a classification would be invalid under the Equal Protection Clause of the Fourteenth Amendment, it is also inconsistent with the due process requirement of the Fifth Amendment." *Id.* at 272 n.5 (citing *Johnson v. Robison*, 415 U.S. 361, 364 n.4 (1974)).

though he did not leave the United States after committing the deportable act.<sup>354</sup>

It was predictable, however, that aliens would seek further expansion of section 212(c). Nevertheless, in *In re Wadud*,<sup>355</sup> the BIA resisted the invitation to apply section 212(c) across the board and insisted that an alien in deportation proceedings would be eligible for relief only if the deportation ground was also a ground for exclusion.<sup>356</sup> Despite this restriction, the BIA still recognized the application of section 212(c) to deportation proceedings, thus continuing the *Francis* approach.

The Second Circuit took its opportunity to vary from the literal application of section 212(c) and extend the *Francis* approach.<sup>357</sup> In *Bedoya-Valencia v. INS*,<sup>358</sup> the government charged the alien with being deportable for entering without inspection,<sup>359</sup> a deportation ground that logically had no counterpart in the exclusion statute. Despite the lack of an exclusion ground with which the court could pair the deportation ground, the court believed that it had to “cope with the interstitial issue posed by grounds of deportation that had no counterparts among the statutory grounds for exclusion.”<sup>360</sup> Maybe the court was influenced by the fact that *Francis* had already tampered with the statute, and so this was but another small step in implementing a legislative design.<sup>361</sup> At least in *Francis*, the court had to respond to a constitutional challenge. There was nothing of the sort in *Bedoya-Valencia*, yet the court opted for this extension of *Francis* in the name of coherence and consistency, apparently motivated by the

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354. *See id.*; *see also In re Silva*, 16 I. & N. Dec. 26, 30 (B.I.A. 1976) (holding that a section 212(c) waiver may be granted to a permanent resident alien in a deportation proceeding regardless of whether or not he leaves the United States following a deportable act).

355. *In re Wadud*, 19 I. & N. Dec. 182 (B.I.A. 1984).

356. *Id.* at 184.

357. The *Francis* court saw no rational basis for distinguishing for purposes of section 212(c) relief between an alien who was returning to the United States and an alien who had never left the United States. *Francis*, 532 F.2d at 269.

358. *Bedoya-Valencia v. INS*, 6 F.3d 891 (2d Cir. 1993).

359. *Id.* at 893. At the time, entry without inspection was a ground for deportation under INA § 241(a)(1)(B), 8 U.S.C. § 1251 (a)(1)(B) (Supp. III 1991).

360. *Bedoya-Valencia*, 6 F.3d at 897.

361. The court in *Bedoya-Valencia* observed that “*Francis* effected a significant alteration of the legal framework in this area . . . .” *Id.* The court was looking “to achieve coherence regarding the impact of [its] prior ruling in *Francis* upon a ground of deportation that, by logical necessity, can have no counterpart ground of exclusion.” *Id.* at 898.

desire to fill in the gap where an entry without inspection could not conceivably appear as an exclusion ground.<sup>362</sup>

On this point, the Second Circuit stood in isolation, for in *Leal-Rodriguez v. INS*,<sup>363</sup> the Seventh Circuit did not see the need to extend section 212(c) further in light of the *Francis* approach that had remedied a constitutional problem, even though the alien in *Leal-Rodriguez* had asked for relief on the basis of his entry without inspection.<sup>364</sup> The Seventh Circuit was no doubt influenced by the First Circuit's observation in *Campos v. INS*<sup>365</sup> that section 212(c) had already been "stretched beyond its language" and that "judicial redrafting simply insured that the statute [would] less and less be the recognizable product of the legislative will."<sup>366</sup>

## B. Statutory Counterpart Approach

The continuing search for variations on the *Francis* theme led to a regulation that denies section 212(c) relief if the alien is removable under section 237 on a ground that has no counterpart in section 212.<sup>367</sup> Soon thereafter, the BIA took this statutory counterpart approach in *In re Blake*<sup>368</sup> and denied section 212(c) relief to a deportable alien when the alien's aggravated felony conviction for sexual abuse of a minor had no statutory counterpart in the inadmissibility grounds of section 212(a).<sup>369</sup> The alien tried without success to link the removal ground for sexual abuse to the inadmissibility ground covering crimes of moral turpitude, but the BIA explained that the latter ground covered a broader category of offenses than the specific aggravated felony involving the sexual abuse of a minor.<sup>370</sup> The BIA advised that "[w]hether a ground of deportation or removal has a statutory counterpart in the provisions for exclusion or inadmissibility

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362. *Id.* at 897. The Second Circuit's position was that since Congress only considered exclusion grounds when it passed section 212(c), it could not have been thinking of an alien's entry without inspection. *See id.* The court saw nothing wrong therefore with filling the gap. After all, in *Francis* it had already gone beyond the literal language of the statute. *Id.*

363. *Leal-Rodriguez v. INS*, 990 F.2d 939 (7th Cir. 1993).

364. *Id.* at 952. The Seventh Circuit explained that "[t]he impetus for taking the first step, in *Francis* and *Silva*, was the arbitrariness of allowing the availability of relief to depend on whether an alien left the country and returned after becoming deportable." *Id.*

365. *Campos v. INS*, 961 F.2d 309, 316-17 (1st Cir. 1992).

366. *Leal-Rodriguez*, 990 F.2d at 952 (quoting *Campos*, 961 F.2d at 316-17).

367. 8 C.F.R. § 1212.3(f)(5) (2011).

368. *In re Blake*, 23 I. & N. Dec. 722 (B.I.A. 2005), *rev'd sub nom.*, *Blake v. Carbone*, 489 F.3d 88 (2d Cir. 2007).

369. *Id.* at 729.

370. *See id.*

turns on whether Congress has employed similar language to describe substantially equivalent categories of offenses.”<sup>371</sup> There is no need to have a perfect match, but the ground of inadmissibility must cover the same category of offenses on which the government bases its removal of the alien.<sup>372</sup> A court should not have to determine what charge the government could have lodged against the alien.

In *Caroleo v. Gonzales*,<sup>373</sup> the alien was convicted of attempted murder, and the government wanted to remove him as an aggravated felon under the provision dealing with crimes of violence. The court denied section 212(c) relief because the statutory basis for his removal, conviction of a crime of violence, had no counterpart in the exclusion section.<sup>374</sup> The court found it irrelevant that the alien’s conviction for attempted murder could have qualified the alien for removal under section 237(a)(2)(A)(i) because the crime involved moral turpitude.<sup>375</sup> The statutory ground upon which the conviction was based was labeled a crime of violence, and the pertinent inquiry, therefore, was whether that ground was substantially similar to any ground covered in section 212(a).<sup>376</sup> In a word, the court found that “a crime of violence” in section 237 is not the statutory equivalent of a “crime involving moral turpitude” covered in section 212.<sup>377</sup>

The Eleventh Circuit also had its say in *De la Rosa v. U.S. Attorney General*<sup>378</sup> regarding the statutory counterpart test. There, an alien also tried to link a conviction for the sexual abuse of a minor, an aggravated felony, with the ground in the exclusion section covering crimes of moral turpitude.<sup>379</sup> The alien could not persuade the court to examine the offense underlying his conviction, for that would have involved taking an offense-based approach to the statutory counterpart test.<sup>380</sup> The court preferred to follow the categorical approach

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371. *Id.* at 728.

372. *Id.* at 729; *see also In re Meza*, 20 I. & N. Dec. 257, 259 (B.I.A. 1991) (holding that deportation charge of “illicit trafficking in any controlled substance . . . including any drug trafficking crime” had a comparable ground of inadmissibility based on violation of or a conspiracy to violate any law or regulation relating to a controlled substance).

373. *Caroleo v. Gonzales*, 476 F.3d 158 (3d Cir. 2007).

374. *Id.* at 168.

375. *Id.*

376. *Id.* at 164.

377. *Id.* at 168; *see also In re Brievea*, 23 I. & N. Dec. 766, 773 (B.I.A. 2005) (concluding that a crime of violence under section 101(a)(43)(F) and a crime involving moral turpitude are not statutory counterparts for purposes of eligibility under section 212(c)), *aff’d sub nom.*, *Brievea-Perez v. Gonzalez*, 482 F.3d 356 (5th Cir. 2007).

378. *De la Rosa v. U.S. Att’y Gen.*, 579 F.3d 1327 (11th Cir. 2009).

379. *See id.* at 1336.

380. *See id.* at 1337.

that focused on the “charged ground of deportability rather than the underlying offense.”<sup>381</sup> The court had already rejected the invitation in *Rodriguez-Padron v. INS*<sup>382</sup> to extend section 212(c) relief to someone who had been convicted of a firearms violation, since there was no corresponding ground in the exclusion section.<sup>383</sup> The court in *Rodriguez-Padron* was in no mood to stretch the statute more than was necessary to avoid constitutional problems,<sup>384</sup> guided no doubt by the *Francis* formula.<sup>385</sup> The alien’s dependence on *Bedoya-Valencia* did not impress the court either because, in that case, the Second Circuit had accommodated the alien only because there could logically be no ground in the exclusion statute covering entry without inspection.<sup>386</sup> But, there was nothing that prevented Congress from making a firearms offense a part of the exclusion statute, and Congress was certainly aware that firearms violations would bring no relief for an alien in deportation proceedings.<sup>387</sup>

The courts are unwilling to undertake the assignment of determining whether an alien’s conviction could be reclassified for inclusion in another part of the exclusion statute.<sup>388</sup> If a court looked beyond the deportation ground charged by the government, it would certainly be expanding its judicial role, and that might force courts to cram an offense into another statutory category not implicated by the

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381. *Id.* at 1336 (citing *In re Esposito*, 21 I. & N. Dec. 1, 9 (B.I.A. 1995); *In re Montenegro*, 20 I. & N. Dec. 603, 605 (B.I.A. 1992); *In re Meza*, 20 I. & N. Dec. 257, 259 (B.I.A. 1991); *In re Wadud*, 19 I. & N. Dec. 182, 185-86 (B.I.A. 1984)).

382. *Rodriguez-Padron v. INS*, 13 F.3d 1455 (11th Cir. 1994).

383. *See id.* at 1460.

384. *See id.* The court distinguished *Bedoya-Valencia v. INS*, 6 F.3d 891 (2d Cir. 1993), on the ground that in that case the alien’s entry without inspection could not be a ground for exclusion and therefore Congress could not have had any intent about an alien who was deportable on that ground. *See Rodriguez-Padron*, 13 F.3d at 1460.

385. *See supra* note 354.

386. *See Rodriguez-Padron*, 13 F.3d at 1460 (noting that the court in *Bedoya-Valencia* depended on the logical absence of congressional intent covering entry without inspection in the exclusion statute, but that Congress could have covered firearms violations if it wanted to do so).

387. Since the *Francis* decision in 1976, the courts and the BIA have held that an alien convicted of a firearms violation is not eligible for section 212(c) relief. *See Adefemi v. Ashcroft*, 386 F.3d 1022, 1031 (11th Cir. 2004) (en banc); *Cato v. INS*, 84 F.3d 597 (2d Cir. 1996); *Gjonaj v. INS*, 47 F.3d 824, 827 (6th Cir. 1995); *Rodriguez v. INS*, 9 F.3d 408, 412-13 (5th Cir. 1993); *In re Esposito*, 21 I. & N. Dec. 1, 10 (B.I.A. 1995). Congress has had ample time to act if it wanted to expand on the *Francis* interpretation.

388. *See Vue v. Gonzalez*, 496 F.3d 858, 861 (8th Cir. 2007) (holding that alien could not get section 212(c) relief because his conviction of an aggravated felony—crime of violence—did not have a statutory counterpart in section 212(a)); *Caroleo v. Gonzalez*, 476 F.3d 158, 164 (3d Cir. 2007) (explaining that “[t]he relevant statutory counterpart inquiry . . . looks—not to the underlying criminal conviction—but rather to the statutory ground for removal contained in INA § 237 and whether it has a counterpart in the statutory ground for exclusion provisions of INA § 212(a).”).

alien's conviction. Section 212(c) relief should not be influenced by what deportation charge the government could have brought against the alien.<sup>389</sup> Congress has conferred on the executive branch the discretion to decide on the charge against the alien.<sup>390</sup> The mere fact that one deportation charge will create more hardship than another for the alien (including ineligibility for a waiver) does not create a constitutional issue, and the alien cannot depend on *Francis* and its progeny to obtain section 212(c) relief on that basis.

### C. The Second Circuit's Offense-Based Approach

Although the BIA's decision in *In re Blake*<sup>391</sup> has garnered overwhelming support in the courts for the categorical approach,<sup>392</sup> the Second Circuit overruled the BIA in *Blake v. Carbone*<sup>393</sup> and pronounced its own offense-based approach. The Second Circuit explained that an alien's eligibility for relief should depend on the particular criminal offense, so that a lawful permanent resident would qualify if the offense that made the alien deportable also made him inadmissible.<sup>394</sup> It would not matter how the removal statute categorized the offense.

While the BIA in *In re Blake* looked for linguistic similarities in the removal and inadmissibility grounds before an alien would be eligible for section 212(c) relief,<sup>395</sup> the Second Circuit observed that

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389. See *Mancillas-Ruiz v. Holder*, 625 F.3d 993, 997 (7th Cir. 2010); *Caroleo*, 476 F.3d at 164.

390. Section 237(a) provides that a deportable alien shall be removed "upon the order of the Attorney General." INA § 287 (a), 8 U.S.C. § 1227(a) (2006).

391. *In re Blake*, 23 I. & N. Dec. 729 (B.I.A. 2005).

392. See *Vo v. Gonzales*, 482 F.3d 363, 372 (5th Cir. 2007) (holding that the deportable alien was not entitled to section 212(c) relief because crime of unauthorized use of a vehicle did not have a comparable ground of inadmissibility under section 212(a)); *Caroleo*, 476 F.3d at 168 (holding that deportable alien was not entitled to section 212(c) relief because conviction of an aggravated felony crime – of violence – had no statutory counterpart in the exclusion section relating to crimes involving moral turpitude); *Valere v. Gonzales*, 473 F.3d 757, 762 (7th Cir. 2007) (holding that denial of section 212(c) relief to alien convicted of indecent assault of minor did not violate equal protection because the crime was not substantially equivalent to a ground of inadmissibility and thus the removable alien was not similarly situated to an inadmissible alien); *Kim v. Gonzales*, 468 F.3d 58, 62 (1st Cir. 2006) (holding that alien not entitled to relief because aggravated felony – crime of violence – did not have statutory counterpart in section 212(a)).

393. *Blake v. Carbone*, 489 F.3d 88 (2d Cir. 2007).

394. See *id.* at 103.

395. See *In re Blake*, 23 I. & N. Dec. at 729. The BIA explained that "[t]he coverage of the offenses described need not be a perfect match in order to be 'statutory counterparts' under the regulation as long as the ground of inadmissibility addresses the same category of offenses under which the removal charge is based." *Id.* In *In re Blake*, the question was whether the aggravated felony offense of sexual abuse of a minor had a statutory counterpart in the admissibility section

Congress never intended the removal grounds to have any connection to the inadmissibility grounds.<sup>396</sup> But, the lack of evidence concerning congressional intent on this point does not mean that a court should open the flood-gates to accommodate any deportation charge. The *Francis* decision resulted from a constitutional challenge, but the court resisted going beyond the problem that had arisen.<sup>397</sup> It is understandable that Congress would not have paid any attention to the need for similarity in language between the deportation and exclusion sections because section 212(c) concerned only returning residents who found themselves in exclusion proceedings.<sup>398</sup> Nevertheless, Congress based its relief on exclusion grounds, and a court should not translate a deportation ground into inadmissibility language that accommodates the underlying offense.<sup>399</sup>

In *Blake*, the Second Circuit did not have much sympathy for the BIA's concern in *In re Brieva* that “there must be a closer match than that exhibited by [an] incidental overlap” between grounds of removal and grounds of inadmissibility.<sup>400</sup> In *In re Brieva*, the BIA saw no way of finding a statutory counterpart in the inadmissibility statute for the aggravated felony that was the ground for the alien's removal.

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212(a). The BIA did not agree with the alien that the aggravated felony charge, sexual abuse of a minor, had its counterpart in section 212(a) dealing with crimes of moral turpitude. *See id.* at 729.

396. The court observed that “Congress did not employ similar terms when writing the grounds of exclusion and grounds of deportation because it had no need to, making it an exercise in futility to search for similar language to gauge whether equal protection is being afforded.” *Id.* at 102.

397. In *Francis v. INS*, the alien was deportable under former section 241(a)(11) because of a marijuana conviction. *See Francis*, 532 F.2d at 270. The corresponding exclusion provision dealing with marijuana offenses was section 212(a)(23). *See id.*

398. Former section 212(c) was limited to lawful permanent residents “returning to a lawful unrelinquished domicile.” INA § 212(c), 8 U.S.C. § 1182(c) (2004).

399. The Eleventh Circuit gave a good explanation in *De la Rosa v. U.S. Attorney General*:

Comparing the underlying criminal offense-instead of the statutory ground of deportation-with the ground of inadmissibility hazards the congruity between an alien in deportation proceedings and an alien in exclusion proceedings. This is so because the underlying offense *could* be among a wide array of inadmissible offenses, or not. With no congruity established, the aliens in question are not similarly situated, and equal protection is not implicated.

*De la Rosa v. U.S. Attorney Gen.*, 579 F.3d 1327, 1339 (11th Cir. 2009). *See also* *Mancillas-Ruiz v. Holder*, 625 F.3d 993, 998 (7th Cir. 2010) (stating that “[e]ven if [the alien] was able to establish that an equal protection right is involved, he only has a constitutionally protected interest if his crime is one that has a statutory counterpart, which a crime of violence does not.”); *Thap v. Mukasey*, 544 F.3d 674, 680 (6th Cir. 2008) (finding that “Congress chose to make certain excludable aliens eligible for discretionary relief under § 212(c), and the expansion of the provision, required by *Francis* and *Silva*, has only been extended to those for whom the ground of deportability has a comparable ground of inadmissibility.”).

400. *In re Blake*, 489 F.3d at 102 (quoting *In re Brieva*, 23 I. & N. Dec. 766, 773 (B.I.A. 2005)).

The alien had hoped to tie his crime of violence to the inadmissibility ground dealing with crimes of moral turpitude.<sup>401</sup> However, the BIA observed that “[s]ome of the most common crimes falling within the definition of a ‘crime of violence’ do not necessarily involve moral turpitude.”<sup>402</sup> Therefore, the BIA failed to find the statutory counterpart that it was looking for. Had the BIA taken a different approach, sooner or later it would have to deal with a removal provision that contains some offenses not involving moral turpitude, and the alien would surely still want to match the moral turpitude offense in the removal section with that in the inadmissibility section. The result would be to make eligible for relief those aliens whose offenses were more serious and to reward them on that basis.<sup>403</sup>

It is true that the court in *Francis* did not consider whether equal protection required a removal ground to have a substantial equivalent in the exclusion statute, and the Second Circuit in *Blake* was keen to rely on that to support the offense-based approach.<sup>404</sup> It did not appear, however, that there was any dispute in *Francis* about a marijuana conviction being a ground for both exclusion and deportation.<sup>405</sup> The parties argued about whether an alien should still be eligible for section 212(c) relief even if he had not travelled abroad.<sup>406</sup> It was that issue that occupied the court’s attention. The *Francis* court was right;

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401. See *In re Brieva*, 23 I. & N. Dec. 766, 772 n.4 (B.I.A. 2005). The alien tried to tie his aggravated felony in the deportation statute to the inadmissibility ground in section 212 dealing with crimes of moral turpitude. He viewed the unauthorized use of a motor vehicle—a crime of violence and an aggravated felony—as a theft offense for purposes of the inadmissibility ground covering crimes of moral turpitude. See *id.*

402. *Id.* at 772. The alien’s reliance on the unauthorized use of a vehicle as a crime of moral turpitude seemed misplaced, even though it was a crime of violence and an aggravated felony under section 101(a)(43)(f) of the INA. See *Vo v. Gonzales*, 482 F.3d 363, 369 (5th Cir. 2007) (holding that alien’s crime of unauthorized use of motor vehicle does not have a statutory counterpart in section 212(a)); *Ramirez v. Ashcroft*, 361 F. Supp. 2d 650, 658 (S.D. Tex. 2005) (finding that “[u]nauthorized use of a motor vehicle does not fit into the types of offenses that courts have found to involve moral turpitude”).

403. See *Koussan v. Holder*, 556 F.3d 403, 411 (6th Cir. 2009); *In re Wadud*, 19 I. & N. Dec. 182, 185 (B.I.A. 1984).

404. The court in *Blake* observed that “[t]he touchstone in *Francis* was the ‘irrelevant and fortuitous’ circumstance of traveling abroad recently . . . ; the decision did not consider whether equal protection requires that all or even most offenses falling under a particular ground of deportation must also fall under the counterpart ground of exclusion.” *Blake v. Carbone*, 489 F.3d 88 (2d Cir. 2007).

405. The court observed that both the exclusion and deportation statutes covered a conviction for possession of marijuana. See *Francis v. INS*, 532 F.2d 268, 270 n.2 (2d Cir. 1976).

406. *Id.* at 273. The government failed to show why the alien’s failure to go abroad following a conviction should be a “crucial factor in determining whether he may be permitted to remain in this country.” *Id.*

therefore, in not succumbing to a diversion that bore no resemblance to the parties' equal protection concerns.

#### D. The Ninth Circuit Approach

After *Francis*, the BIA and the courts fell into line and adopted the *Francis* approach to section 212(c). The Ninth Circuit expressed its views in *Tapia-Acuna v. INS*<sup>407</sup> that consistent with *Francis*, equal protection required it to treat aliens in deportation proceedings who had never left, the same way that it would treat aliens who were eligible for section 212(c) relief from exclusion once such aliens had left and returned.<sup>408</sup> It was, therefore, surprising when the Ninth Circuit overruled *Tapia-Acuna* in *Abebe v. Mukasey*,<sup>409</sup> claiming that it could give a “rational reason” that Congress enacted section 212(c)—to give relief to aliens facing exclusion, and not to aliens facing deportation who had never left the United States.<sup>410</sup> In a word, the court observed that “Congress could have limited section 212(c) relief to aliens seeking to enter the country from abroad in order to ‘create [an] incentive for deportable aliens to leave the country.’”<sup>411</sup> Therefore, a deportable alien would know that he could not get relief unless he left the country. His incentive to leave on his own would translate into a conservation of the government’s resources because the government would not have to pursue such aliens and deport them.<sup>412</sup>

The *Abebe* court did not try to identify the specific rational basis for the legislation. Its inquiry into section 212(c) was only whether a “hypothetically rational Congress could have adopted the statutory scheme.”<sup>413</sup> This approach really creates endless possibilities. There was no inkling that the court would overturn long-standing precedent by examining everything that Congress may have had in mind about section 212(c). The court was bound by a standard of “bare rationality,”<sup>414</sup> but that did not give it free reign to do as it pleased. If the

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407. *Tapia-Acuna v. INS*, 640 F.2d 223 (9th Cir. 1981).

408. *Id.* at 225.

409. *Abebe v. Mukasey*, 554 F.3d 1203 (9th Cir. 2009).

410. *Id.* at 1206.

411. *Id.* (quoting *Laguerre v. Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998)).

412. *See id.*

413. *Id.* at n.4.

414. *Id.* (citing *United States v. Barajas-Guillen*, 632 F.2d 749, 752 (9th Cir. 1980)). One authority has indicated that “the government has won the vast majority of immigration cases decided using [the rational basis] test.” Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1697-98 (1992).

constitutional right of equal protection is to have any meaning, there must be “rational bounds” on what a rational basis review will produce.<sup>415</sup>

The majority in *Abebe* was concerned with the government’s interest in saving resources.<sup>416</sup> After all, if deportable aliens leave the country on their own, the government does not have to hunt them down for removal. But, when a lawful permanent resident returns from a trip abroad and finds himself subject to exclusion, but potentially eligible for section 212(c) relief, the government usually allows him to pursue that remedy from within the country after entry.<sup>417</sup> If the alien does not get his waiver, the government will have to remove him if he does not depart voluntarily. The government’s ability to exclude those aliens who try to return after leaving voluntarily is important in the scheme of things only if such aliens are pessimistic about their eligibility for relief. If an alien concludes on reflection that he will not succeed, he will have no incentive to depart, and the government will still have to pursue him. Section 212(c) provides a remedy for the classes of aliens whom the government has already identified as worthy of consideration for relief despite their mistakes, and it is not a ruse for getting rid of aliens whom the government hopes never to see again.

The *Abebe* court was concerned that the *Francis* and *Tapia-Acuna* courts did not give sufficient deference to the complex legislative scheme surrounding section 212(c).<sup>418</sup> The court acknowledged that Congress has broad powers over immigration and that it “is therefore entitled to an additional measure of deference when it legislates as to admission, exclusion, removal, naturalization or other matters pertaining to aliens.”<sup>419</sup> It is worth noting, however, that as far back as 1940, the government interpreted the INA as giving it the discretion to grant relief in both deportation and exclusion proceedings.<sup>420</sup> This practice continued after the enactment of section 212(c), and the BIA held in 1955 that the Attorney General had the discretion to grant section 212(c) relief in both proceedings.<sup>421</sup> The circle

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415. *Abebe*, 554 F.3d at 1210 (Clifton, J., concurring).

416. *See id.* at 1206.

417. *See id.* at 1213. (Thomas, J., dissenting).

418. *See id.* at 1205-06.

419. *Id.* at 1206.

420. *See In re L*, 1 I. & N. Dec. 1 (B.I.A. 1940).

421. *In re S*, 6 I. & N. Dec. 392 (B.I.A. 1955).

was complete when the BIA allowed an alien who should not have been readmitted, to apply for relief *nunc pro tunc*.<sup>422</sup>

The courts in *Francis* and *Tapia-Acuna* could hardly be accused of not giving due deference where it belonged. Once the BIA set the stage for relief in both deportation and exclusion, it remained for the courts to answer any constitutional queries that might arise. With the track record established on section 212(c) regarding deportation and exclusion, no one expected the Ninth Circuit to overrule its long-standing opinion in *Tapia-Acuna* by limiting section 212(c) relief to the exclusion scenario.

The court in *Abebe* made much of the rationale that Congress intended to give relief to a deportable alien only if he was returning to the country, thus providing the incentive for him to leave in search of the section 212(c) benefit.<sup>423</sup> That emphasis left the impression that the court was thinking more about the comparison between an alien in deportation proceedings and a returning alien who was seeking to re-enter. But, that was not the situation in *Tapia-Acuna*, where the alien found himself in deportation proceedings after being convicted for possession of marijuana.<sup>424</sup> The *Tapia-Acuna* court agreed with the Second Circuit in *Francis* that section 212(c) “create[d] a distinction that lack[ed] a rational basis,” and that distinction was between an alien in deportation proceedings who had never left the United States and one in deportation proceedings who had left and returned since his conviction.<sup>425</sup> The discussion was about two aliens in deportation proceedings, one of whom may have ventured abroad and then returned.<sup>426</sup> The *Abebe* court had to go beyond the question raised to overturn *Tapia-Acuna* since the alien would still have been ineligible for section 212(c) relief because his conviction for an aggravated felony (sexual abuse of a minor) did not have a counterpart in the exclusion section.<sup>427</sup>

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422. *In re G-A-*, 7 I. & N. Dec. 274 (B.I.A. 1956).

423. *See Abebe*, 554 F.3d at 1206.

424. *Tapia-Acuna v. INS*, 640 F.2d 223 (9th Cir. 1981).

425. *Id.* at 225.

426. *Id.* (holding that “eligibility for § 1182(c) relief cannot constitutionally be denied to an otherwise eligible alien who is deportable under § 1251 (a)(11), whether or not the alien has deported from and returned to the United States after the conviction giving rise to deportability”).

427. The alien was deportable for committing an aggravated felony under section 237(a)(2)(A)(iii). There is no similar provision in section 212 dealing with inadmissibility.

## CONCLUSION

Congress has done its best to draft a comprehensive immigration statute that addresses many of the major problems. When it drafted the definition of the terms “admission” and “admitted” in section 101(a)(13)(A), it must have thought that it had clarified matters for all time. Nevertheless, there is every indication that the definition in section 101(a)(13)(A) cannot be applied literally in every context and that courts must face the reality that Congress could not have foreseen every conceivable situation that would bring the definition into play.

The BIA responded admirably in *In re Rosas*<sup>428</sup> when it realized it could not recognize the alien’s unlawful entry as an admission in terms of section 101(a)(13)(A),<sup>429</sup> although it knew that the alien had committed an aggravated felony and was thereby subject to removal. The only other juncture that remained available to the BIA for recognizing an admission was when the alien adjusted his status to that of a lawful permanent resident.<sup>430</sup> The BIA did not avoid the issue, for it admitted that the alien’s change in status did not meet the definition of an admission in section 101(a)(13)(A).<sup>431</sup> However, the BIA also made it clear that the definition “does not set forth the sole and exclusive means by which admission to the United States may occur under the Act.”<sup>432</sup> Quite frankly, the BIA had nowhere else to go in *In re Rosas*. It could not accept the alien’s illegal entry as the time of admission, so the only other event available was the adjustment. That adjustment mechanism allowed the BIA to recognize the alien’s status as analogous to the routine admission encountered in section 101(a)(13)(A). But, this does not mean that an adjustment will always be recognized as an admission.<sup>433</sup> There is no denying that an admission can occur subsequent to the alien’s entry, but it is admission to the legal status of a lawful permanent resident. That is not, therefore,

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428. *In re Rosas*, 22 I. & N. Dec. 616 (B.I.A. 1999).

429. An “admission” requires a “lawful entry.” See INA § 101(a)(13)(A), 8 U.S.C. § 1101(a)(13)(A)(2006). In *In re Rosas*, the alien originally entered without inspection. *In re Rosas*, 22 I. & N. Dec. at 616.

430. See 8 U.S.C. § 1255a(b).

431. *In re Rosas*, 22 I. & N. Dec. at 623.

432. *Id.*

433. See *Zhang v. Mukasey*, 509 F.3d 313, 316 (6th Cir. 2007) (holding that “there is only one first lawful admission, and it is based on physical, legal entry into the United States, not on the attainment of a particular legal status”); *Aremu v. Dep’t of Homeland Sec.*, 450 F.3d 578, 581 (4th Cir. 2006) (holding that the date of admission was not when the alien adjusted his status but when the alien was previously admitted as a nonimmigrant visitor); *Shivaraman v. Ashcroft*, 360 F.3d 1142, 1146 (9th Cir. 2004) (holding that the alien’s admission as a nonimmigrant was the date of admission and not the date of adjustment to lawful permanent residence).

the admission defined in section 101(a)(13)(A), and even section 101(a)(20) recognizes that this adjustment relates to status, and not the physical entry contemplated by section 101(a)(13)(A).

Congress should recognize by now that its definition of “admission” in section 101(a)(13)(A) cannot be applied across the board in the same way. The drafters could have given us a warning of the possibilities of different applications by using a phrase such as “unless the context otherwise requires.” Without such a clue, one is left to wonder whether the term “admitted” has the same meaning in section 101(a)(20) that it has in section 101(a)(13)(A).

The term “admitted” appears again in section 212(h).<sup>434</sup> The definition of that term, like that of admission, contemplates the lawful entry of the alien “after inspection and authorization by an immigration officer”.<sup>435</sup> Here again, Congress could simply clarify that the section really deals with the alien’s status as a lawful permanent resident, thus leaving a role for adjustment in the ordinary course of events. By leaving the word “admitted” unattended in section 212(h)(2), the drafters left room for a quarrel about what they meant in light of the specific definition of “admitted” in section 101(a)(13)(A).

With respect to section 212(c), the section will recede in importance as time goes on, as there will be fewer and fewer cases left in which aliens have pleaded guilty with the expectation of section 212(c) relief. Nevertheless, the BIA and most courts have followed the statutory counterpart test, and with good reason.<sup>436</sup> They have opted not to go beyond the limits dictated by the constitutional queries of *Francis* and its progeny. The Second Circuit’s offense-based approach simply opens the floodgates to manipulation of the statutory offenses. The government’s charge of a particular offense will be open to an alien’s allegations that his offense falls under a different category. This goes well beyond the mischief that *Francis* was intended to remove. It remains to be seen what the United States Supreme Court

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434. See 8 U.S.C. § 1182(h).

435. *Id.* § 1101 (a)(13)(A).

436. See *De la Rosa v. U.S. Attorney Gen.*, 579 F.3d 1327 (11th Cir. 2009); *Gonzales-Mesias v. Mukasey*, 529 F.3d 62, 64-65 (1st Cir. 2008); *Vo v. Gonzales*, 482 F.3d 363, 372 (5th Cir. 2007); *Caroleo v. Gonzales*, 476 F.3d 158, 162-63 (3rd Cir. 2007); *Valere v. Gonzales*, 473 F.3d 757, 762 (7th Cir. 2007); *In re Brieva*, 23 I. & N. Dec. 766, 773 (B.I.A. 2005) *aff’d sub nom.*, *Brieva-Perez v. Gonzales*, 482 F.3d 356 (5th Cir. 2007).

will do to resolve the three-way conflict that has ensued from the different approaches to section 212(c).<sup>437</sup>

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437. On April 18, 2011, the United States Supreme Court granted a petition for certiorari in *Judulang v. Holder*, 131 S. Ct. 2093 (2011). The question presented is:

Whether a lawful permanent resident who was convicted by a guilty plea of an offense that renders him deportable and excludable under differently phrased statutory subsections, but who did *not* depart and reenter the United States between his conviction and the commencement of removal proceedings, is categorically foreclosed from seeking discretionary relief from removal under former Section 212(c) of the INA.

Petition for Writ of Certiorari at \*i, *Judulang v. Holder*, 131 S. Ct. 2093 (2011) (No. 10-694).

# Reconstructing African American Cultural DNA: An Action Research Agenda for Howard University

HAROLD A. McDOUGALL\*

*We are McWorld. You will be assimilated. Your cultural distinctiveness will be added to our own. Resistance is futile.*<sup>1</sup>

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1. See *STAR TREK: FIRST CONTACT* (Paramount Pictures 1996); see discussion *infra* Part II.E (discussing global consumer culture, or “McWorld”).

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INTRODUCTION

Culture is the way a community solves problems. We see the evidence of a community’s problem-solving processes in the beliefs, behavior patterns, customs, art, music, cuisine, institutions, and organizations it generates along the way.

DNA is the material that transfers genetic characteristics in all life forms. In this article, I use the metaphor of “cultural DNA” to describe a matrix or template that organizes the cultural information of a particular community and gives it coherence.<sup>2</sup> Just as an organism’s DNA contains the instructions needed for it to develop, survive, and reproduce, cultural DNA permits human communities to pass analogous instructions to their successors, such as how to prepare food, practice faith, or provide for one’s young.

The cultural DNA produced by each human community over time, carrying the imprint of its distinct problem-solving techniques, constitutes a rich storehouse of “socio-diversity,” which we would be wise to preserve and protect.<sup>3</sup> If every culture were a plant species within the Amazon, we could easily see how foolish it would be to preserve only those species that have an identified use, while destroying those that have no ascertained purpose. Razing the Amazon to make way for cities and subdivisions could cost the world a treasure-

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2. Cf. Paul J. Kampas, *Shifting Cultural Gears in Technology-Driven Industries*, MIT SLOAN MGMT. REV., Winter 2003, at 41, 42 (discussing how understanding a person’s DNA can be helpful in the work place); Stephen R. Covey, *The Greater Identity Theft is Our Cultural DNA*, STEPHEN R. COVEY BLOG (Nov. 14, 2008), <http://www.stephencovey.com/blog/?tag=cultural-dna> (discussing cultural DNA and setting goals to avoid losing it).

According to the National Institute of Health, deoxyribonucleic acid (DNA) is a molecule that directs biological species to create a species. NATIONAL HUMAN GENOME RESEARCH INSTITUTE, DEOXYRIBONUCLEIC ACID (DNA), <http://www.genome.gov/25520880> (last reviewed Mar. 23, 2011). Critical information about two people is transferred to their offspring. *Id.* DNA contains vital information about a person’s genetic make-up. *Id.* While foundational information is transferred from generation to generation, any changes can have grave effects on DNA. *See id.* Also, a cell may die if destroyed beyond repair. *Id.*

3. Human existence is similar in many respects across the globe—there are births, marriages, sicknesses, and deaths. However, each culture has a different way in which it celebrates or recognizes the transitions people make. Moreover, each culture has a different way of solving human problems, some of which are universal. The diverse approaches offered by each culture enrich the global community and provide a storehouse of “know-how” resources.

## *Reconstructing African American Cultural DNA*

trove of biodiversity with potential cures for many diseases, including cancer.<sup>4</sup> Similarly, leveling indigenous and traditional cultures to make way for Western, homogenizing consumer culture<sup>5</sup> could cost the world a treasure-trove of “socio-diversity”<sup>6</sup> containing potential solutions for many social, economic, political, and medical problems.

In order for conditions within African American communities to improve, not only must the physical and economic infrastructure be rebuilt, including housing, schools, stores, transportation, and jobs, but also the community’s civic and social culture—its cultural DNA. Repairing the physical, psychological, and cultural damage of slavery, segregation, and racial chauvinism, which remains in African American communities, is a challenge that all African Americans should embrace. Historically Black Colleges and Universities (HBCUs) have a special role to play because they help educate significant numbers of African Americans who, upon graduation, will have the necessary intellectual, political, and financial resources to get the job done. Howard University’s great fund of cultural DNA and social capital positions it to lead the way. My goal with this article is to show how universities, particularly HBCUs, can use their resources to help African American communities leverage “cultural DNA” to address contemporary problems that uniquely affect the African American community.

Part I of this article unpacks cultural DNA, examining how the human brain processes information from our five senses and organizes it for use, and how culture affects these processes. Part II describes various historical and contemporary stressors to the African American community and how these stressors have affected African Ameri-

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4. See, e.g., *MEDICINE MAN* (Walt Disney Video 1992).

5. See Benjamin R. Barber, *Jihad vs. McWorld*, *THE ATLANTIC*, Mar. 1992, available at <http://www.theatlantic.com/magazine/archive/1992/03/jihad-vs-mcworld/3882/> (discussing the two principles of tribalism and globalism and their relation to democracy).

6. See Sabine U. O’Hara, *Valuing Socio-Diversity*, 22 *INT’L J. SOC. ECON.* 31 (1995). O’Hara defines socio-diversity as “the diverse ways of social and economic arrangements by which peoples have organized their societies, particularly the underlying assumptions, goals, values and social behaviours.” *Id.* at 31. As O’Hara describes elsewhere,

[m]aintaining these networks of communication and support not only benefits the stability of communities and social networks, but the stability of markets themselves. Their loss leads to the erosion of essential networking and provisioning activities offered in households and communities, as well as to the growing dependence on market activities for basic survival and material needs.

Sabine U. O’Hara & Sigrid Stagl, *Global Food Markets and Their Local Alternatives: A Socio-Ecological Economic Perspective*, 22 *POPULATION & ENV’T*, July 2001, at 533, 542 (citing V. SHIVA, *ECOLOGY AND THE POLITICS OF SURVIVAL: CONFLICTS OVER NATURAL RESOURCES IN INDIA* (1991)).

can cultural DNA. Parts III–VI discuss university-based initiatives and programs that use African American cultural DNA and social capital to respond to these stressors.

## I. CULTURE, INTELLIGENCE, AND PROBLEM-SOLVING

To gain a deeper understanding of culture and cultural DNA, we need to look more closely at how human beings solve problems. Let us start by considering how we *think*.

In his book *On Intelligence*, Jeff Hawkins shows that the brain processes all the information it receives—whether through sight, smell, hearing, taste or touch—by casting the received data into manageable patterns.<sup>7</sup> Dr. Sabine O’Hara’s work suggests that a cultural matrix influences this patterning in five important ways, affecting our sense of: (1) *context*,<sup>8</sup> (2) *participation*,<sup>9</sup> (3) *place*,<sup>10</sup> (4) *limits*,<sup>11</sup> and (5) *temporality*.<sup>12</sup> The manner in which we process information to solve problems thus stems from culturally derived patterns that shape our sense of how our world is constructed, and of what is desirable or even possible. The resulting information-patterning is nested in our music and art as well as our modes of social, political and economic organization. This constitutes a cultural matrix handed down from generation to generation, refined and renewed by each.

The brain has multiple processing levels for storing experiences (that is, “remembering”).<sup>13</sup> The brain receives information at the low-

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7. Jeff Hawkins & Sandra Blakeslee, ON INTELLIGENCE 24-25 (2004). As stated *On Intelligence*’s liner notes, “[t]he brain stores experiences in a way that reflects the true structure of the world, remembering sequences of events and their nested relationships and making predictions based on those memories. [Thus, i]t is this memory-prediction system that forms the basis of intelligence, perception, creativity, and even consciousness.” *Id.* at 264.

8. A sense of context involves valuing our community as a matrix in which life functions are supported and carried on. O’Hara, *supra* note 6, at 33-36.

9. Participation is unconditionally including each member of the community in common efforts and benefits. *See id.* at 37.

10. Place is literally the state of being grounded; an individual’s awareness of the unique ecological balance of the particular location they occupy and, representing an allegiance to the community rather than institutions. *See id.* at 38-40.

11. Limits give human beings an appreciation of the world’s finiteness and enables us to challenge the idea that more is better, and to resist the ever-increasing consumption which consumerism presses upon us. *See id.* at 40, 42.

12. *See id.* at 42; *see also* OKOT P’BITEK, SONG OF LAWINO & SONG OF OCOL 21 (1984) (discussing how time is Ocol’s master). Lawino, the female narrator speaking for African values, expresses the African sense of time with the example of a child being fed when it cries and not according to a fixed time. *Id.* at 95. Lawino feels her people should not be rushed, but should rather allow things to occur in their own time. *Id.* Her husband Ocol, the male narrator, embraces Western culture and rejects his own. *See discussion infra*, note 28.

13. Hawkins, *supra* note 7, at 76.

## *Reconstructing African American Cultural DNA*

est level and structures it into a rough pattern.<sup>14</sup> The brain's next highest level receives a symbol for that pattern and links it to a sequence of symbols for related patterns.<sup>15</sup> This next brain level assigns a symbol to this more complex pattern, passes the symbol for the sequence on to the next highest level, and so on and so forth<sup>16</sup> (these symbols are culturally determined—they reflect a particular culture's way of seeing the world<sup>17</sup>).

The brain not only uses patterns to collect, organize, and store information.<sup>18</sup> It also uses these patterns to retrieve and deploy the information to predict future events and instruct the body to respond accordingly.

Hawkins further suggests that patterns we develop to process information acquired with any one of our five senses can assist us in organizing information acquired with any one (or more) of the others.<sup>19</sup> This is why listening to music sometimes helps us think or write more effectively, or even why the sight of food enhances the taste. If we think of culture as a matrix of patterns people have developed in their journey through history, we can see how culture might powerfully influence this patterning process.

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14. *Id.* at 30.

15. *Id.* at 136.

16. Professor Leah Christensen found independent evidence to support Hawkins' theory that this is how our brains work and how we learn. See Leah M. Christensen, *Legal Reading and Success in Law School: An Empirical Study*, 30 SEATTLE U. L. REV. 603 (2007). Christensen shows that students use one or more of the following techniques when reading a judicial opinion: (1) default (wherein readers paraphrased, reread, underlined and made margin notes); (2) problematizing (wherein readers asked questions, made predictions, hypothesized about meaning and connected with the overall purpose of the text); and (3) rhetorical (wherein readers synthesized the text with their own experiences). *Id.* at 608-10.

Less experienced legal readers read at the default level, struggling to find the simplest patterns, and rarely connect what they read to the overall purpose of the reading. In contrast, successful law students spend most of their time using the problematizing and rhetorical techniques. These more successful students work to resolve confusion and make sense out of the text; often, by relating the new information they are learning to previous experiences and the patterns they have developed to process them.

This type of pattern seeking and pattern recognition resonates powerfully with Hawkins' research. Law school success follows when students progress from the default technique, to the problematizing technique, to the rhetorical technique. That is, they manage larger and larger amounts of information, more and quickly as they progress, because they are able to "chunk" the information with increasingly complex patterns.

17. An example: before we learn to read, we see writing as squiggles, lines and dots. Then we learn the symbols for letters. We then learn symbols which collect and synthesize letters—words. Then, we learn symbols to pattern words into sentences (grammar and syntax also play a role). Paragraphs, pages, chapters, and entire books follow as we learn to capture and store increasingly more complex information through these "nested" patterns.

18. See Hawkins, *supra* note 7, at 174-175.

19. See *id.* at 46, 60, 65, 113, 117, 123-125.

Finally, there is a continuum of increasingly more sophisticated information-patterning, from prediction to imagination, planning, creativity, and even genius. Creativity occurs when we make predictions by processing new information with the patterns we have developed in response to previous information and experience. This is how we reason by analogy, a process that undergirds both prediction and creativity.

Hawkins suggests that when extremely gifted and creative people take newly learned patterns to review and re-sort information already stored under older ones, a synergetic effect results. Linked together, the new and old patterns<sup>20</sup> and the information they organize merge and cross-fertilize. In a flash, we call an epiphany, or an “aha” moment the old and new patterns (and their associated information) that mutually energize each other.<sup>21</sup>

I believe the architects of the *Brown v. Board of Education* litigation had minds that functioned in this way. For example, I believe Charles Hamilton Houston, Dean of Howard University School of Law and architect of the *Brown* strategy, took the patterns and information his Harvard mentor Roscoe Pound synthesized as “sociological jurisprudence,” cross-fertilized them with the cultural patterns of the African American community and, “aha,” created social engineering.

What did the cultural DNA making this phenomenon possibly look like? In the early 1990s, I studied such patterns for four years in the city of Baltimore, coincidentally the home of Houston’s star pupil, Thurgood Marshall. In my book, *Black Baltimore: A New Theory of Community*, I examined the vernacular culture of Baltimore’s African American West Side.<sup>22</sup> I saw that cultural DNA patterns not only speech, work, music, cuisine, gender roles, home life and gossip, but also the building of relationships and networks, modes of political and economic organization, and the ways in which problems are solved.

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20. In psychology, it is called “schemas,” which “is a cognitive framework or concept that helps organize and interpret information. Schemas can be useful, because they allow us to take shortcuts in interpreting a vast amount of information.” Kendra Cherry, *What is a Schema?*, ABOUT.COM, [http://psychology.about.com/od/sindex/g/def\\_schema.htm](http://psychology.about.com/od/sindex/g/def_schema.htm) (last visited Sept. 13, 2011).

21. Professors Peter Gabel and Duncan Kennedy once called this sort of thing “intersubjective zap” in a celebrated 60s style law review article, *Roll Over Beethoven*. See Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 3-5, 54 (1984).

22. See HAROLD A. MCDUGALL, *BLACK BALTIMORE: A NEW THEORY OF COMMUNITY* 2 (1992) [hereinafter *BLACK BALTIMORE*].

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Marshall and Houston cross-fertilized African American cultural DNA with Sociological Jurisprudence to create a litigation strategy.<sup>23</sup> Martin Luther King fused that same DNA with ideas of passive resistance from India's Mahatma Gandhi's program of nonviolent civil disobedience that complemented and energized the lawyer's work.<sup>24</sup>

People of my generation (a bit younger than King) linked African American cultural DNA with new ideas about participatory democracy. We also used sister patterns from Africa and from the Caribbean. Stokely Carmichael, an immigrant from Trinidad who attended Howard University and rose quickly in the leadership of the Student Nonviolent Coordinating Committee (SNCC) conceived and launched the concept of Black Power.<sup>25</sup> The Black Power movement directly connects to the rapid increases in the number of black elected officials that occurred in the 1970s. Interest in Africa and its cultural patterns heightened as we encountered African students in our colleges, but the focus on Africa had been engineered long ago by two sons of the Caribbean, Marcus Garvey and W.E.B. Du Bois.<sup>26</sup>

Our community/cultural patterns for understanding our world and living in balance with it are key ingredients to our conceiving and maintaining sustainable lifestyles.<sup>27</sup> Human capital and its development are critical factors in this equation. Hence, we must protect and

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23. *See generally* GENNA RAE McNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* (1983) (analyzing the systematic approach Marshall and Houston utilized in shaping the fight against inequality during the civil rights era).

24. *See generally* MICHAEL J. NOJEIM, *GANDHI AND KING: THE POWER OF NONVIOLENT RESISTANCE* xi-xiii (2004) (discussing Gandhi's nonviolent actions and King's philosophical principles of nonviolence).

25. Carmichael came from a context in which black people ran their own governments, a principle of "self-determination" that remerged in Caribbean and African countries during the Decolonization period immediately following World War II. *See generally* Stokely Carmichael & Ekwueme Michael Thelwell, *READY FOR REVOLUTION: THE LIFE AND STRUGGLES OF STOKELY CARMICHAEL (KWAME TURE)* (2003) (describing Carmichael's personal, political, and intellectual life).

26. Jamaican immigrant Marcus Garvey created the "Back to Africa" movement. JOHN HENRIK CLARKE, *MARCUS GARVEY AND THE VISION OF AFRICA* 105-06 (1974). W.E.B. DuBois was the son of Haitian immigrant Alfred DuBois. Christopher Challenger Child, *Ancestry of W.E.B. DuBois*, <http://www.wargs.com/other/dubois.html> (last visited Sept. 13, 2011). DuBois authored the concept of Pan-Africanism. *See generally* Rhett Jones, *Pan Africanism as Sub-Africanicity in the United States*, in *REEVALUATING THE PAN-AFRICANISM OF W. E. B. DU BOIS AND MARCUS GARVEY: ESCAPIST FANTASY OR RELEVANT REALITY* (James L. Conyers, Jr. ed., 2005) (discussing the lives of two leading Pan-Africanists, Marcus Garvey and W.E.B. DuBois). In recognition of his contributions, Ghana's first President Kwame Nkrumah, offered DuBois Ghanaian citizenship, which he accepted. *See* William H. Melish, *Address at the Memorial Service of Dr. W.E.B. Du Bois* (Sept. 29, 1963). He lived in Ghana until his death. *Id.*

27. Sustainable development addresses the need to maintain a sustainable lifestyle in balance with available natural resources.

strengthen the cultural patterns that accelerated and amplified the genius of our forbears.<sup>28</sup>

## II. DAMAGE TO THE AFRICAN AMERICAN COMMUNITY<sup>29</sup> AND ITS CULTURAL DNA

Over the nearly one hundred fifty years since the end of slavery, conditions for African Americans have gradually improved. However, African Americans as a group still lag behind in almost every index of social well-being and development.<sup>30</sup> Large gaps remain in African American employment, housing, and educational opportunity; in health, wealth,<sup>31</sup> and income; and in political representation. A system of *de facto* segregation confines African Americans to neighborhoods with poorly funded schools, deteriorating housing, declining municipal services, and limited employment opportunities.

During the times of slavery and segregation, African American communities contained members from all classes, from professionals to blue-collar workers. As noted above, human capital develops through a cultural matrix, as we marshal our resources and our intelligence to solve problems and confront adversity. For this time, a relatively unified community worked for a common cause—to get free.

Once segregation ended, the African American community split into haves and have-nots, as the middle-class left black communities in favor of communities that were racially integrated (though economically segregated). The community and its cultural patterns diverged, weakening the cultural energy and problem-solving abilities of both those who left and those who stayed behind.

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28. Ocol does not appreciate this difference. In *Song of Ocol*, Ocol wonders why he was born black and advocates the complete annihilation of the of the Acholi culture, which he abhors because of his love for the Western culture. P'BITEK, *supra* note 12, at 23-32.

29. See generally HAROLD McDougall, AFRICAN AMERICAN CIVIL RIGHTS IN THE AGE OF OBAMA: A HISTORY AND A HANDBOOK (2010) (discussing “Obama-Era Civil Rights”) [hereinafter AFRICAN AMERICAN CIVIL RIGHTS IN THE AGE OF OBAMA].

30. See U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 89 tbl. 125 (2000), available at [http://www.census.gov/prod/www/abs/statab1995\\_2000.html](http://www.census.gov/prod/www/abs/statab1995_2000.html) (last visited Aug. 13, 2011) (demonstrating higher infant mortality rates than people of European descent); *id.* at 83-85 tbls.115, 116, 117, 118 (demonstrating shorter life spans); *id.* at 58 tbl.69 (demonstrating a higher rate of unwed motherhood and absent fathers); *id.* at 404 tbl.645 (demonstrating a higher unemployment rate); *id.* at 97 tbl.136 (demonstrating a higher death rate from injury by firearms); *id.* at 209-10 tbls.341, 342, & 343 (demonstrating a higher criminal victimization rate); *id.* at 180-81 tbls.290, 291 (demonstrating a higher high school dropout rate); *id.* at 478 tbl.760 (demonstrating a higher rate of persons living below the poverty level); *id.* at 470 tbl.743 (demonstrating a lower family income level); *cf. id.* at 283 tbl 463; *id.* at 16 tbl.15.

31. See MELVIN OLIVER & THOMAS SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 12-13 (10th Anniversary ed. 2006).

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Impoverished African American inner-city community residents had little education, few skills, and many went long periods without formal employment. A culture of poverty and hopelessness arose in these communities as social, political, and economic infrastructure crumbled. Middle-class refugees from these communities, in a desperate attempt to escape their stigma, pursued assimilation into American mainstream culture, which was itself suffering from a cultural breakdown precipitated by its transition from a producer to a consumer society. Assimilation proved elusive, however, as racism and discrimination bedeviled even these relatively fortunate African Americans.

### A. Employment Barriers

Following the Civil War, Southern whites adopted the Black Codes to control the recently freed slaves. Congress responded to the Black Codes with the Civil Rights Act of 1866. Southern whites responded with sharecropping as another means to control Black labor. Sharecroppers independently managed the land but shared the crop with the owner as a payment for rent. Sharecroppers borrowed against their crops to pay for essentials. When the sharecroppers were without crops to pay for essentials, they fell deeper and deeper into debt to the landowner.

During the height of America's industrial production period, and especially around World Wars I and II, many cities housed large factories that provided employment to low-income African Americans who consequently flocked to the cities. Once they arrived, they lived in substandard ghettos and were forced to accept the dirtiest and most dangerous jobs, while working long hours for minimal wages. However, they were transformed from serfs to industrial workers.

After World War II, technological advances called for more spread-out industrial locations, so factories began to move to the suburbs, where land was cheaper. Blue-collar jobs left town with the factories, and the white working class followed. Restrictive covenants and exclusionary zoning kept blacks out of suburban housing. They could not even effectively commute to suburban jobs from the cities in which they lived, as public transportation lines tended to terminate at the city limits. Few had other means of transportation.

By the mid-twentieth century, as the Civil Rights Movement began, African Americans were almost evenly divided between a barely-

educated, rural, Southern peasantry and an under-employed, Northern, urban proletariat. There was a very small middle class of shopkeepers and professionals in both locations. Southern whites clung to the image of the uneducated black peasant; Northern whites viewed African American males as unemployable and dangerous.<sup>32</sup> Both tended to see successful blacks, who did not fit the prevailing negative stereotypes, as “uppity.”

When seeking employment today, African Americans face all the stereotypes of the past:<sup>33</sup> they are lazy, unemployable, and dangerous when they fail and uppity or know-it-alls when they succeed.<sup>34</sup> Negative film and television images continue to reinforce these stereotypes.<sup>35</sup>

Even when an African American overcomes these obstacles and qualifies for a job, more obstacles await in the workplace. Some of the obstacles African American employees must overcome, particularly males, include: less desirable duties,<sup>36</sup> more frequent accusations of sexual harassment,<sup>37</sup> more closely monitored job performance,<sup>38</sup> and lower performance evaluations.<sup>39</sup> They often face hostility in the

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32. See generally Aminifu R. Harvey, *The Plight of the African American Male in the United States: An Africentric Human Service Provider Analysis and Intervention Strategy*, 8 J. AFRN. AM. STUD., Winter 2004, at 37 (2004) (detailing the historical relationship between the African American male and American society).

33. See generally William H. Turner, *Myths and Stereotypes: The African Man in America*, in THE BLACK MALE IN AMERICA 122 (Doris Y. Wilkinson & Ronald L. Taylor eds., 1977) (recounting common stereotypes regarding black men and detailing the reality and fiction of said stereotypes).

34. See TOM W. SMITH, NAT'L OPINION RESEARCH CTR., UNIV. OF CHI., ETHNIC IMAGES 4-6, 9 (1990). See generally John McWhorter, WINNING THE RACE: BEYOND THE CRISIS IN BLACK AMERICA (2005) (suggesting political and social pathways for overcoming stereotypes among blacks); Timothy Davis, *The Myth of the Superspade: The Persistence of Racism in College Athletics*, 22 FORDHAM URB. L.J. 615 (1995) (analyzing a persistent, unconscious racism in college athletics nourished by fraudulent stereotypes and myths).

35. See Ivory L. Toldson & Alfred B. Pasteur, *The Black Male Mystique: At Once Admired and Feared, an Exposition of What It Means to be Black and Male in America*, 1 J. AFR. AM. MALE STUD. 70, 71, 74-75 (1993).

36. Cf. *Sledge v. J.P. Stevens & Co.*, 16 Fair Empl. Prac. Cas. 1652 (E.D.N.C. 1975), *aff'd*, 25 Empl. Prac. Dec. P 31, 244 (1980) (alleging that plaintiffs were subject to delays in hiring, less desirable duties and blocked from pursuing positions of authority on account of their race).

37. See, e.g., *Equal Emp't. Opportunity Comm'n v. Mount Vernon Mills, Inc., Riegel Div.*, 58 Fair Empl. Prac. Cas. 73 (N.D. Ga. 1992) (alleging that plaintiff, an African American, was treated differently than other white employees who sexually harassed individuals when plaintiff was fired for making a sexually explicit comment to a co-worker).

38. See *Webb v. Missouri Pac. R.R. Co.*, 826 F. Supp. 1192 (E.D. Ark. 1993) (finding an African American employee has established a prima facie case that defendant disciplined and discharged black employees at higher rates than whites).

39. Jeffrey H. Greenhaus et al., *Effect of Race on Organizational Experiences, Job Performance Evaluations, and Career Outcomes*, 33 ACAD. MGMT. J. 64, 68-69 (1990).

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workplace as well.<sup>40</sup> Even for those who prevail, there are few trophies; the proverbial glass ceiling makes it difficult for even the most determined to advance to the highest levels of management.<sup>41</sup> At the lower end of the market, black workers face stiff competition from an influx of immigrants for semi-skilled and unskilled jobs.

### B. Spatial Dislocation

The “flight” of white, middle-class residents in cities to the suburbs in the 1950s and 1960s significantly eroded urban tax bases; taxes increased while municipal services such as education, police, fire prevention, and sanitation declined.<sup>42</sup> In the 1970s, members of the African American middle-class, no longer restricted by segregation, began to follow their white counterparts for a life in the suburbs.<sup>43</sup> This further eroded the middle-class tax base and incidentally deprived African American neighborhoods of successful role models.<sup>44</sup>

Those left behind face not only deteriorating living conditions, but also competition for their living space from affluent young whites looking for cheap housing and city amenities.<sup>45</sup> The resulting “gentrification” displaces lower-class Blacks from their present urban neighborhoods and forces them to move to even less desirable loca-

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40. See *Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1522-23 (11th Cir. 1991).

41. The term “glass ceiling” was first used by the *Wall Street Journal*. Carol Hymowitz & Timothy D. Schellhardt, *The Glass Ceiling: Why Women Can't Seem to Break the Invisible Barrier that Blocks Them from the Top Jobs*, WALL ST. J., Mar. 24, 1986, at D1, D4-5; see also U.S. DEPT OF LABOR, A REPORT ON THE GLASS CEILING INITIATIVE 1 (1991).

42. *Countries and Their Cultures, United States of America*, EVERY CULTURE, <http://www.everyculture.com/To-Z/United-States-of-America.html> (last visited Nov. 1, 2011) (“Inner-city schools are underfunded and have a high proportion of minority students. This reflects a history of white flight to the suburbs and a system in which schools are funded through local property taxes. Thus, in cities abandoned by wealthier whites, both tax bases and school funding have declined.”). Cf. Jan Blakeslee, “White Flight” To The Suburbs: A Demographic Approach, FOCUS, Winter 1978-79, available at [www.irp.wisc.edu/publications/focus/pdfs/foc32a.pdf](http://www.irp.wisc.edu/publications/focus/pdfs/foc32a.pdf).

43. Robert Greenstein, *Prisoners of the Economy*, NY TIMES ON THE WEB, Oct. 25, 1987, <http://www.nytimes.com/books/98/12/06/specials/wilson-disadvantaged.html> (reviewing William Julius Wilson, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY (1990)) (“[B]lack middle-class families . . . took advantage of . . . lessened housing discrimination to leave the inner cities in large numbers. Inner-city ghettos—where, in a more segregated society, the black middle, working and lower classes had lived together—have become more the domain of the black jobless, poor single-parent families and others at or near the economic bottom . . . This [Mr. Wilson] argues, has undermined community institutions formerly maintained by black middle- and working-class families, removed positive role models for young children and cut off young blacks from the informal job networks and contacts prevalent in neighborhoods where most adults are employed.”).

44. *Id.*

45. See generally Harold A. McDougall, *Gentrification: The Class Conflict over Urban Space Moves into the Courts*, 10 FORDHAM URB. L.J. 177 (1982) (discussing legal claims pursued by affluent residents in an effort to block subsidized housing in revitalized areas).

tions, often doubling and tripling up in dense living conditions as competition for urban space accelerates.<sup>46</sup> The process is led and propelled by a “gentrification industry”<sup>47</sup> (realtors, developers, mortgage lenders, and construction companies) that seeks out neighborhoods located near transportation and amenities and occupied by low-income people who are easily displaced.

### C. Community Fragmentation

In his new book, *Disintegration: The Splintering of Black America*, Eugene Robinson aptly describes the seismic shifts in the Black American landscape that have emerged over the last two or three census decades.<sup>48</sup> Five distinct groups—“transcendent” elite; a mainstream middle-class majority; a poor, abandoned minority; and two newcomers (mixed-race and immigrant)—now occupy the racial space formerly inhabited by only two classes (middle and lower class).<sup>49</sup> Robinson attributes these shifts to a number of factors, including affirmative action, individual “Horatio Alger”—type achievement, and changes in immigration and miscegenation laws.<sup>50</sup>

Robinson’s paradigm-shifting view of the new “black” America resonates powerfully with our experience. It should be approached with caution, however, while acknowledging its great value. For example, Robinson marvels at the transcendent blacks who have arrived, i.e., those who are part of the leadership of our country.<sup>51</sup> Black-tie affairs with liveried waiters, “fabulous” parties held in indoor equestrian centers, perpetual V.I.P. status—these are the indications of the great heights to which these people have climbed. It sounds like a modern version of *The Great Gatsby*,<sup>52</sup> but with eerie echoes of Franklin Frazier’s *Black Bourgeoisie*.<sup>53</sup> According to Robinson, transcendent status is what every black person, from each of the five subgroups, really wants.<sup>54</sup>

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46. *Id.*

47. See Walter Wasacz, *Gentrification?*, MODEL D (Oct. 10, 2005), <http://www.modeldmedia.com/features/gentrification.aspx>.

48. EUGENE ROBINSON, *DISINTEGRATION: THE SPLINTERING OF BLACK AMERICA* 76, 177 (2010).

49. *Id.* at 139.

50. *Id.* at 208.

51. *Id.* at 139.

52. See generally F. SCOTT FITZGERALD, *THE GREAT GATSBY* (Scribner Paperback ed. 1995) (discussing American life in the 1920s).

53. See generally E. Franklin Frazier, *BLACK BOURGEOISIE* (Free Press Paperbacks ed. 1997) (discussing the African-American middle class in the 1950s).

54. ROBINSON, *supra* note 48, at 196.

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At the opposite pole from the transcendents are the ghetto-dwellers who Robinson views with sympathy but also with occasional contempt.<sup>55</sup> He recognizes that not every ghetto family is dysfunctional, not every ghetto teenager is engaged in a life of crime and drug abuse, and that ghetto dwellers themselves divide their community between “decent” people and “street” people.<sup>56</sup> Yet, he supports Bill Cosby’s view that people live in ghettos because of their own choices and have no one but themselves to blame for the lives they lead.<sup>57</sup>

Unlike Cosby,<sup>58</sup> Robinson, to his credit, feels that the middle class mainstream and the transcendents bear some responsibility to the abandoned minority, at least enough for them to relinquish affirmative action. Robinson argues that affirmative action should be means-tested to extricate the abandoned poor minority from their plight and that members of the other three groups that have already “made it” should give up such claims.<sup>59</sup> He also calls for a domestic Marshall Plan to lift the abandoned minority to the point where they could actually take advantage of affirmative action if offered.<sup>60</sup>

He barely mentions, however, that the Civil Rights Movement that propelled successful blacks to where they are now was carried on in the name of the entire black community, and used that community’s entire fund of segregation-era social capital as fuel.

### D. Community Underdevelopment

It is true that the “abandoned minority” faces special challenges, occupying the bottom rungs of the socio-economic ladder in terms of academic performance, the percentage of two-parent households, and the income earned. African Americans comprise forty-one percent of the prison population.<sup>61</sup> Seventy-two percent of African American

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55. *Id.* at 124.

56. *Id.* at 202.

57. *Id.* at 196.

58. John McWhorter & Michael Eric Dyson, *Is Bill Cosby’s Personal Responsibility Message Unfair to Poor Blacks?*, EBONY, Dec. 2008, at 158 (referencing Cosby’s address to the NAACP on the 50th Anniversary of Brown v. Board of Education, which was delivered on May 17, 2004, at the Constitution Hall in Washington D.C.).

59. ROBINSON, *supra* note 48, at 212.

60. *Id.* at 213, 216.

61. Manning Marable, *Incarceration vs. Education: Reproducing Racism and Poverty in America*, THE RACE, POVERTY ENVIRONMENT: RACE AND REGIONALISM, Fall 2008, at 59, available at <http://www.urbanhabitat.org/node/2808>.

children are born to unwed mothers compared to the national rate of forty-one percent.<sup>62</sup>

America's historic pattern of thought blames this on weakness of individual character. Take the issue of unwed mothers. This sensitive topic took national stage in 1965<sup>63</sup> when a member of Congress, Daniel Moynihan, raised the issue in a government report.<sup>64</sup> According to Senator Moynihan, the rate of African American children born to single mothers resulted from a "tangle of pathology."<sup>65</sup> Moynihan, a white man, may have helped to publicize this sore spot during the 1960s, but, since then, many influential figures like Bill Cosby have followed suit, placing the blame on the African American community.<sup>66</sup>

These critics rarely mention the combination of unequal employment opportunity and structural unemployment that "abandoned minority" members face, however. In the aftermath of Vietnam and years of economic underinvestment, the United States adjusted its tax and fiscal policies to allow U.S. capital to migrate freely around the world in search of cheap and non-unionized labor. Blue-collar and manufacturing jobs, which moved from the inner cities to the suburbs left the country altogether. In the meantime, change from an industrial to a service economy reduced the number of jobs available to the less educated.<sup>67</sup>

When jobs for unskilled workers dried up because of these changes in industry, large numbers of blue-collar African Americans became unemployed.<sup>68</sup> Far too often, when unemployment numbers rose, so did prison populations.<sup>69</sup> Whose "fault" is this?

Employment barriers, the lack of successful role models due to class dispersal, and the disappearance of remaining cultural support networks due to gentrification conspire together in "abandoned minority" communities. Low-income parents in the city seeking employ-

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62. *Percentage of All Births to Unmarried Women: Difference By Race and Hispanic Origin, and Age, Selected Years 1960-2009*, CHILD TRENDS DATABANK, tbl.1, [http://www.childtrendsdata.bank.org/sites/default/files/75\\_tab01.pdf](http://www.childtrendsdata.bank.org/sites/default/files/75_tab01.pdf) (last visited Aug. 13, 2011).

63. See Jesse Washington, *72% of Black Babies Born to Unwed Moms; Data Revive Debate*, CHRON.COM (Nov. 6, 2010, 5:30 AM), <http://www.chron.com/disp/story.mpl/moms/7282612.html>.

64. *See id.*

65. *See id.*

66. *See id.*

67. See JARED BERNSTEIN, ECON. POLICY INST., *WHERE'S THE PAYOFF? THE GAP BETWEEN BLACK ACADEMIC PROGRESS & ECONOMIC GAINS* 3, 40 (1995).

68. *See id.*

69. *See id.*

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ment must not only find a job for which they are qualified and locate one they can reach by public transportation; they must also arrange child-care. Many “abandoned minority” households unfortunately have only one parent, further limiting available options.<sup>70</sup>

Further, most low-income parents work in the service industry during off-peak hours since they lack the necessary education and skill to secure other forms of employment.<sup>71</sup> Finding a child-care provider during off-peak hours is difficult, leaving parents no alternative but to leave their children unattended at home while the parent attempts to make a living. For many parents, finding a job that can cover their necessary expenses comes at the cost of being a parent to their children.

The choices that low-income parents make affect their children immediately as well as when they become adults. Children left without adult supervision may become juvenile offenders.<sup>72</sup> At the very least, children with inadequate supervision lack motivation to excel in the classroom,<sup>73</sup> further undermining their prospects for employment.<sup>74</sup> Finally, these children are likely to grow to be parents who lack the capacity to raise their own children, creating a generational cycle of neglect,<sup>75</sup> which further compromises the transmission of cultural DNA.

Bereft of their cultural reference points, the physiological health of community residents suffers as natural means of coping with stress

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70. Margaret Simms, Karina Fortuny, Everett Henderson, *Racial and Ethnic Disparities Among Low-Income Families*, URBAN INSTITUTE, Aug. 2009, available at <http://www.urban.org/publications/411936.html> (“African American families are the most likely to be single-headed (83%), which might make it more difficult to balance work and family responsibilities.”)

71. Sarah Goodyear, *Should Transit Systems Charge More During Peak Hours?*, STREETS BLOG NETWORK (May 7, 2010), <http://streetsblog.net/2010/05/07/should-transit-systems-charge-more-during-peak-hours/>.

72. See ERICA ZIELEWSKI, ET AL., THE URBAN INSTITUTE, CHILDREN CARING FOR THEMSELVES AND CHILD NEGLECT, WHEN DO THEY OVERLAP 5 (2006), available at <http://www.urban.org/url.cfm?ID=311323>.

73. *Parental Involvement Strongly Impacts Student Achievement*, SCIENCE DAILY (May 27, 2008), <http://www.sciencedaily.com/releases/2008/05/080527123852.htm> (“New research from the University of New Hampshire shows that students do much better in school when their parents are actively involved in their education.”)

74. *Tying Education To Future Goals May Boost Grades More Than Helping With Homework*, SCIENCE DAILY (May 19, 2009), <http://www.sciencedaily.com/releases/2009/05/090519134711.htm> (“Helping middle school students with their homework may not be the best way to get them on the honor roll. But telling them how important academic performance is to their future job prospects and providing specific strategies to study and learn might clinch the grades, according to a research review.”)

75. See Cynthia R. Mabry, *Second Chances: Insuring that Poor Families Remain Intact by Minimizing Socioeconomic Ramifications of Poverty*, 102 W. VA. L. REV. 607, 622 (2000).

fall away. Community social infrastructure erodes even more rapidly. Lack of access to health services, drinkable water, and healthy food plague “abandoned” black communities, such as those in the city of Baltimore dramatized in *The Wire*, crippling them with drug abuse, crime, and AIDS.<sup>76</sup>

#### E. Consumerism

It is no surprise that middle-class blacks flee “abandoned minority” neighborhoods whenever they get a chance.<sup>77</sup> However, what awaits them as they enter the mainstream? They too have lost a part of their cultural DNA, and mainstream American consumer culture moves in to fill the gap.<sup>78</sup>

In his 2001 book, *Jihad v. McWorld*,<sup>79</sup> Benjamin Barber refutes Francis Fukuyama’s “End of History” thesis<sup>80</sup> by demonstrating that our era, like those before, is driven by large-scale conflict and dialectic—not capitalism versus communism, or even worker versus owner, but a growing culture of consumerism and corporate control (McWorld<sup>81</sup>) versus an eroding culture of community.<sup>82</sup> Barber gave us more insight into consumer culture with his 2009 book, *Con-*

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76. Drake Bennett, *This Will Be on the Midterm. You Feel Me?* SLATE MAGAZINE (Mar. 24, 2010), [http://www.slate.com/articles/arts/culturebox/2010/03/this\\_will\\_be\\_on\\_the\\_midterm\\_you\\_feel\\_me.html](http://www.slate.com/articles/arts/culturebox/2010/03/this_will_be_on_the_midterm_you_feel_me.html) (explaining why so many colleges are teaching *The Wire*).

77. See BARACK H. OBAMA, DREAMS FROM MY FATHER 280-81 (2004).

78. See P’BITEK, *supra* note 12, at 23-33, 36, 48. In *Song of Lawino*, Ocol, who has abandoned his Acholi culture, views beauty differently from his wife Lawino. *Id.* Ocol prefers women who wear makeup and bleach their skin. *Id.* The westernized Ocol sees African people as unenlightened and uneducated. *Id.*

79. “The two axial principles of our age—tribalism and globalism—clash at every point except one: they may both be threatening to democracy.” Barber, ATLANTIC, *supra* note 5.

80. See FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN xi (1992) (arguing that liberal democracy is the “end point of mankind’s ideological evolution,” the “final form of human government, and as such, “the end of history.”).

81. Barber states:

[McWorld] is being borne in on us by the onrush of economic and ecological forces that demand integration and uniformity and that mesmerize the world with fast music, fast computers, and fast food—with MTV, Macintosh, and McDonald’s, pressing nations into one commercially homogenous global network: one McWorld tied together by technology, ecology, communications, and commerce.

Barber, ATLANTIC, *supra* note 5.

82. More specifically, [T]he . . . participatory and direct form of democracy that engages citizens in civic activity and civic judgment and goes well beyond just voting and accountability—the system I have called ‘strong democracy’—suits the political needs of decentralized communities as well as theocratic and nationalist party dictatorships have done. Local neighborhoods need not be democratic, but they can be. Real democracy has flourished in diminutive settings: the spirit of liberty, Tocqueville said, is local.

*Id.*

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*sumed*,<sup>83</sup> which portrays a growing consumer culture “infantilizing” adults and turning citizens into consumers.<sup>84</sup>

In American consumer culture, consumption validates the individual<sup>85</sup> and undercuts contributions to community.<sup>86</sup> Advertisements promote the idea of the individual over the idea of community,<sup>87</sup> undercutting community norms and values and promising individual consumer satisfaction in their place.<sup>88</sup>

American consumer culture attacks our cultural DNA,<sup>89</sup> distorting its template and compromising its integrity. Individuals are separated from their community, forming allegiances with institutions rather than with their communities.<sup>90</sup> We experience time as a resource to be spent, and give ourselves over to “rush hour.” We believe in limitlessness, and that more is necessarily better. Our participation is conditioned upon our propensity—and our ability—to consume.

Carnivalization, a key strategy in advertising and the establishment of shopping malls, offers shopping as a sensuous, transforma-

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83. See generally BENJAMIN R. BARBER, *CONSUMED: HOW MARKETS CORRUPT CHILDREN, INFANTILIZE ADULTS, AND SWALLOW CITIZENS WHOLE* 257, 257-339 (2007) [hereinafter *CONSUMED*] (discussing dominance of modern capitalism and the inability of individuals to resist, withdraw or rebel against its late consumerist phase).

84. Pamela Paul, *Proceed to Checkout*, N.Y. TIMES, Apr. 8, 2007 (reviewing BENJAMIN R. BARBER, *JIHAD VS. McWORLD: TERRORISM'S CHALLENGE TO DEMOCRACY* (1996)), <http://www.nytimes.com/2007/04/08/books/Paul.t.html>. Paul explains that:

[W]hile an earlier capitalist economy . . . was built around selling goods . . . that served people's needs, today's consumerist economy sustains profitability by creating needs, convincing us that Wikis and iPhones are necessary. It has done so by promoting what Barber calls an ethos of infantilization, a mind-set of “induced childishness” in which adults pursue adolescent lifestyles, as evidenced by their tastes and spending habits. In other words, in order to sell superfluous stuff, the market must foster a permanent mentality of “Gimme” and “I want it now!”

*Id.*

85. See Bradley A. Harsch, *Consumerism and Environmental Policy: Moving Past Consumer Culture*, 26 *ECOLOGY L.Q.* 543, 557 (1999).

86. JENNIFER L. HOCHSCHILD, *FACING UP TO THE AMERICAN DREAM: RACE, CLASS AND THE SOUL OF A NATION* 252-53 (1995).

87. *CONSUMED*, *supra* note 83, at 257-339.

88. See BENJAMIN R. BARBER, *JIHAD VS. McWORLD: TERRORISM'S CHALLENGE TO DEMOCRACY* 54 (1996) [hereinafter *JIHAD VS. McWORLD*]; Harsch, *supra* note 85, at 562-63. Commercial and industrial capitalism, in which goods are produced to meet demand, is yielding to a postmodern capitalism in which demand is manufactured by advertising. “[A]dvertising . . . detrimentally affects culture and creates unnecessary environmental harm . . . ‘it deceives young and old alike into purchases that are inappropriate, unnecessary, or wasteful, feeding the frenzy of consumption that is responsible for civilization’s overshooting present carrying capacity.’” Harsch, *supra* note 85, at 566.

89. See discussion, *supra*, note 2.

90. See P'BITEK, *supra* note 12, at 103-11 (describing the rending of families in Africa because of political affiliation).

tional experience in a fluid, anonymous social setting<sup>91</sup>—a form of liberation from established order. Carnivalization is a masterful technique employed by advertisers to seduce unwary consumers. Advertisers promote shopping as a pleasant and playful experience, “retail therapy” emancipating people from their daily concerns.<sup>92</sup> Shopping becomes a fantasy-driven and entertaining world that herds consumers into indulgence, feeling liberated in their consumption of commodities that they do not need.<sup>93</sup> Though presented as a moment of escape, consumerism becomes a daily recreational activity and an involuntary addiction.

Modern consumerism is a carnival especially for the young. Children are prime targets for marketers.<sup>94</sup> Children are influenced by advertisements from birth and can recognize brand names as early as the age of two.<sup>95</sup> Children have a huge influence on family purchases and encourage billions of dollars in family purchases each year.<sup>96</sup> Marketing experts theorize that if a child asks for an item enough times, the parent will eventually break down and purchase the item.<sup>97</sup> The marketing industry devotes a great deal of creative energy to market products to children.<sup>98</sup>

Carnivalization’s themes of escape and liberation are also very seductive to oppressed minorities. A common quality in individuals prone to conform to the idea of consumerism seems to be the lack of strong community attachment.<sup>99</sup> Such individuals are particularly susceptible to the power of suggestion, the key to the consumer advertising industry.<sup>100</sup>

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91. See CONSUMED, *supra* note 83, at 277.

92. *Id.* at 280.

93. *Id.* at 279 (“The mall, like the carnival, can be seen as a form of controlled release.”).

94. Paul, *supra* note 84; see also Sharon Beder, *Advertising to Children*, BUS.-MANAGED DEMOCRACY, <http://herinst.org/BusinessManagedDemocracy/culture/consumerism/advertising.html> (last visited Nov. 1, 2011).

95. *How Marketers Target Kids*, MEDIA AWARENESS NETWORK, [http://www.media-awareness.ca/english/parents/marketing/marketers\\_target\\_kids.cfm](http://www.media-awareness.ca/english/parents/marketing/marketers_target_kids.cfm) (last visited Nov. 1, 2011) (“Loyalties can be established as early as age two, and by the time children head off to school most can recognize hundreds of brand logos.”).

96. Kim Campbell and Kent Davis-Packard, *How Ads Get Kids to Say I Want It!*, CHRISTIAN SCI. MONITOR, Sept. 18, 2000.

97. *Id.*

98. *Id.*

99. See Harsch, *supra* note 85, at 557-58 (describing the Yankee ethic of work, sacrifice, and savings being replaced by a consumer ethic, in which individuals value leisure, hedonism and spending).

100. See Andy Coghlan, *Consumerism is ‘Eating the Future’*, NEWSIDENTIST, Aug. 07, 2009, <http://www.newscientist.com/article/dn17569-consumerism-is-eating-the-future.html?full=true>.

## *Reconstructing African American Cultural DNA*

Blacks, persistently faced with social humiliation and disappointment, fall disproportionately into this category and consume conspicuously as a consequence. Separated from their cultural DNA, transcendents and the mainstream middle-class have turned to hyper-consumption to make up for feelings of powerlessness and alienation that just will not go away. Ironically, hyper-consumption disturbs cultural patterns even further, deepening the cycle.<sup>101</sup>

Advertisers have developed marketing strategies specifically aimed to capitalize on such tendencies and to bombard black consumers with images of leisure, spending, and self-indulgence, devaluing sustainable lifestyles based on hard work and productivity.<sup>102</sup> Consumerism thus serves as both a symptom and cause of African American powerlessness. For African Americans, especially members of the middle-class, consumerism is a never-ending journey for acceptance.

Middle-class African Americans have drifted from their roots and embrace American consumer culture more and more. Many purchase goods simply for the status attached to the item.<sup>103</sup> In doing so, they have become participants in an America that consumes far more than it produces, and far more per capita than any nation in the world. It is the world's most vigorous polluter, producing more trash, waste and greenhouse gas per capita than any other nation, including China.<sup>104</sup>

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Lebow and his cronies got together to “create” the modern advertising industry, which plays to primitive beliefs . . . It makes you feel insecure, because the advertising industry turned our sense of self-worth into a symbolic presentation of the possessions we have . . . We’ve turned consumption into a necessity, and how we define ourselves.

*Id.*; see also *Consumerism, In the 21st Century*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Consumerism> (last modified Sept. 5, 2011).

As a general trend, regular consumers seek to emulate those who are above them in the social hierarchy. The poor strive to imitate the wealthy and the wealthy imitate celebrities and other icons. The celebrity endorsement of products can be seen as evidence of the desire of modern consumers to purchase products partly or solely to emulate people of higher social status. This purchasing behavior may co-exist in the mind of a consumer with an image of oneself as being an individualist.

*Id.*

101. See Harsch *supra* note 85, at 583.

102. See generally RICHARD WIGHTMAN FOX & T.J. JACKSON LEARS, *THE CULTURE OF CONSUMPTION: CRITICAL ESSAYS IN AMERICAN HISTORY, 1880-1980* ix-xvii (1983) (attempting to account for the rise of consumer culture and to explain its rise by focusing on powerful individuals and institutions that conceived, preached, and practiced the ideology of consumption).

103. See Chadsenga, *Consumer Society*, YOUTUBE (July 14, 2006), [http://www.youtube.com/watch?v=uoD3nNvwVa8&feature=player\\_embedded](http://www.youtube.com/watch?v=uoD3nNvwVa8&feature=player_embedded); Resistnetwork, *Consumer Society Has Misdirected Us About How We Find Meaning*, YOUTUBE (Nov. 21, 2008), <http://www.youtube.com/watch?v=QEwPfy0N4g>; *Century of the Self: Episode One: Happiness Machines*, YOUTUBE, <http://video.google.com/videoplay?docid=9167657690296627941#> (last visited Aug. 12, 2011).

104. *What countries produce the most trash*, GREENANSWERS.COM, <http://greenanswers.com/q/63410/recycling-waste/garbage/what-countries-produce-most-trash> (indicating that the U.S. is at the top of the list); *Report No. 5: How do we contribute individually to global warming?*, HINKLE CHARITABLE FOUNDATION, <http://www.thehcf.org/emaila5.html> (last visited Nov. 1,

Malcolm X once famously chided the black middle-class leadership of the early civil rights movement for wanting to integrate into a burning house.<sup>105</sup> However, it is not only the middle-class that is affected. The consumer culture has focused on poor and working-class blacks as images of defiance and alternative lifestyles.<sup>106</sup> This is particularly attractive to wealthy, bored, suburban white youth who pay large sums for “ghetto-style” clothing and accessories to fashion new identities for themselves that seem diverse, yet all share the same essentials of consumerism, defined by what they own, wear, or watch.<sup>107</sup>

Poignantly, Black Americans’ consumerist lifestyle affects their relationships,<sup>108</sup> minimizes physical activity, and imposes serious threats to their health.<sup>109</sup> People who care about others have better marriages, get involved in their community, tend to live longer, and have fewer diseases.<sup>110</sup>

#### F. Civic Schizophrenia

Consumer culture has another danger—civic schizophrenia, the psychopathology of privatization.<sup>111</sup> This danger results from the ten-

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2011) (“When compared to 1.3 billion people of China, the 290 million people in the US emit over seven times as much trash, per person. Viewed differently, the 290 million Americans emit 65% more carbon dioxide annually than the 1.3 billion Chinese do in total.”).

105. See generally MALCOLM X, Malcolm X: Speeches at Harvard (Archie Epps, ed., 1991) (providing a compilation of Malcolm X speeches documenting Malcolm’s progression from Black nationalism to internationalism); MALCOLM X, MALCOLM X SPEAKS (George Breitman ed., 1990) (providing a compilation of Malcolm X speeches discussing several issues including integration). Apparently the expressions “integrate into a burning house” originated with James Baldwin. See JAMES BALDWIN, THE FIRE NEXT TIME 111 (1963).

106. See CONSUMED, *supra* note 83, at 61 (noting how the marketing of “America” ironically displays many images of black ghetto life—as “cool and hip” (à la Jack Kerouac)—living on the edge in America, surviving and excelling by your wits, making American ghetto culture thrilling to outside observers).

107. Harsch observes that:

[C]onsumption can also become a means of achieving . . . feelings of being socially accepted . . . based on an individual’s self or group identity, she or he may be more likely to consume products that societally represent a cohesive identity . . . consumers create an identity for themselves by buying products that, taken together, represent some identity or role. . . wearing the right clothes, driving the right car, and living in the right quarters are all some ways of saying “I’m OK”. . . [Other-directed people, according to David Riesman] use consumption, rather than character, intelligence or integrity [cultural values] as a means of gaining respect.

Harsch, *supra* note 85, at 563-64; see also *id.* at 568 (“[A]dvertisements . . . condition people to seek emotional and psychic fulfillment through consumption of material goods.”).

108. See O’Hara, *supra* note 6, at 43 (“Time spent with others, time spent in observation, time spent for renewal – without time neither productive, nor consumptive, neither creative nor communicative functions are possible.”).

109. See discussion *infra* text accompanying note 188 (discussing obesity in African American communities).

110. See Harsch, *supra* note 85, at 593.

111. See CONSUMED, *supra* note 83, at 128.

sion between the private and public self in clash between “me and we, of id and ego, of [capitalism’s] economic mandate and its [allegedly democratic] value system.”<sup>112</sup> Consumers are overwhelmed by too many private market choices, and citizens are disempowered by the lack of real public choices on our nation’s agenda.<sup>113</sup>

Consumerism’s aim is not for the benefit of society, but for the needs of the individual. This dueling between what an individual wants and the greater societal good creates civic schizophrenia. In the meantime, America’s economy is in shambles. To maintain its profligate, “consumerist” way of life, it must continually engage both its citizens and its dwindling treasure in war. Racism, religious intolerance, and xenophobia inhabit an uncomfortable place in our national psyche, just below the surface, breaking out on talk radio and increasingly in public demonstrations.

### III. REBUILDING AFRICAN AMERICAN CULTURE AND COMMUNITY

Barber believes that the only antidote to McWorld’s metastasizing consumer culture and the civic schizophrenia it spawns is a stronger form of democracy.<sup>114</sup> McWorld’s consumerism atomizes the general will of citizens<sup>115</sup> into the wills of individual consumers, too alienated from one another to create social force at the scale necessary to solve their common problems. Stronger democracy could shore up a culture of citizenship and help us resist civic schizophrenia.<sup>116</sup>

Oddly, Barber gives short shrift to the forces of community, the so-called “third way” of civil society. He seems to regard civil society as an insufficient—even dangerous—counterpoint to McWorld. While generally respectful of communitarian impulses, Barber makes a powerful suggestion by viewing them all through the lens of “jihad,” community in an extreme and reactionary form.<sup>117</sup>

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112. *Id.* at 130.

113. *Id.* at 142.

114. Harkening back to a much earlier work, *Strong Democracy* was much more community-oriented. See generally BENJAMIN R. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* (1984) [hereinafter *STRONG DEMOCRACY*] (describing the need for a participation of all people, in some respect, in government).

115. The term “general will” is Rousseau’s construct. See JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT OR PRINCIPLES OF POLITICAL RIGHT*, Book II, ch. 3 (1762), <http://www.constitution.org/jjr/socon.htm> (last visited Aug. 12, 2011).

116. See *STRONG DEMOCRACY*, *supra* note 114, at xii.

117. See *JIHAD VS. MCWORLD*, *supra* note 88, at 4.

In my own work, I have closely examined community's power to educate, check, and renovate democracy.<sup>118</sup> I have also examined its power to create "third way" forms for direct problem-solving that are useful alternatives to government and the market.<sup>119</sup> Barber underestimates the power and importance of community. It is community—not the market, not government—that is the crucible of culture, and culture is the root of problem-solving, of intelligence itself.

#### A. Cultural Renovation

To sustain human life, consumers must learn to value their communities and the individuals in those communities as well as communities around the world; learn, respect, and employ local civil and social balance; be flexible with time; acknowledge responsibility to future generations; and resist political corruption and opportunism. However, sustainable culture needs political support. Cultural DNA strands must be promoted by off-the-grid political and civil action—a style that was once highly developed in African American communities.

The values of *context*<sup>120</sup> and *place*<sup>121</sup> urge us to invest in black communities whether or not we choose to live in such communities ourselves, much as American Jews support Israel. Neighborhoods are more than just places to live; they can affect a person's possibilities for employment and wealth accumulation,<sup>122</sup> as well as one's friends, personal safety, and the schools that one's children attend. They are an integral part of the systems that structure peoples' lives. "Abandoned minority" neighborhoods deserve our support.

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118. See, e.g., Harold A. McDougall, *Social Movements, Law, and Implementation: A Clinical Dimension for the New Legal Process*, 75 CORNELL L. REV. 83 (1989) (examining the history and evolution of "discussion groups" that aimed to create law and public policy in the area of civil rights); see also BLACK BALTIMORE, *supra* note 22.

119. See Harold A. McDougall, *The New Property vs. The New Community*, 24 UNIV. S.F. L. REV. 399 (1990).

120. See *supra* note 7.

121. See O'Hara, *supra* note 6, at 49.

122. See Nancy A. Denton, *In Pursuit of a Dream Deferred: Linking Housing and Education—The Persistence of Segregation: Links Between Residential Segregation and School Segregation*, 80 MINN. L. REV. 795, 817 (1996); see also Scott J. South & Glenn D. Deane, *Race and Residential Mobility: Individual Determinants and Structural Constraints*, 72 SOC. FORCES 147-48 (1993).

B. Preparing the Youth

In order for youth potential to deepen and expand, the grave threats to our young people's educational development must be addressed. Today, African Americans are likely to attend schools with fewer resources than those attended by their white counterparts.<sup>123</sup>

Action-oriented public citizenship curricula for our middle-school and high-school students, linked to their social studies program, can help students' overall learning improve. Educating the youth about social problems inherent to the African American community will give them a "cultural DNA" perspective that can push them to excel in the classroom, helping bridge the troublesome "achievement gap" between minority and majority students.

Mentors are also needed to properly educate the youth and prepare them for today's difficult social and economic challenges. Youth mentoring should begin as early as middle school and continue throughout high school. In college, students often find mentors of their own, but outreach by the college and its alumni can be a great help here. HBCUs have done a particularly good job in this respect.

The *participation*<sup>124</sup> strand of cultural DNA requires that we be invested in the success of every African American, especially the youth. We want them to know how to pick up the reins, because our sense of *temporality*<sup>125</sup>—another strand—assures us that one day we will drop them.

As we teach them and send them on their way, we have a responsibility to pass on the tenets of social engineering, as our generation understands them: learn by experience; respect context; encourage participation; honor place; accept limits; and acknowledge temporality. These strands of cultural DNA, traditional and modern, can help us construct a culture of empathy<sup>126</sup> and sustainability, moderating, if

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123. Marable, *supra* note 61, at 60 ("The patterns of racial inequality and unfairness [in the development of black educators]—from tenure decisions to the difficulties black graduate students have in finding employment as teaching assistants—continue to exist.")

124. See O'Hara, *supra* note 6 (observing that participation is unconditionally including each member of the community in common efforts and benefits).

125. How we experience time and what we think time's purpose is. *Cf. id.* at 10-12.

126. See generally JEREMY RIFKIN, *THE EMPATHIC CIVILIZATION: THE RACE TO GLOBAL CONSCIOUSNESS IN A WORLD IN CRISIS* (2009) (providing an analysis of the emphatic evolution of the human race and the profound manner in which it has shaped our development). According to Arianna Huffington,

Jeremy Rifkin's *The Empathic Civilization* . . . sets out to present nothing less than—as Rifkin puts it—"a new rendering of human history and the meaning of human existence."

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not replacing, the consumer culture that threatens to eat the world before our grandchildren get to taste it.<sup>127</sup>

The young people of today are linking all the patterns of my generation and of the generations that preceded us with the Internet's patterning of vast sources of information,<sup>128</sup> as well as many new non-consumerist cultural patterns from outside the black community.<sup>129</sup> They have already changed the complexion of the White House. Who knows what more they will achieve?

### C. Social Business-the Economic Dimension

The value of *limits* gives us an appreciation of the world's finiteness and enables us to challenge the idea that more is better, and to resist the ever-increasing consumption that McWorld presses upon us. Holding the blandishments of consumer society at bay, we can perhaps overcome our civic schizophrenia and focus our resources on some things that are much more important.

Efforts to renovate African American culture and develop African American youth require economic support.<sup>130</sup> Social business is a good approach—it serves individuals' real needs, as opposed to needs

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Empathy, Rifkin tells us . . . lies at the very core of human existence.

. . . .

[T]he progress of civilization has been a constant struggle between empathy—increased human connection—and entropy, the deterioration of the health of the planet.

. . . .

The Empathic Civilization . . . challenges the conventional view of human nature embedded in our educational systems, business practices, and political culture—a view that sees human nature as detached, rational, and objective, and sees individuals as autonomous agents in pursuit primarily of material self-interest. And it seeks to replace that view with a counter-narrative that allows humanity to see itself as an extended family living in a shared and interconnected world.

Arianna Huffington, *Only Empathy Can Save Us: Why Jeremy Rifkin's The Empathic Civilization Is This Month's HuffPost Book Club Pick*, THE HUFFINGTON POST (Feb. 3, 2010, 12:30 PM), [http://www.huffingtonpost.com/arianna-huffington/only-empathy-can-save-us\\_b\\_447685.html](http://www.huffingtonpost.com/arianna-huffington/only-empathy-can-save-us_b_447685.html).

127. See Dorothy Noyes, *The Judgment of Solomon: Global Protections for Tradition and the Problem of Community Ownership*, 5 CULTURAL ANALYSIS 27-56 (2006); see also Hafstein & Valdimar Tr., *The Politics of Origins: Collective Creation Revisited*, 117 J. AM. FOLKLORE 300, 300-15 (2004).

128. See RIFKIN, *supra* note 126, at 575-80.

129. See, e.g., OBAMA, *supra* note 77, at 62, 78, 258. There is much to be learned from the Eastern cultures of India and China in particular. See generally ANODEA JUDITH, *WHEELS OF LIFE: A USER'S GUIDE TO THE CHAKRA SYSTEM* (1987) (commenting on Indian world views and cultural patters); EFREM KORNGOLD, *BETWEEN HEAVEN AND EARTH: A GUIDE TO CHINESE MEDICINE* (1992) (commenting on Chinese world views and cultural patterns).

130. See Maribel Alvarez, *Strike a Global Pose: Considerations for Working with Folk and Traditional Cultures in the 21st Century*, INDIANA U. SCHOLAR WORKS (Aug. 7, 2011, 4:33 PM), [https://scholarworks.iu.edu/dspace/bitstream/handle/2022/6595/FFC\\_WP\\_2008.pdf?sequence=1](https://scholarworks.iu.edu/dspace/bitstream/handle/2022/6595/FFC_WP_2008.pdf?sequence=1) (2008) (“[C]urrent global economic and social structures that bring survival matters to the forefront of people's traditional cultures may be impinging on traditional cultures. . . .”).

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created by marketers.<sup>131</sup> Social businesses provide community services at fees that are low enough so that residents can afford them, yet high enough to sustain the business and the operators.

Three major thinkers, the most important of whom is Mohamed Yunus, winner of a Nobel Prize in economics for his contribution to the concept, developed the idea of social business.<sup>132</sup> These are ideas and cultural patterns from outside the African American community that can leaven African American cultural DNA.

C. K. Prahalad's contribution was to identify the economic power held by less affluent consumers at the bottom of the economic pyramid due to their large number.<sup>133</sup> According to Prahalad, people must stop viewing the impoverished as "pitiful outliers" who do not attract investment.<sup>134</sup> People must change their perception and view the impoverished as collaborators, or possibly potential customers.<sup>135</sup>

Hernando De Soto contributed the insight that the less affluent at the bottom of the pyramid often already have economic power, because of their role in the informal economy.<sup>136</sup> While his ideas for legitimizing the informal economy have some serious drawbacks—taxation and regulation, for example, which might crush these fragile economic structures—the insight is important.

Yunus put it all together, and did more than think about it. His Grameen Bank focused on women in the informal economy who were also at the bottom of the economic pyramid.<sup>137</sup> Providing small groups of these women with very small micro-credit loans, he made it possible for them to raise their level of business activity to a point

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131. See also CONSUMED, *supra* note 83, at 316 ("Unless ways can be found to help capitalism survive and prosper by serving real rather than faux needs, by providing services to those who are not yet consumers rather than those addicted to consumption, no resistance from inside the market is likely to succeed."). See generally MUHAMMAD YUNUS, CREATING A WORLD WITHOUT POVERTY: SOCIAL BUSINESS AND THE FUTURE OF CAPITALISM (2008). Vaccines and mosquito nets are two examples of products that could secure the health and safety of children and that would be widely produced and distributed but for capitalism's profit motivation. See *id.* at 317-18.

132. BARBER, CONSUMED, *supra* note 83, at 320 (discussing Prahalad, DeSoto, and Yunus).

133. C.K. PRAHALAD, THE FORTUNE AT THE BOTTOM OF THE PYRAMID: ERADICATING POVERTY THROUGH PROFITS 10 (2004).

134. BARBER, CONSUMED, *supra* note 83, at 320

135. *Id.*

136. HERNANDO DE SOTO, THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD (1990).

137. BARBER, CONSUMED, *supra* note 83, at 320.

where they could sustain themselves as well as provide valuable services to their communities.<sup>138</sup>

These micro-businesses did not seek profit, but were not charitable either.<sup>139</sup> Rather, they were “not for loss,” modestly maintaining themselves and their owners while providing essential services to their neighbors.<sup>140</sup> Social businesses thus avoided the pitfalls of profit-motivated greed on the one hand, and charitable dependence on the other.

Social businesses that go off the grid and embrace strands of cultural DNA<sup>141</sup> are critically important to the struggle for a sustainable economy. They can help counter the “disembeddedness”<sup>142</sup> of a globalized economy, enabling consumers to value their communities and their local environments and adhere to sensible consumption limits that acknowledge their stewardship obligation to future generations.

In *contextual* terms, these social businesses could complement the “disembedded” expertise of the globalized economy with local knowledge. They could counter the erosion of local social and ethical structures and the consequent loss of trust. They could utilize, revitalize, and renovate folk skills.

To rebuild a *sense of place*, social businesses could employ knowledge of the locality to help reduce our reliance on chemicals and fossil fuels, reverse the loss of biodiversity and arable land, and prevent health hazards. The business could enhance conservation; reduce pollution, waste, and dependence on processed food and manufactured goods; develop technology that understands nature rather than subduing it; and encourage the consumer and producer to share the risks of supply and demand rather than keep them hidden in anonymous money transactions.

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138. See generally MUHAMMAD YUNUS, *CREATING A WORLD WITHOUT POVERTY: SOCIAL BUSINESS AND THE FUTURE OF CAPITALISM* (2008).

139. Muhammad Yunus, *Social Business*, THE YUNUS CENTRE (Dec. 25, 2007), <http://www.muhammadyunus.org/Social-Business/social-business/>.

140. *Id.*

141. See, e.g., Craig Dreeszen, MONOGRAPH SPECIAL REPORT: BUILDING CREATIVE ECONOMIES: THE ARTS, ENTREPRENEURSHIP, AND SUSTAINABLE DEVELOPMENT 5 (2003), available at <http://www.arc.gov/images/programs/entrep/BuildingCreativeEconomiesReport.pdf>.

142. See FRED BLOCK, INTRODUCTION TO KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* xxiii-xxv (2d ed. 2001); see also BOOKRAGS, [http://www.bookrags.com/research/polanyi-karl-este-0001\\_0003\\_0/](http://www.bookrags.com/research/polanyi-karl-este-0001_0003_0/) (last visited Sep. 19, 2011) (stating that according to Polanyi, capitalism is unique among economies in the world’s history in that it separated economic relationships from other social connections such as family, community, and religion, “disembedding” these economic relationships).

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To restore a proper sense of *temporality*, social businesses could harmonize production and consumption with natural time cycles. “Flex” time, for example, can help us appreciate and enhance other strands of cultural DNA, which have implications for civic and political action. Sustainable social businesses counter disembodiedness with *context*, for example, strengthening social relationships and local civic, cultural, and economic structures.

Increasing our acceptance of and appreciation for *limits* will help us enhance conservation and reduce pollution and waste, as well as free us from our dependence on processed food and manufactured goods. Accepting the limits within which we must work will help us focus our creativity on developing environmentally-friendly technology.

A commitment to full *participation* of each community member will—increase social capital and promote bottom-up solutions.

For African Americans to achieve economic parity in American society, black business ownership and revenues must roughly approximate the black portion of the population.<sup>143</sup> Entrepreneurship is specifically beneficial because it provides increased employment opportunities, retail services, and tax revenues.<sup>144</sup> Yet, potential neighborhood business owners will not be able to compete successfully without dramatically increasing their skills. For successful business activities, increases in human and social capital are needed.<sup>145</sup>

Human capital deals with the skills, attitudes, experiences and values necessary to operate a successful business.<sup>146</sup> Social capital, linked to cultural DNA, deals with the networks of trust relationships, family support, and mentoring, which are acquired and developed over time providing access to and credibility with sellers of credit, equipment and other resources.<sup>147</sup> The dual goals of investing in the

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143. See Robert E. Suggs, *Economic Justice in America's Cities: Visions and Revisions of a Movement – Bringing Small Business Development to Urban Neighborhoods*, 30 HARV. C.R.-C.L. L. REV. 487, 487 (1995); see also Andrew F. Brimmer, *Small Business and Economic Development in the Negro Community in*, BLACK BUSINESS ENTERPRISE: HISTORICAL AND CONTEMPORARY PERSPECTIVES 164 (Ronald W. Bailey ed., 1971) (reporting that the prospects of success of African American businessmen in non-personal services industries such as manufacturing is extremely dim).

144. See Suggs, *supra* note 143, at 488.

145. See *id.* at 489, 499.

146. See *id.* at 489.

147. See *id.*

human and social capital of the “abandoned minority” can only come about if the middle-class gets involved.<sup>148</sup>

#### IV. ENGAGING THE UNIVERSITY: ACTION RESEARCH

Action research is a problem-solving process carried on by individuals cooperating in a “community of practice” to improve the way they address issues and solve problems,<sup>149</sup> planning their work and reflecting on the results. I believe Howard University is in a good position to leverage and expand its community involvement and community service by using action research to leaven its community-based social justice work with the considerable intellectual and social capital it has at its disposal (indeed, the *Brown v. Board of Education* litigation strategy developed at Howard University School of Law by means of such an approach<sup>150</sup>).

While Howard has many community projects that could benefit from an action research approach,<sup>151</sup> I will focus on one of its highest profile efforts—Alternative Spring Break (ASB).<sup>152</sup> Howard University’s ASB has taken students on public service missions since 1996—immersing participants in “abandoned minority” neighborhoods to provide immediate assistance as well as to reflect on the challenges at hand.<sup>153</sup> Since Hurricane Katrina in 2005, ASB has taken students to New Orleans every year to help rebuild the city. In 2009, the mission

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148. David D. Troutt, *Katrina’s Window: Localism, Resegregation, and Equitable Regionalism*, 55 BUFF. L. REV. 1109, 1115 (2008).

149. See, e.g., Action Research, WIKIPEDIA, [http://en.wikipedia.org/wiki/Action\\_research](http://en.wikipedia.org/wiki/Action_research) (last visited Aug. 12, 2011) (“Action research . . . is a reflective process of progressive problem solving led by individuals working with others in teams or as part of a ‘community of practice’ to improve the way they address issues and solve problems.”). See generally JOHN ELLIOTT, ACTION RESEARCH FOR EDUCATIONAL CHANGE (1991) (discussing action research as a form of teachers’ professional development).

150. See McNEIL, *supra* note 23, at 56, 117, 140.

151. For example, international programs could benefit from an action research approach. See, e.g., Aleesa Mann, *New Project Aims to Expand Howard’s Global Impact*, HOWARD U. NEWS SERVICE (Mar. 2, 2011, 6:03 PM), <http://www.hunewsservice.com/news/new-project-aims-to-expand-howard-s-global-impact-1.2043498>.

152. Three-hundred undergraduates and graduates, including an additional fifty Howard University School of Law students, participated in Alternative Spring Break (“ASB”) 2010. Originally coordinated through the Office of the Dean of the Chapel, the project is now headed by Dr. Paula Whetsel-Ribeau, wife of Howard University President Sidney Ribeau. See Camille Augustien, *Howard University Students Embark on Life Changing Experience*, THE HILLTOP, Mar. 22, 2010, <http://www.thehilltoponline.com/howard-university-students-embark-on-life-changing-experience-1.2197473> (last visited Aug. 14, 2011).

153. *HU Alternative Spring Break 2012*, FACEBOOK, <http://www.facebook.com/group.php?gid=84644468289> (last visited Aug. 12, 2011).

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expanded to include the cities of Detroit, Chicago, and the District of Columbia.<sup>154</sup> In 2010, ASB expanded to include the city of Atlanta.<sup>155</sup>

One of ASB's key focal points has been mentoring school children.<sup>156</sup> In the District of Columbia, for example, ASB has focused on students in five elementary schools: (1) Malcolm X; (2) Turner at Green; (3) Simon; (4) Francis Stevens; and (5) Stanton elementary schools, all in Southeast Washington.<sup>157</sup> ASB volunteers serve as teachers' aides and have focus on reducing the "achievement gap" facing black and Latino students as well as the steady stream of young African Americans entering the criminal justice system.<sup>158</sup> They are also working with juvenile offenders on parole at the *Safe Passages* program at Cleverly Baptist Church in Washington, D.C.<sup>159</sup>

How might action research enhance these efforts? I posed that question to students in my Civil Rights Planning and Sustainable Development seminars, as well as students involved with a middle-school mentoring project I launched in Montgomery County, Maryland, several years ago (this project, Boys II Men and Girls II Women, engages Howard Law students with middle-school minority youth in Takoma Park, Maryland). The team<sup>160</sup> decided upon a "community school" initiative. This initiative first identifies the middle-school in the District to which the ASB elementary school students are bound as a focal point for a year-round project. Then the Boys II Men/Girls II Women group would expand to service the surrounding community as a whole. We would focus the University's social and intellectual capital through a "social incubator" tying the middle school to university academic programs relevant to the community school initiative.<sup>161</sup>

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154. The Howard University Alumni Club ("HUAC") of Greater Washington, D.C. awarded the ASB program with the 2009 Service Organization of the Year award for work and service outside of the Howard University community. Lauren Gaspard, *ASB Volunteers Presented Service Award*, THE HILLTOP (Apr. 1, 2009), <http://www.thehilltoponline.com/asb-volunteers-presented-service-award-1.1637836>.

155. *Id.*

156. *Id.*

157. See *Alternative Spring Break, Latest News: Howard Students Fight Educational Disparities and Incarceration*, HOWARD U., <http://www.howard.edu/asb/2010/washingtondc.htm> (last visited Aug. 12, 2011) [hereinafter *Alternative Spring Break*].

158. *Id.*

159. *Id.*

160. The team consisted of students Indongesit Umo, Ebony Wheaton, Jaymes Sanford, Fathia Touray, and Geovanny Martinez.

161. See, e.g., *Middle School of Mathematics and Sciences (MS)<sup>2</sup>*, HOWARD U., <http://www.howard.edu/ms2/> (last visited Aug. 12, 2011) ("The Howard University Middle School of Mathematics and Science (MS)<sup>2</sup> is a public charter school committed to academic excellence, with a specific focus on mathematics and science.").

A. Community Schools

Especially in low-income communities, a child's home and community environment impacts school performance. Community schools pair the municipal government and the community with the school system to integrate academics with health and social services, youth and community development, and civic engagement.<sup>162</sup>

The community school model grows out of early Progressive notions of the school as a social center.<sup>163</sup> Modern examples include the Mirabal Sister Campus in New York City and Sayre High School in Philadelphia, Pennsylvania. Other community school experiments include: the Chicago Community Schools Initiative, the Houston Communities in Schools Program; Schools Uniting Neighborhood Community Schools of Multnomah County in Portland; the Tulsa Area Community Schools Initiative; and the United Way of Greater Lehigh Valley's Community Partners for Student Success Initiative in Allentown, Bethlehem, and Easton, Pennsylvania.<sup>164</sup>

Mirabal, a group of sister public schools serving sixth through eighth grade children, supplements its academic program with a full-service school-based health center, after-school and summer programs (including athletics, performing and visual arts, technology, design and leadership training). They also offer classes for English as a Second Language, computer, GED, and vocational training to parents and to the community at large. Student achievement and literacy, levels of discipline and attendance, as well as parent involvement have steadily increased. Dropout rates have dramatically decreased.

Sayre High School, located in a predominantly African American Philadelphia community, collaborates with the Netter Center for Community Partnerships at the University of Pennsylvania.<sup>165</sup> Like Mirabal, Sayre has a health clinic and after-school programs.<sup>166</sup> Sayre also has an extensive student service-learning program, using community issues such as lead-based paint, obesity, and hypertension to en-

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162. See Coalition for Community Schools, *Community Schools Across the Nation: A Sampling of Local Initiatives and National Models*, COMMUNITY SCHOOLS, <http://www.communityschools.org/assets/1/AssetManager/Community%20School%20Models2009.pdf> (last visited Aug. 12, 2011).

163. See Steny Hoyer & Randi Weingarten, *Re-Imagining What a School Can Be*, THE HILL'S CONGRESS BLOG (Oct. 1, 2009, 2:06 PM), <http://thehill.com/blogs/congress-blog/education/61169-re-imagining-what-a-school-can-be-house-majority-leader-steny-hoyer>.

164. See McDougall, *AFRICAN-AMERICAN CIVIL RIGHTS IN THE AGE OF OBAMA*, *supra* note 29, at 164-65.

165. *Id.*

166. *Id.*

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rich the core curriculum to build awareness and capacity in the community at large.<sup>167</sup> University of Pennsylvania students in medicine, nursing, social work, dentistry, and law serve as mentors and classroom aides at the Sayre School.<sup>168</sup>

Sayre has experienced significant improvements in inner-student and general classroom behavior, improved academic performance, greater rates of homework completion, and student math scores exceeding the statewide average.<sup>169</sup> Sayre's "Family Fitness Nights" have also produced healthier eating habits among the students' families and increased their levels of exercise.

Community schools are at the epicenter of sustainable communities, providing services to children and their families during the school year, weekends, and summer vacation. Co-locating facilities such as libraries and other recreational facilities could enhance these efforts. In Atlanta, coordinating school construction with YMCAs, affordable housing and other community development efforts worked well to create dynamic communities that are attractive to families of all ethnicities and income levels.

Another excellent model is the Harlem Children's Zone ("HCZ"), a center designed to follow and support youth academic achievement in a twenty-four-block area of Harlem.<sup>170</sup> Under CEO Geoffrey Canada's leadership, the covered area has grown to one-hundred blocks, serving more than 17,000 people and an associated network of block associations.<sup>171</sup>

Even more impressive is the breadth of their program, which operates in-school, after-school, social service, health, and community-building programs.<sup>172</sup> HCZ provides academic programs such as early reading initiatives, a charter school, support for children not in the charter school, employment and technology preparation, and college placement.<sup>173</sup> They also address the community context in which children learn, providing community members with programs in media-

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167. *Id.*

168. Laura Cavender, *Engaging Locally: The Sayre High School, The Penn Compact*, <http://www.upenn.edu/president/penn-compact/sayre-high-school> (last visited Aug. 12, 2011).

169. *Id.*

170. The HCZ Project, 100 Blocks, One Bright Future, HARLEM CHILDREN'S ZONE, <http://www.hcz.org/about-us/the-hcz-project> (last visited Aug. 12, 2011); *see also* Aisha Granville, *The Community Fraternity* (2010) (unpublished paper) (on file with the author).

171. Granville, *supra* note 170, at 2, 9-10.

172. *Id.*

173. *Id.*

tion training, health and fitness, family counseling and parent training.<sup>174</sup>

HCZ's "Single Stop" program provides clients with legal guidance, financial advice, debt-relief counseling, and domestic crisis resolution.<sup>175</sup> The Obesity Initiative helps children and their families reverse the trend toward obesity and its corresponding health problems.<sup>176</sup> The Family Development Program specializes in access to mental health professionals who collaborate with caseworkers to support therapeutic interventions.<sup>177</sup> The Clean Living and Sober Program specializes in providing referrals to drug and alcohol abuse programs, as well as creating, implementing, and monitoring drug treatment service plans.<sup>178</sup>

#### B. University-Based Social Incubators

Social incubators support groups organizing to meet a community need. Because of universities' intellectual capital and the large number of potential student activists, institutions of higher learning are ideal locations for social incubation projects.

Most of the Top 50 Colleges and Universities in the nation are located in communities of need, but rarely do universities look beyond their immediate academic environment.<sup>179</sup> Some of these universities have developed living learning communities that allow students to live together, participate in small seminars and discussions, take specific classes, and reside with course professors in the same residence hall.<sup>180</sup> These communities focus on integrating the academic and the social aspects of learning. Service learning is another approach, based on John Dewey's notions of experimental learning.<sup>181</sup> Newer social incubation approaches include community-university partnerships.<sup>182</sup>

Community-university partnerships collaborate with local businesses and industries to help implement programs designed by students.<sup>183</sup> Harvard, Stanford, and Santa Clara universities have such

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174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. See N. Alyssa Fobi, Sustainable Development Seminar: The University as a Social Incubator 5-6 (Spring 2009) (unpublished paper) (on file with the author).

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

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programs.<sup>184</sup> These programs help to identify potential social ventures, collaborative partnerships, and opportunities that can be developed with university resources.<sup>185</sup>

### C. Combining Social Incubator and Community School

Muhammad Yunus-style social businesses are excellent clients for social incubators and permit us to combine the best practices of the programs mentioned above. Living-learning communities can be constructed around community-based rather than university-based social projects. Service-learning credits should be available to students, but only if they take seminars concurrent with their community work, which teaches them to appreciate the perspectives of the communities they serve. Combining these approaches with clinical and community/university partnership programs in a social incubator will allow students to learn through experience as well as develop useful projects that can be implemented with university resources, student participation, community norms, and social capital.

### D. Action Research

My Civil Rights planning student Indongesit Umo, a product of DC schools, reached out to the Principal of Charles Hart Middle School with the intention of establishing a Boys II Men/Girls II Women program that would begin implementation of our community school project. All of the elementary school students mentored in Howard's ASB program in DC (from Malcolm X, Turner at Green, Simon, Francis Stevens, and Stanton elementary schools) will eventually attend Hart Middle School.<sup>186</sup> Boys II Men/Girls II Women could engage with them at that time, on a year-round basis.<sup>187</sup>

Umo proposed to begin broadening the Boys II Men/Girls II Women project to a full-fledged "community school," first by identifying vendors to provide afterschool meals to students mentored in the program. These vendors could be community members whose culinary skills were enhanced through a social incubator actually located at the

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184. *Id.*

185. *Id.*

186. See Alternative Spring Break, *supra* note 157.

187. See Indongesit Umo, New Approaches for DC Public Schools (2010) (unpublished paper) (on file with author). Umo also wrote an extensive research paper for the project, examining the history and current difficulties of the D.C. Public School System and developing solutions in the best traditions of action research. *Id.*

school, operating in the evenings, but also teaching nutrition and food preparation to students during the regular school session. A twenty-four/seven infirmary serving the entire community would also be based at the school.

Other students suggested social incubator approaches to develop community school-based responses to growing child obesity,<sup>188</sup> the lack of parent financial literacy,<sup>189</sup> the need for community health outreach programs<sup>190</sup> and problems of violence and incarceration.<sup>191</sup> Another team member raised the importance of exposing students to non-consumerist problem solving patterns from other cultures.<sup>192</sup> This suggests two approaches: (1) a middle-school course in elemen-

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188. In her paper for my Civil Rights Planning seminar, April Hunter explained:

New and innovative approaches must be implemented in order actually to affect minority communities in particular. Some new approaches include a Supplemental Nutrition Assistance Program that provides food stamp recipients with a discount on every dollar spent on fresh produce; Supermarket shuttles that provide low income individuals with transportation to supermarkets; Non-profit fitness and health centers with membership based on income; and Garden Resource Programs that work with community members to help residents eat better by participating in urban gardens.

April Hunter, *Obesity in the African American and Hispanic Community* (Fall 2010) (unpublished paper) (on file with the author). Christopher Boone, Kara Hoffman, and Tiffany Lindsay, in my spring 2010 Sustainable Development Seminar, also wrote interesting papers on this topic. Cf. Erica Nzei, *Local Food that Nourishes for Everlasting Life*, DISTRICT CHRONICLES (Dec. 30, 2007), available at <http://media.www.districtchronicles.com/media/storage/paper263/news/2007/12/30/Business/Local.Food.That.Nourishes.For.Everlasting.Life-3145699.shtml> (interviewing Dr. Baruch Ben-Yehudah of Everlasting Life Health Complex and Organic Market in Temple Hills, Maryland, who states, “fast food is fast, but your body does not recognize it as food, despite the fact that it is engineered to smell and taste like good food”).

189. See, e.g., Jaylen Johnson, *Saving For \$ustainability: Achieving Economic Sustainability for Black American and Black African Communities through Financial Literacy* (2009) (unpublished paper) (on file with the author). Johnson interviewed—on April 14, 2009—Keith Bourne, Manager of Business Planning & Development at Barbados Public Workers’ Co-operative Credit Union Limited “BPWCCUL,” who stated that, “an example of a credit union that has had a positive economic impact on its community of members is in Barbados. The establishment and growth of the BPWCCUL has helped shape the economic and social landscape of the Barbadian community.” *Id.*

190. Francesca Braz, *The State of Black Health in America* (2010) (unpublished paper) (on file with the author).

191. See generally Bianca Cooper, *Gun Violence as a Hate Crime* (2010) (unpublished paper) (on file with author) (describing CeaseFire Chicago’s public health strategy to increase neighborhood safety and the Smart and Safe initiative that was developed by the Chicago branch of the NAACP); Shateera Reed, *How the Under-Education of African American Men leads to the Over-Incarceration of African American Men* (2010) (unpublished paper) (on file with author) (describing the Shelby County Juvenile Detention Center’s Hope Academy, established in collaboration with the Memphis City Schools); Darcia Rufus, *Do You Fit The Description—Racial Profiling and Felony Disenfranchisement* (2010) (unpublished paper) (on file with author) (describing “community justice centers” that offer an array of sanctions, including community restitution projects, on-site educational workshops and GED classes, drug treatment and mental health counseling—all rigorously monitored to ensure accountability and drive home notions of individual responsibility).

192. Memorandum from Ebony Wheaton, Professor Harold A. McDougall (Jan. 21, 2011) (on file with author).

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tary cultural anthropology<sup>193</sup> and cultural literacy, and (2) a course in media literacy to immunize youngsters against McWorld's consumerist messaging.<sup>194</sup> Some of these ventures would be delivered to adults in the community in the evenings as well as to children during school hours. The social incubator shows real promise, and could be used to develop a wide variety of social businesses aimed to meet community needs.

Umo also urged enhanced parental involvement using organizational models such as the NAACP Parents Councils, which I developed while serving as the Executive Vice President of the Montgomery County, Maryland NAACP in the 1990s. Parents could also receive training through models such as those used by the William Caspar Graustein Memorial Fund in Connecticut, whose leadership met with my student team in the fall of 2010. The Fund has been very effective in obtaining and sustaining parental involvement in school issues.<sup>195</sup> They have created parent leadership training and other services that keep the parents involved with the program.<sup>196</sup>

Finally, Umo pointed to the University of Southern California's Joint Educational Program (JEP), through which the University sends student tutors to neighborhood schools as part of their curriculum.<sup>197</sup> This approach could be enhanced by adding medical students to assist in the infirmary and business students to help with the social incubator.

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193. The University of Maryland, Baltimore County (UMBC), the honors university in the Maryland state system, requires such a course of all graduates. *See, e.g.,* Seth D. Messinger, *Introduction to Cultural Anthropology: ANTH 211*, UMBC (2004), <http://www.umbc.edu/sociology/Faculty/Messinger/Courses/anth211fall04.pdf>

Cultural Anthropology is the comparative study of society, culture, and human diversity. The discipline focuses on the various ways that peoples' lives are shaped by social relations, history, political economy, and cultural images such as the media . . . . The course will introduce students to . . . family and social organization, religion, beliefs and rituals, conflict, social control, exchange and transactions, social suffering and healing, globalization, transformations of citizenship, alterations in local worlds, individual agency and social structure, and other topics.

*Id.*

194. Boys II Men is currently developing such a course for its students. Interview with Kareem Bond, Assistant Principal, Takoma Park Middle Sch., in Takoma Park, Md. (Apr. 19, 2011).

195. Interview with Angela K. Frusciante, Knowledge Dev. Officer, William Caspar Graustein Memorial Fund (Nov. 19, 2010).

196. *Id.*

197. Umo, *supra* note 187, at 5

## CONCLUSION

Our community at Howard University includes members of all five groups Eugene Robinson describes—“transcendents,” middle-class people, students and faculty who hail from “abandoned” neighborhoods, mixed-race individuals and immigrants. Most feel there is much more work to be done. They do not believe America is all she could or should be. They feel connected to the America described in the country’s founding documents, not to the thoughtless, careless consumer society which we have become. We can do better than this; we *are* better than this. President Obama, himself, a member of three out of five of Robinson’s categories of black people (immigrant, mixed race, transcendent), spoke of his commitment to the African and African American communities in his 2004 book, *Dreams from My Father*.<sup>198</sup>

Robinson seems to think mainstream and transcendent efforts to “give back” to the abandoned minority are quaint charity, but I think something else is going on. I think successful Blacks continue to identify with the ghetto, on one level or another, because despite its privations, it seems a more authentic existence than consumerism. I believe they see the plight of the abandoned minority as a mission field, not just to transform the lives of the people there, but also to give meaning to their own.<sup>199</sup> I believe they are looking for a way to rebuild their community and renovate their culture.

To accept that idea, you will have to consider that culture is something we produce, not something we consume. Could the wasteful, profligate consumer culture Benjamin Barber describes as “McWorld” be what sojourners in the ghetto are trying to escape?

I have argued earlier that culture is the root of problem-solving and therefore of intelligence itself. Transcendence, as Robinson describes, seems to be a drive to disconnect oneself from the problems of the community, which is one’s original reference point. This drive exposes one to the risks of being without culture at all, reduced to buying the cultural artifacts that others produce while solving real problems and engaging in real life.<sup>200</sup> The most successful people in

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198. See generally OBAMA, *supra* note 77 (detailing influences from his Asian stepfather, his pre-consumerist white American grandparents, and his Luo relatives in Kenya).

199. See, e.g., *id.* at 177-79, 276-79 (describing his experiences as a community organizer in Chicago).

200. A similar problem confronted the emerging elites of colonial Africa. Revolutionary leader Amilcar Cabral of Guinea-Bissau divided the élites into two camps – a “nationalist”

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McWorld terms thus find themselves presented with a challenge—how to succeed without transcending? This goes directly to the Cultural DNA strands involving context (what is the community?) and participation (who is included and who is left behind?). It also involves the strand of limits—challenging the idea that more is better, and to resist the ever-increasing pressures to live our lives through consumption alone.

If we at Howard undertake to teach our students with Hawkins' insights in mind,<sup>201</sup> using “real world” problems and scenarios, we will accelerate their growth. Real world problems and scenarios introduce students to the many associated disciplines, which must come together to solve any such problems (policy, sociology, economics, history, medicine). People from these disciplines approach problems with different mindsets and different cultural references, using different information, patterns, sequences, and invariant forms. This wealth of information and structure gives students a broader playing field, freeing their minds to auto-associate old and new patterns and information, rearranging bits and pieces, and looking for analogies in their past or present experience, thus, provoking “aha” moments. In this way, our students can reach higher and higher levels, achieving creativity, even genius in their chosen fields—in a word, social engineering.

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group whose power and accountability rested with their own country and with their own people, and a “comprador” group whose power and accountability lay with the colonizing powers and the multinational corporations that succeeded them. AMILCAR CABRAL, *RETURN TO THE SOURCE: SELECTED SPEECHES OF AMILCAR CABRAL* (1973) (referring to traditional African culture as “the source”); see also OBAMA, *supra* note 77 at 300, 401 (describing the difficulty of extricating themselves from white colonial influence faced by his ancestors and modern relatives in the Kenyan Luo tribe). See generally P'BI TEK, *supra* note 12 (describing the clash of traditional and western values in the Kenyan Acholi tribe).

201. See discussion *supra* Part I.



# Affirmative Action and the First Amendment's Single Minority of One

ROBERT LUTHER III\*

“[T]he First Amendment was not written for the vast majority of Virginians. It belongs to a single minority of one.”<sup>1</sup>

If one were to ask a group of constitutional scholars to recall the single most powerful statement in American constitutional history, I would not be surprised if a majority lauded Justice John Marshall Harlan's solitary dissent in *Plessy v. Ferguson*<sup>2</sup> that “[o]ur [C]onstitution is color-blind, and neither knows nor tolerates classes among citizens.”<sup>3</sup> Given the historical import of this statement and the Court's subsequent decision in *Brown v. Board of Education*,<sup>4</sup> one would think its point—that government should not treat Americans differently on the basis of immutable characteristics like race—would be the rock of our individual rights jurisprudence and the legacy that each generation of Americans proudly passes on to the next.

However, it is not so much a legacy of equal protection under the law, but a legacy of the right to free speech that typically causes the Justices to wax poetic pithy catch phrases that last for generations. For example, Justice Oliver Wendell Holmes opined that the First Amendment protects the freedom to express the “thought that we hate”<sup>5</sup>—a notion affirmed by Justice Louis Brandeis, shortly thereaf-

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\* Mr. Luther is an attorney and author who practices civil and constitutional litigation in Virginia and Washington, D.C. He litigates and writes in the areas of free speech and anti-discrimination. Comments are graciously received at <http://www.RobLuther.com>.

1. *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles*, 305 F.3d 241, 242 (4th Cir. 2002) (Wilkinson, C.J., concurring).

2. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

3. *Id.*

4. *See generally* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

5. *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting) (“[I]f there is any principle of the Constitution that more imperatively calls for attachment than any

ter, when he reminded us that the First Amendment serves as a “safety-valve” for the release of controversial ideas to preserve them from going underground.<sup>6</sup> Indeed, we saw these classic approaches to free speech exercised by the U.S. Supreme Court just this past March in *Snyder v. Phelps*<sup>7</sup>—the now infamous military funeral picketing case—in which eight Justices held that the vitriolic speech of Phelps and his cohorts was protected by the First Amendment.<sup>8</sup>

But, many Americans were as outraged by the decision in this case as they were by Phelps’ actions.<sup>9</sup> What possible value is there in protecting such odious behavior, they ask. The answer is that we tolerate speech like Phelps’ because “we the people”<sup>10</sup> have made a collective decision that free speech is paramount to the idea of a free society, and that individuals—simply by being born free—possess a pre-existing right to speak or remain silent on controversial issues of the day. This is a precious right that our culture and courts have respected better than any civilization in history to date.<sup>11</sup>

Given this apparent embrace of free speech and its corollary, dissent, one might assume that our system affords similarly vibrant constitutional protections to those who dissent in other individual rights contexts. For example, while a recent Pew Research Center survey concluded that a majority of African Americans favor preferential treatment from government to improve the position of blacks and other minorities,<sup>12</sup> consider the African Americans who potentially stand to benefit from affirmative action policies, but who nevertheless oppose them, because they believe they are unconstitutional (“double minorities”). No doubt, the First Amendment protects these “double

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other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.”).

6. See generally *De Jonge v. Oregon*, 299 U.S. 353 (1937) (expanding on the “safety-valve” function of the First Amendment discussed in *Whitney v. California*, 247 U.S. 357, 375-76 (1927) (Brandeis, J., concurring)).

7. *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

8. See *id.* at 1220. See generally U.S. CONST. amend. I.

9. See Robert Knight, *High Cost of Free Speech*, WASH. TIMES, Mar. 7, 2011, at B1 (“Everyone with a shred of decency should be outraged, just as in 1977, when the American Nazi Party won the right to parade through Skokie, Ill., where many Holocaust survivors live.”).

10. U.S. CONST. pmb1.

11. See *e.g., id.*; *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting).

12. *Public Backs Affirmative Action, But Not Minority Preferences*, PEW RESEARCH CENTER (June 2, 2009), <http://pewresearch.org/pubs/1240/sotomayor-supreme-court-affirmative-action-minority-preferences>. “Majorities of both African Americans (58%) and Hispanics (53%) favor preferential treatment to improve the position of blacks and other minorities . . .” *Id.*

minorities’” right to speak out in opposition to their unequal treatment, and also to petition governmental officials to change their views on affirmative action. But, aside from convincing the U.S. Supreme Court to revisit the issue, or from convincing government officials not to utilize the discretion they are vested with under the case law when awarding benefits, the only remedy available to these African Americans—holding the dissenting views that race-based preference policies are unconstitutional—is to initiate legislative remedial action through the ballot initiative process.<sup>13</sup> Still, the latter option may fail to provide a clear resolution because even in cases where the ballot initiative process has been successfully utilized to forbid government from granting preferences on the basis of race under state constitutional law, federal courts have failed to uniformly vindicate this fundamental right.<sup>14</sup>

Along the same lines, affirmative action programs further incapacitate potentially vocal “double minorities” from engaging in informed dissent under the “single minority of one” principle because it is difficult for them to obtain the data necessary to determine whether they were the recipient of a race-based preference. Their admissions packages do not reveal whether they were admitted over another student on the basis of race, just as minority employment applicants and bidders on public contracts are not informed of why their services were retained beyond that they are the most qualified applicants. And so, for these reasons, it seems problematic that we proudly embrace broad protections for speech so that a “single minority of one”<sup>15</sup> dissenting viewpoint can be heard, yet institutions simultaneously exclude “double minorities” from the conversation before it begins by failing to provide these individuals with the information necessary to determine whether their equal protection rights were violated.

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13. See MICH. CONST. art. I, § 26; CAL. CONST. art. I, § 31(a) (West 2011).

14. Compare *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 652 F.3d 607 (6th Cir. 2011) (holding that a successful Michigan ballot initiative subsequently incorporated into the Michigan constitution forbidding the consideration of race or sex in public education, contracting, or employment unconstitutionally altered Michigan’s political structure by impermissibly burdening racial minorities in contravention of the Equal Protection Clause) with *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997) (holding that a successful California ballot initiative subsequently incorporated into the California constitution forbidding the consideration of race or sex in public education, contracting, or employment did not unconstitutionally alter California’s political structure by impermissibly burdening racial minorities in contravention of the Equal Protection Clause).

15. *Sons of Confederate Veterans, Inc. v. Comm’r of the Va. Dep’t of Motor Vehicles*, 305 F.3d 241, 242 (4th Cir. 2002).

During law school, one of my then-colleagues, who is African American, told me over lunch that he did not support affirmative action because he thought employers would question whether he had received admission to law school because he was African American and not because of his individual record of achievement. He was concerned that the widespread acknowledgment of affirmative action in legal education would cause him to be “second-guessed” throughout at least the beginning of his legal career. He did not think that situation should occur in twenty-first century America, and he was right. Just as it was unacceptable for his ancestors to be judged by the color of their skin many years ago, it is unacceptable for there to be a basis in recent U.S. Supreme Court case law for a potential employer, colleague, or adversary to believe he reached his station in professional life from a race-based admissions preference.<sup>16</sup>

My former classmate is now a member of the Virginia State Bar like many other leaders in business, government, and education in the Commonwealth. As members of the bar, these policymakers are routinely called upon to answer questions concerning what the law is and what the law should be. With respect to what the law of racial preferences is, it is true that *Grutter v. Bollinger*<sup>17</sup> and *Adarand Constructors Inc. v. Pena*<sup>18</sup> (and its Fourth Circuit progeny, *H.B. Rowe, Co. v. Tippet*<sup>19</sup>) currently *permit* public entities to consider race in public university admissions and in the award of public contracts. However, neither the Constitution nor its cases *compel* these entities to do so. That choice is entirely a legislative and administrative prerogative. Indeed, as a well-settled function of federalism, states may always provide greater protection for individual liberties than the federal Constitution and its cases provide because the federal Constitution is merely a floor—not a ceiling—for those protections.<sup>20</sup> With respect

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16. See generally *Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding that the consideration of race in an admission decision does not violate the Equal Protection Clause).

17. *Id.*

18. See generally *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (holding that racial classifications must be narrowly tailored to further a compelling government interest).

19. See *H.B. Rowe Co. v. Tippet*, 615 F.3d 233, 251-52 (4th Cir. 2010) (finding that “[in] sum, the State has met its burden of producing a ‘strong basis in evidence’ for its conclusion that minority participation goals were necessary to remedy discrimination against African American . . . subcontractors . . . In circumstances like these, the Supreme Court has made it abundantly clear that a state can remedy a public contracting system that withholds opportunities from minority groups because of their race”) (citing *Adarand*, 515 U.S. at 237)).

20. See Ralph W. Kasarda & Robert Luther III, *Why Courts Must Subject Municipalities to Constitutional Tort Liability Under § 1983 When Unconstitutional Race-And Sex-Based Preference Statutes Deprive an Otherwise Lowest Qualified Bidder of a Public Contract*, 19 GEO. MA-

to the question of what the law should be, policy-makers in Virginia and nationwide would be prudent to exercise the discretion vested in them under these cases and halt all government-sanctioned racial preferences in connection with these public programs.

While it was not always so, case law now makes clear that the Constitution protects the “single minority of one”<sup>21</sup> in free speech contexts. The time has come to unapologetically apply that same logic in public education, contracting, and employment contexts. Just as we would discourage policymakers from taking action that would restrict controversial, dissenting speech from public life, we should consider the impact of affirmative action policies on those “double minorities” who oppose affirmative action for fear their competence may be “second-guessed” because of the color of their skin. Although these dissenting voices appear to be the minority today, Justice Harlan’s own dissent reminds us that it takes only a single voice to impact the law for the betterment of all.

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SON U. C.R. L.J. 371, 386-87 (2009). “State law can grant citizens more rights than the federal Constitution guarantees, but in no circumstances can state law ever reduce its citizens’ rights below the protections that the federal Constitution affords.” *Id.*

21. *Sons of Confederate Veterans, Inc. v. Comm’r of the Va. Dep’t of Motor Vehicles*, 305 F.3d 241, 242 (4th Cir. 2002).



# Finding the Oscar

W. BURLETTE CARTER\*

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\* Professor of Law, George Washington University Law School, J.D. Harvard Law School, B.A. Agnes Scott College. Professor Carter teaches, among other courses, Trusts and Estates and Women, Money, and Law.

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## INTRODUCTION

On February 29, 1940, the Academy of Motion Picture Arts and Sciences (the “Academy”) made history when it awarded an Oscar to a Negro—Hattie McDaniel.<sup>1</sup> Her winning and controversial role was that of Scarlett O’Hara’s loyal black slave caretaker known only as Mammy in the epic film *Gone With the Wind* (“*Gone*”).<sup>2</sup> Later, a seriously ill McDaniel would execute her will. In it, she would ask that her Oscar be sent to Howard University (“Howard”) after her demise.<sup>3</sup> Today, more than seventy years after her historic win and some sixty years after her death, no one seems to know where Hattie McDaniel’s famous Oscar is.<sup>4</sup> The Academy has declined to replace it.<sup>5</sup> One collector has estimated the McDaniel Oscar to be worth more than half a million dollars.<sup>6</sup>

This article investigates what happened to Hattie McDaniel’s Oscar and what the story of the Oscar reveals about the interrelationship between race discrimination, on the one hand, and wealth generation,

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1. Edwin Schallert, *Cocanut Grove Throngs Give Stars Gay Ovation*, L.A. TIMES, May 1, 1940, at A; *Hattie McDaniel Wins Academy Award*, BALT. AFRO-AMERICAN, Mar. 9, 1940, at 14; *Hollywood Applauds Hattie McDaniel as She Receives Award*, CAL. EAGLE, Mar. 7, 1940, at 2B. Note that the author uses the term “Negro” or “black” to refer to blacks in Hattie McDaniel’s time, and in particular, the descendants of the survivors of American slavery. The author does not consider “Negro” to be disparaging. To accommodate some modern ears, she uses herein the term “black” or African American to reference such descendants in a modern era and, when the context suggests, to reference immigrant blacks as well.

2. *GONE WITH THE WIND* (Selznick International Pictures, Metro-Goldwyn Mayer 1939).

3. See discussion *infra* p. 130.

4. Letter from Joe Selmon to Bd. of Governors, Acad. of Motion Picture Arts and Scis. (Dec. 20, 2005) (on file with author) (describing Oscar as unfortunately “lost” and asking that the Academy replace it).

5. Letter from Bruce Davis, Exec. Dir. for the Acad. of Motion Picture Arts and Scis., to Joe Selmon, Chair, Howard Univ. Dep’t of Theater Arts (Jan. 17, 2006) (on file with author) (expressing concern over precedent of replacing for a non-winner holder and asking Howard not to give up hope of finding it).

6. Memorabilia Collector Tom Gregory has estimated the Oscar’s value at \$550,000. See J. Freedom du Lac, *And Hattie McDaniel’s Oscar Went To . . . ?1940 Prize, Howard U., Plays Role in Mystery*, WASH. POST, May 26, 2010, at A1. For more on Gregory’s connection to the story, however, see discussion *infra* pp. 161-63.

wealth protection, and intergenerational transfers of wealth by the descendants of slaves on the other. Regarding the Oscar, this article concludes that, the Oscar arrived at Howard University, but not directly from the McDaniel estate, and that after being displayed in Howard's Drama Department for a decade, it was returned to the Channing Pollack Theater Collection ("Pollack Collection") in the Founders Library at Howard University between 1971-1972. Whether the Oscar remains there today is a question that only Howard University can answer.<sup>7</sup>

McDaniel did not receive the familiar, tall statuette commonly known as "Oscar." Instead, she received a plaque, approximately 5 1/2 inches by 6 inches mounted on a small base, bearing a description of the award and a molded image of a miniature Oscar.<sup>8</sup> An Oscar nevertheless, it was the type given to all best supporting actor or actress winners at that time.<sup>9</sup>

Until now, it has been assumed that the McDaniel Oscar came directly to Howard University from her estate,<sup>10</sup> and that it disappeared from a display case in Howard University's Drama Department in the 1960s during a nationwide explosion of campus unrest.<sup>11</sup> Beyond these points, however, there has been broad disagreement. No one knew exactly when the Oscar arrived at Howard, when it disappeared, or how;<sup>12</sup> Howard could find no official records of receipt.<sup>13</sup>

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7. Shortly before this article went to press, the author shared with Howard University some key facts she had uncovered in order to aid in any future search for the Oscar.

8. The website of the Academy of Motion Picture Arts and Sciences has a picture of Hattie McDaniel with presenter and actress Faye Bainter handing her the tall Oscar with the caption "Best Supporting Actress Hattie McDaniel ("Gone With The Wind") accepts her award from Faye Bainter." THE ACAD. OF MOTION PICTURE ARTS & SCI., <http://www.oscars.org/awards/academyawards/legacy/ceremony/12th-winners.html>. That picture was an official portrait taken after the awards, one that every actor Oscar winner was allowed, regardless of the type of Oscar received. Interview with Barbara Hall, in Hollywood, Cal. (July 26, 2011). The Academy's database also confirms that she received a plaque and never exchanged it for a statuette. *The Official Academy Awards Database*, THE ACAD. OF MOTION PICTURE ARTS & SCI., [http://awardsdatabase.oscars.org/ampas\\_awards/BasicSearchInput.jsp](http://awardsdatabase.oscars.org/ampas_awards/BasicSearchInput.jsp). For a picture of McDaniel with her Oscar, see *Best Supporting Actress*, BALT. AFRO-AMERICAN, Mar. 9, 1940, at 14.

9. According to the Academy's online database, the Best Supporting Actor and Actress categories were first recognized in 1936 (the 9th Awards), and plaques were awarded up to 1942. *The Official Academy Awards Database*, *supra* note 8; see also Email from Libby Wertin, Acad. Librarian, to W. Burlette Carter (May 13, 2011, 7:59pm EST) (on file with author) (database is source for award type and other such information).

10. *E.g.*, *Howard University Can't Find McDaniel Oscar*, JET MAGAZINE, May 4, 1992, at 24 (stating that McDaniel left the school the statuette and implying that that is how Howard got it); J. Freedom du Lac, *supra* note 6 (to same effect).

11. See, *e.g.*, J. Freedom du Lac, *supra* note 6.

12. *Id.*

Various theories have emerged to explain the Oscar's disappearance. Some argue that former Howard Professor Owen Dodson, the Oscar's caretaker in the Drama Department, must have taken it when he left.<sup>14</sup> Unidentified persons have named another professor, Mike Malone, as the culprit.<sup>15</sup> Another claimed that Howard students removed it during the so-called "black power" protests of the 1960s. In 1990, McDaniel's biographer, Carlton Jackson, was told unofficially by Howard sources that the Oscar turned up "missing" during those civil rights demonstrations.<sup>16</sup> In 1992, *Jet Magazine* reported that Howard "officials speculated that during the campus unrest in the 1960s, the Oscar may have been stolen, removed for safekeeping, or misplaced."<sup>17</sup> By the time the story took on a sense of urgency, many of those who had been in a position to know more about the whereabouts of the Oscar were dead, and those still alive struggled against a horizon of fading memories.

The "angry protesting students took it" story developed new energy in 2007 when memorabilia collector and media personality Tom Gregory reported in the *Huffington Post* that "[f]urious, frustrated black Americans are rumored to have heaved the Oscar into the Potomac River in effigy of racial stereotyping."<sup>18</sup> Gregory would rerun the same story verbatim in January 2009.<sup>19</sup> In April, 2010, responding to a

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13. *Id.* Apart from its Art Gallery, Howard has two other primary collections that hold artifacts. Telephone Interview with Michael Winston, Dir. of Moorland-Spingarn Research Ctr., 1973-83 (June 6, 2011) [hereinafter Winston Interview]; see also Telephone Interview with Thomas C. Battle, former Dir., Moorland-Spingarn Research Ctr. (July 11, 2011) [hereinafter Battle Interview]. Most are under the jurisdiction of the Moorland-Spingarn Research Center. *Id.* A separate collection, the Channing Pollack Collection, houses many theater-related items. *Id.* That Collection is under the jurisdiction of Founders' Library. *Id.* In 1973, Moorland did a general physical inventory of all of its holdings. No Oscar was found in that inventory. After *JET Magazine* reported a "missing" Oscar in 1990, see discussion *supra*, n.10, Battle reviewed Moorland's records specifically for evidence that Moorland received the Oscar, and he found none. *Id.* As for the Pollack Collection, according to Founders Library, various curators have also conducted prior searches for the Oscar, without success. Discussion with Dr. Arthuree Wright, Interim Dir., Founders' Library, Howard Univ. (Sept. 15, 2011) [hereinafter Wright Discussion].

14. J. Freedom du Lac, *supra* note 6.

15. *Id.* It is easy, of course, to blame the dead. For more on Malone's contributions to theater, see Yvonne Shinhoster Lamb, *Director and Teacher Mike Malone Nurtured DC Black Theater Scene*, WASH. POST, Dec. 6, 2006.

16. CARLTON JACKSON, *THE LIFE OF HATTIE MCDANIEL* 54 (1990).

17. *Howard University Can't Find McDaniel Oscar*, *supra* note 10; see also J. Freedom du Lac, *supra* note 6 (referencing Howard Professor in the Department of Theater Arts, Joseph Selmon's belief that the Oscar is safe but no one knows today where it was placed).

18. See *Oscar Time for Hattie McDaniel*, HUFF POST, Aug. 13, 2007.

19. Tom Gregory, *Hattie McDaniel, Equality 41 Years in the Mud*, HUFFINGTON POST (Jan. 19, 2009) [http://www.huffingtonpost.com/tom-gregory/hattie-mcdaniel-racism-41\\_b\\_159169](http://www.huffingtonpost.com/tom-gregory/hattie-mcdaniel-racism-41_b_159169).

*Washington Post* investigation by J. Freedom DuLac, he would be more specific: “I spoke to a guy who told me it was heaved into the river—he was there.”<sup>20</sup> Generic rumor had morphed into a live witness, but still, Gregory said he could not recall his informant’s name.<sup>21</sup> Since the matter has become one of public discussion, Howard University has faced a barrage of negative press charging that it negligently “lost” the Oscar or, alternatively, allowed it to be stolen.<sup>22</sup>

This article seeks to turn the page on the story of Hattie McDaniel’s Oscar. It concludes that the Oscar did not come to Howard directly from McDaniel’s estate. Instead, it argues that it likely came as a gift from actor Leigh Whipper, from the Howard University class of 1895, along with a pair of bronzed Bill “Bojangles” Robinson’s shoes (“Bojangles shoes”). It further theorizes that the Oscar was not stolen by irate students, upset that Howard would honor McDaniel, but rather was returned to Howard’s Channing Pollack Theater Collection, most likely between the spring of 1971 and the summer of 1972 as Howard faculty and administrators tried to make room for new voices in black theater.

Part I of this piece explains why McDaniel and her Oscar were so controversial and remain so today. Part II offers, for the first time, an examination of Hattie McDaniel’s probate records. Part III discusses evidence that the Oscar came to Howard, not from the estate, but via actor Leigh Whipper, years after the estate had closed. Part IV dismisses the theory that students took the Oscar and, offers the theory of its removal and return to the Pollack collection. Part V considers and rejects the “Potomac River” theory propounded by Gregory. Finally, Part VI discusses how the story of the McDaniel Oscar demonstrates the effect of race discrimination upon African-American wealth building, wealth preservation, and intergenerational transfers of wealth. That section also argues that we need not agree on McDaniel’s legacy in order to care about the fate of the McDaniel Oscar. The true value of that Oscar lies not in the person who won it but in the

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20. J. Freedom du Lac, *supra* note 6.

21. *Id.*

22. See, e.g., *Hattie McDaniel’s Academy Award is Lost*, JET MAGAZINE, Apr. 13, 1998, at 33; *Howard University Misplaced Hattie McDaniel’s Oscar*, ESSENCE (May 27, 2010), <http://www.essence.com/2010/05/27/howard-university-cant-find-hattie-mcdaniels-oscar/>. The subject has also been covered on radio and television. See *Disappearance of Historic Oscar Explored in Hattie’s Lost Legacy* (WDCW TV Local Black History Month Special Feb. 11, 2011), available at <http://corporate.tribune.com/pressroom/?p=2791> (“Was it tossed in the Potomac River by students in the late 1960’s who were angered that the role of a slave received such an honor?”); Carla Eckels, *The Curious Case of a Missing Academy Award*, NPR, Feb. 22, 2009.

struggles between supporters and opponents of black civil rights, that framed her victory on that historic night.

### I. THE LEGACY OF HATTIE MCDANIEL<sup>23</sup>

Identifying Hattie McDaniel's place in history is a complex undertaking. Although she was the first Negro to win an Oscar, one is not compelled to view her victory as an unequivocal source of pride.<sup>24</sup> Those who dismiss criticisms of that award decision ignore a long-established and troublesome Hollywood practice of rewarding talented Negroes for playing roles meant to be subservient and demeaning and punishing those who protested against such roles. And yet, those who dismiss her as an accomplice in blatant racism ignore the amazing talent that she displayed and her own victimization and triumph over both racism and sexism. Hattie McDaniel's desire to be simply a successful entertainer—when racism insisted that she was far less and yet required that she be much more—will arguably forever place her near the center of debates over one of our country's most significant human rights struggles.

McDaniel was one of seven surviving children of two former slaves.<sup>25</sup> She began her entertainment career as a blues singer/comedian.<sup>26</sup> When she turned her focus to acting in the 1930s and 1940s,<sup>27</sup> Hollywood's leading writers, directors, producers, and movie houses offered blacks roles that primarily presented them as caricatures, shaped by whites' imaginations. Virtually any actor who played a Negro (including white actors who played one) spoke in a contrived "Negro dialect," which they had to learn if it was unfamiliar.<sup>28</sup> Some roles required blacks to roll their eyes widely and act as if they were unin-

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23. For the facts—but not my analysis—of McDaniel's life, I rely substantially upon the biography by Jill Watts and to a lesser extent, the one by Carlton Jackson. See generally JILL WATTS, *HATTIE MCDANIEL: BLACK AMBITION, WHITE HOLLYWOOD* (2005) (describing the life of Hattie McDaniel); JACKSON, *supra* note 16. These two offer very different takes on her life. I offer a third here and in some cases have found some additional facts that will confirm or contradict facts presented by these two authors.

24. *Hattie McDaniel Negro Star Dies: Only Actress of Her Race to Win Academy Award Passes at Motion Picture Home; Ill a Year*, L.A. TIMES, Oct. 27, 1952, at A1.

25. WATTS, *supra* note 23, at 2-5. Her mother, Susan, bore thirteen children of which six died at birth or an early age. Susan brought three, as a widow, to her marriage to Hattie's father, Henry McDaniel. *Id.* at 13, 17.

26. *Id.* at 56-74.

27. *Id.* at 83.

28. *Id.* at 83, 161 (explaining that blacks, including McDaniel, were required to speak in dialect); *id.* at 79, 257 (describing white actors using alleged Negro dialect while playing Negroes); *id.* at 248 (explaining the incorporation of dialect into animals in the Disney movie *Song of the South*); see also E.B. Rea, *Does Radio Give Our Performers A Square Deal, They Say*

telligent.<sup>29</sup> Their skin color was often darkened and made to appear glossy.<sup>30</sup> “Respectable” black males were usually slightly built devoted servants, soft spoken, and often appeared childlike in nature.<sup>31</sup> Meanwhile, “aggressive” black males had to be put down violently.<sup>32</sup> “Respectable” black women had to serve white families loyally as domestics, with little reference to their own families, and were often cast as asexual, unattractive, and plump.<sup>33</sup> In addition to limited roles, black actors faced disparate work conditions when compared to whites.<sup>34</sup> McDaniel’s biographer, Watts, has noted that McDaniel’s “generous figure and dark skin” matched a Hollywood stereotype for the casting of black women in the thirties and early forties.<sup>35</sup>

McDaniel’s early career was sprinkled with washroom attendant and laundress jobs as she struggled to make a career in entertainment.<sup>36</sup> A big break came when she was considered for the part of a black, female slave referred to only as “Mammy” in the film adaptation of Margaret Mitchell’s book, *Gone With the Wind*.<sup>37</sup> The book won the 1937 Pulitzer Prize.<sup>38</sup> It told the story of a fictional white

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*We’re Out To Make An Honest Dollar, Critics Contend Dialect Offends Colored People*, BALT. AFRO-AMERICAN, Jan. 7, 1948, at M11.

29. WATTS, *supra* note 23, at 217 (discussing NAACP’s Walter White’s objections to these images).

30. *Id.* at 83.

31. *Id.*

32. See DONALD BOGLE, TOMS, COONS, MULATTOES, MAMMIES & BUCKS, AN INTERPRETIVE HISTORY OF BLACKS IN AMERICAN FILM 3-18 (2003) (discussing various black stereotypes); see also WATTS, *supra* note 23, at 46 (discussing the use of blackface), *id.* at 81-83 (discussing maid roles, stereotypes of hypersexuality, desire for contrived black dialect, and avoidance of miscegenation), *id.* at 112-113 (explaining that childlike behavior and humor was required and that blacks were excluded from creative ranks).

33. WATTS, *supra* note 23, at 83, 101 (explaining that large black women were cast as maids); see MARGARET MITCHELL, GONE WITH THE WIND 40 (Scribner 75th Anniversary ed. 2011) (1936) (referring to Mammy’s “lumbering tread shaking the floor”); *id.* (describing Mammy as “a huge old woman”). For more on stereotypes, see generally BOGLE, *supra* note 32; DONALD BOGLE, BRIGHT BOULEVARDS, BOLD DREAMS: THE STORY OF BLACK HOLLYWOOD (2006) (describing the lives of some black Hollywood stars and their struggles); see also James V. Hatch, *A White Folks Guide to 200 Years of Black & White Drama*, DRAMA REVIEW, Dec. 1972, at 5-24.

34. Jonathan Dewberry provides essential research on the discrimination facing black actors in this time in his 1988 Ph.D. dissertation. See generally Jonathan Dewberry, *Black Actors Unite: The Negro Actors Guild of America, 1937-1982* (1988) (unpublished Ph.D. dissertation, New York University) (on file with Elmer Holmes Bobst Library, New York University).

35. WATTS, *supra* note 23, at 83.

36. *Id.* at 74, 80; see also E.B. Rea, *Natural Talent Made Her a Star; Hattie McDaniel Enjoyed Full Life of Pearl Diving, Table Waiting on her Way to Radio-TV Fame*, BALT. AFRO-AMERICAN, Nov. 22, 1952, at A3.

37. WATTS, *supra* note 23, at 151-52; see also MITCHELL, *supra* note 33.

38. *Pulitzer Prize for Novel Won by Gone With The Wind . . .*, N.Y. TIMES, May 4, 1937, at 1.

family of slaveholders in Atlanta during the Civil War.<sup>39</sup> It presented the “respectable” black slaves as unswervingly loyal to the white family that they served.<sup>40</sup> It criticized the Civil War and the opponents of slavery, blaming them for disrupting a society that was operating smoothly and cast the Ku Klux Klan as saviors of a downtrodden white race.<sup>41</sup>

The book’s success led producer David O. Selznick to purchase the movie rights to *Gone*.<sup>42</sup> Under pressure from the NAACP and others, Selznick reluctantly omitted some of the most racially offensive content in the book.<sup>43</sup> However, despite these changes, the essential message about black life, about slavery, and about the Civil War remained the same. Many blacks viewed the movie as part of a larger trend of mischaracterizing their history.<sup>44</sup>

The majority of white media commentators would celebrate *Gone* as a cinematic masterpiece.<sup>45</sup> In Margaret Mitchell’s book,

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39. See *The Golden Anniversary of Scarlett [sic] and Rhett*, WASH. POST, June 29, 1986, at 3.

40. MITCHELL, *supra* note 33, at 602 (discussing her Mammy character saying that, though free, she stays at Scarlett’s side and doesn’t go back to Tara because she wants to stay with Scarlett). Overwhelmingly, former slaves had no property, no education, no family or community with assets and no one to hire them for decent wages. While Mitchell says Mammy loved Scarlett as if she was “her baby,” she offers a character who would never want any babies of her own (or has forgotten the ones she did have) and who doesn’t long for a romantic partner or her own household. *Id.* at 600-01; see also *id.* at 779-89 (showing Sam offering to be Scarlett’s driver to protect her from mean “niggers” and the hollering of “trashy black wenches.”). Mitchell fairly points out the hierarchy between house slaves/servants and blacks who were not, and the distinctions of class in white society. *Id.* at 883. But, she also slyly plants the notion that slaves before and immediately after slavery felt they were not just better but also better off than poor whites (the latter of which had always had their freedom). *Id.* at 837-38 (black character references to “white trash”). The notion of the disdain for “white trash” runs throughout the book among blacks and white characters. See, e.g., *id.* at 454, 504, 540, 698, 718.

41. *Id.* at 564-65 (quoting character “Pitty” stating that Rhett Butler has been accused of killing a “negro”; that the Yankees are “upset because so many uppity darkies have been killed recently”; that “it doesn’t seem to bother the Yankees whether [white] folks are guilty or not, so long as they can hang somebody”; and referencing the Ku Klux Klan as rising to whites’ defense against Yankee abuses of them and against “uppity negroes”).

42. WATTS, *supra* 23, at 148.

43. *Id.* at 152-161 (battle over racism in the film); see also discussion *infra* p. 120.

44. BOGLE, *supra* note 32, at 10; WATTS, *supra* note 23, at 46-47 (discussing the film *Birth of a Nation*).

45. See Frank S. Nugent, *The Screen in Review, David Selznick’s “Gone With the Wind” Has Its Long Awaited Premier at Astor and Capitol, Recalling Civil War and Plantation Days of the South; Seen as Treating Book with Great Fidelity*, N.Y. TIMES, Dec. 30, 1939, at 31. Ironically, the communist papers did criticize *Gone* and were criticized for doing so by the *Washington Post*. *New Masses Pans ‘Wind’*, WASH. POST, Dec. 28, 1939, at 9 (rejecting a review in the communist magazine *New Masses* that called *Gone* “racist” and also a negative review by Ben Davis, Jr., “a colored member” of the editorial board of the *Communist Daily Worker*); *Coming with the Wind*, WASH. POST, Dec. 29, 1939, at 8 (attacking the negative review of *Gone* appearing in the *Daily Worker* as ignoring all of the progress made in race matters and satirically suggesting

Mammy is feisty and strides through the household after Scarlett.<sup>46</sup> McDaniel brought these features to life.<sup>47</sup> Perhaps sensing some negative reactions to Mammy's forwardness toward a white person, a *New York Times* movie reviewer suggested that McDaniel's Mammy must be "personally absolved" of the "unfittin" scene in which she scolds Scarlett.<sup>48</sup> He added "She played even that one right, however wrong it was."<sup>49</sup> Although they wondered whether *Gone* was "art," the British were impressed too.<sup>50</sup> One writer proclaimed, "McDaniel almost acts everybody else off the screen when she is allowed to appear in the foreground."<sup>51</sup> The Academy too would praise *Gone*. It would receive fifteen nominations, winning ten, including Best Picture and Best Supporting Actress—the latter for the performance of Hattie McDaniel.<sup>52</sup>

The 12th Academy Awards was held in the Cocoanut Grove of the Ambassador Hotel on February 29, 1940.<sup>53</sup> Dressed to the nines, McDaniel and her escort, Ferdinand Yober, entered the room to applause.<sup>54</sup> They then walked to a small round table at a far, back end

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that *Worker* has revealed *Gone* as an attempt to reverse all progress including the Thirteenth and Fourteenth amendments).

46. E.g., MITCHELL, *supra* note 33, at 40-41 ("Mammy felt that she owned the O'Haras, body and soul, and their secrets were her secrets.")

47. Some have suggested that McDaniel's "Mammy" is somehow different from Mitchell's. BOGLE, *supra* note 32, at 88-89; WATTS, *supra* note 23, at 166. This writer does not see the differences suggested between the character in the book and that in the film. While she is but a child to Mammy, Scarlett speaks to her in a way that would never be acceptable if Mammy were white. In neither the book nor the film does Mammy ever cross the white woman who heads that household, Mrs. O'Hara. And, Mammy is enslaved in a Greek chorus of one that constantly comments upon and yet affirms white people's lives, no thought given to her own life or that of any other family. Even the most dedicated house slave had to have self-interest at heart. The observation does not diminish the difficulty of bringing a character from page to life. More compelling is the argument that McDaniel later transformed later maid roles by "talking back" to whites, but she was the only one who could get away with doing so. STEPHEN BOURNE, BUTTERFLY McQUEEN REMEMBERED 52 (2007).

48. Nugent, *supra* note 45.

49. *Id.*

50. *British Hail Negro Player in G.W.T.W.*, L.A. TIMES, Apr. 19, 1940, at 17 (quoting the *London Times*); see also *Entertainments, Gone With the Wind, Film Version of the Novel*, THE TIMES (LONDON), Apr. 18, 1940, at 4.

51. *Id.*

52. For a list of *Gone's* victories, see the Academy Website, THE ACAD. OF MOTION PICTURE ARTS & SCI., [http://awardsdatabase.oscars.org/ampas\\_awards/DisplayMain.jsp?sessionId=D884E0309714E6DFEBA083F5DCDC2196?curTime=1305316060708](http://awardsdatabase.oscars.org/ampas_awards/DisplayMain.jsp?sessionId=D884E0309714E6DFEBA083F5DCDC2196?curTime=1305316060708) (last visited Oct. 18, 2011).

53. Schallert, *supra* note 1, at A.

54. Lillian Johnson, *The Social Whirl*, CAL. EAGLE, Mar. 7, 1940, at 5A (reporting that her escort was Ferdinand Yober); Schallert, *supra* note 1, at A (noting crowd approval of stars and the actors' applause for McDaniel as she entered room).

of the large banquet room, separated from all of the white guests.<sup>55</sup> On the very night in 1940 that she would become the first Negro to win an Oscar, McDaniel and her escort would be segregated because of their race; they were not allowed to sit with the rest of the *Gone* cast and not welcomed among the rest of McDaniel's white Hollywood colleagues.<sup>56</sup>

The Oscar that McDaniel won that night made her a star. But, as the Academy's seating arrangements for its Awards demonstrated, the Oscar did not lift the racial discrimination that lay like a soaked blanket on her shoulders or on the shoulders of Negroes across America. Weeks earlier, the Atlanta *Gone* premier had offered yet another reminder of that burden. Under pressure from white Southern leaders, Selznick agreed to omit the faces of all the Negro *Gone* actors from advertising throughout the South.<sup>57</sup> Moreover, under that same pressure, he agreed that none of the black actors in *Gone*—including McDaniel—would be invited to attend the racially-segregated Atlanta premier.<sup>58</sup>

Ironically, after the Atlanta premier, the book's author, Margaret Mitchell, who had been in attendance, sent McDaniel a congratulatory telegram.<sup>59</sup> Reportedly, it read, "The Premier Audience Loved You and So Did I. The Mayor of Atlanta called for a hand for Our Hattie McDaniel and I wish you could have heard the cheers."<sup>60</sup> But of course, McDaniel could not have heard the cheers. Being a Negro, she was not allowed to sit in the theater, among her own entertainment colleagues, to watch her own movie. Nevertheless, as biographer Watts reports, afterward she sent a letter to Selznick thanking him for the opportunity "to play "Mammy" in [the] epochal drama of the Old South" and expressing the hope that her characterization was "the exact replica of what Ms. Mitchell intended her to be."<sup>61</sup>

Most white writers simply summarized McDaniel's success as the first "colored" or "Negro" to win, if they mentioned her at all.<sup>62</sup> Ed

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55. Photograph of Guests at 12th Academy of Motion Picture Arts & Sciences Awards Banquet (1939) in Margaret Herrick Library, Special Collections.

56. Andrea Lewis, *Celebrating Hattie McDaniel, First African-American to Win Oscar*, PROGRESSIVE MAG., Feb. 24, 2004, [http://www.progressive.org/media\\_883mplewis](http://www.progressive.org/media_883mplewis).

57. WATTS, *supra* note 23, at 168.

58. *Id.*

59. *Cuff Notes*, CHARLESTON DAILY MAIL, Jan. 19, 1940, at 6.

60. *Id.*

61. WATTS, *supra* note 23, at 169.

62. E.g., Schallert, *supra* note 1, at A; *Gone With the Wind Sweeps Awards of Movie Academy*, WASH. POST, Mar. 1, 1940, at 1 (listing her as "Hattie McDaniel, Negro mammy, as the best

Sullivan wanted to read more into the Academy's actions.<sup>63</sup> He wrote in his *New York Daily News* column that, "when the Academicians, for the first time in history gave the second-highest award to a colored actress, buxom Hattie McDaniel, they underscored a necessity at this time of a completely tolerant attitude toward all races, creeds and colors."<sup>64</sup> He added that the motion picture industry had served notice that it was not narrow or bigoted and that by the power of their "suggestion," the world would gain.<sup>65</sup> But, Sullivan's observations of the industry's complete abandonment of prejudice were clearly aspirational. There is little evidence that McDaniel's Oscar or her high visibility increased opportunities for black actors in Hollywood.<sup>66</sup> Indeed, some of her contemporaries claimed that McDaniel's choices contributed to white resistance to affording Negro actors fair opportunities.<sup>67</sup> It would be twenty-five years before Hollywood would award another non-honorary Oscar to an African-American—Sidney Poitier.<sup>68</sup> It would be fifty-one years before another black woman would win Best Supporting Actress and sixty-one years before a black wo-

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actress in a supporting role"). *But see 'Gone With Wind' Academy Winner*, N.Y. TIMES, Mar. 1, 1940, at 23 (describing McDaniel's win as the first time a member of her race has been honored).

63. *Tolerance*, BALT. AFRO-AMERICAN, Mar. 9, 1940, at 13 (quoting Sullivan and the *Daily News*).

64. *Id.* Black newspapers seemed to take Sullivan's comments in a positive light. *Id.*

65. *Id.*

66. See WATTS, *supra* 23, at 276 (explaining that opportunities are still limited in decades after McDaniel's win).

67. *No Hope For The Negro In Films, Says Writer, As Long As Hattie McDaniel 'Toms'*, CLEVELAND GAZETTE, Feb. 17, 1945, at 9.

68. Sidney Poitier won Best Actor in 1964 for the low budget *Lilies of the Field*, thus becoming the first black to win a Best Actor statuette and the second black man to be awarded any type of Oscar. See THE ACAD. OF MOTION PICTURE ARTS & SCI., <http://www.oscars.org/awards/academyawards/legacy/ceremony/36th.html> (last visited Oct. 5, 2011). In 1946, the Academy awarded James Baskette an honorary Oscar for his portrayal of Uncle Remus in the Disney movie *Song of the South*. THE ACAD. OF MOTION PICTURE ARTS & SCI., <http://www.oscars.org/awards/academyawards/legacy/ceremony/20th.html> (last visited on Oct. 5, 2011). McDaniel had a role in that film too and defended the production against criticism. WATTS, *supra* note 23, at 247-49. Early in his career, Poitier was praised for not speaking of race. Ruben Salazar, *Humans, Not Race Important, Films on Conflict 'Sheer Exploitation, Winner of Academy Award Believes*, Apr. 15, 1964; see also Hedda Hopper, *Entertainment, Curious Situation of Lilies of the Field, Producer Nelson Reports No Acknowledgement From Negroes*, L.A. TIMES, Sept. 21, 1964, at C17. Notably, Poitier's family immigrated from the Bahamas. *Sidney Poitier*, HOLLYWOOD'S GOLDEN AGE, [http://www.hollywoodsgoldenage.com/actors/sidney\\_poitier.html](http://www.hollywoodsgoldenage.com/actors/sidney_poitier.html) (last visited Nov. 15, 2011). One wonders the extent to which his lack of family ties to the American slavery experience in particular affected both the casting of him—or even, whether his black immigrant status fit a different Hollywood stereotype deemed suitable. As a successful and established actor, Poitier would criticize Hollywood quite forcefully. See Clifford Terry, *Sidney Poitier Blasts Hollywood Casting Bias*, CHI. TRIB., July 23, 1967, at F11 (discussing Poitier's blasting of the film industry for bias despite his own success).

man would win Best Actress.<sup>69</sup> Further, the stereotyping of blacks by Hollywood and the discrimination against black actors would continue.<sup>70</sup>

As McDaniel's biographer Watts observes, "[McDaniel's] association with *Gone With the Wind* finally sealed her public image as a key agent in the perpetuation of Hollywood racism."<sup>71</sup> After *Gone*, she became a "go to" girl for mammy and maid roles, in a segregated competition that largely involved other black female actresses.<sup>72</sup>

While much of white America celebrated *Gone*, the black community was divided over the meaning of McDaniel's success. For example, Harry Weber of the *Afro American* said the movie displayed the wreckage that slavery wrought in the South and also expressed appreciation that Selznick altered the more offensive parts of the story.<sup>73</sup> Lillian Johnson wrote that McDaniel's role demonstrated that sometimes, one conquers by stooping and succeeds by yielding.<sup>74</sup> Dean Gordon Hancock of Virginia Union University argued that Negroes cannot select their roles and that the objection to Mammy roles in film was borne of an unjustified embarrassment.<sup>75</sup> On the other

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69. In 1991, Whoopi Goldberg won a Best Supporting Actress Statue for *Ghost*. *The Oscar Winners*, N.Y. TIMES, Mar. 26, 1991, at 14. In 2002, Halle Berry won Best Actress for *Monster's Ball*. *See Beautiful Mind Wins, Best Actress Goes to Halle Berry*, N.Y. TIMES, Mar. 25, 2002, at 1. That same evening, Denzel Washington won Best Actor, and Sidney Poitier was honored with an Honorary Oscar. *Id.* There have been others. *See generally* EDWARD MAPP, AFRICAN AMERICANS AND THE OSCAR, DECADES OF STRUGGLE AND ACHIEVEMENT 5 (2008) (illustrating the presence of African Americans in Hollywood).

70. Vernon Scott, *Being Black in Hollywood*, BALT. AFRO-AMERICAN, Feb. 1, 1986, at 11; Hollie I. West, *For 60 Years, Blacks Were Anything But "Super"*, WASH. POST, Oct. 15, 1972 (discussing stereotyping faced by the actors including McDaniel and others); Ted Yates, *1942 Marked Many Changes in Entertainment World*, BALT. AFRO-AMERICAN, Jan. 2, 1942, at 10 (noting progress and Republic Pictures' decision to give as much publicity to blacks as to white stars); *Progress Noted in Radio-TV*, BALT. AFRO-AMERICAN, Dec. 30, 1950, at 9 (noting the prior stereotypes prohibiting black actors but that there are hopeful signs); *see also supra* note 68 (discussing Sidney Poitier's criticism of Hollywood). Actors union also played a major role in advancing the cause welcoming black actors to their ranks and trying to negotiate better terms with studios. *See discussion infra* p. 123.

71. WATTS, *supra* note 23, at 156-57 (noting that as celebrity grew, so did reputation as an apologist for the film industry).

72. Phillip K. Scheuer, *Cagney's Next Feature Has Western Locale*, L.A. TIMES, Jan. 24, 1940, at 13 (discussing column on various Hollywood incidents and noting that McDaniel, now riding the crest of a wave of popularity, was now being sought out by the Samuel Goldwyn Organization for a "similar portrayal" in *Little Foxes*).

73. Harry E. Weber, *"Gone With the Wind" Has Some Good Points*, BALT. AFRO-AMERICAN, Jan. 20, 1940, at 13.

74. Lillian Johnson, *A Woman Talks*, BALT. AFRO-AMERICAN, Mar. 9, 1940, at 4.

75. Dean Gordon B. Hancock, *Between the Lines, Mammy Comes Back*, PLAINDEALER, May 17, 1940, at 7. Hancock was a professor and founder of the Department of Social Science at Virginia Union University and a writer for the Associated Negro Press. CHI. DEFENDER, June 14, 1952, at 2 (showing photo of and caption regarding Hancock).

hand, the majority of black commentators were more critical.<sup>76</sup> McDaniel's friend and fellow actor Clarence Muse, who himself had been labeled an "Uncle Tom" for his roles, discouraged blacks from seeing *Gone*.<sup>77</sup> While praising McDaniel's performance, he called the proponents of the movie mere opportunists, who were anxious to satisfy whites in the hope of economic gain. He also accused them of "committing a great crime against the race."<sup>78</sup>

Members of the Howard University community also strongly objected to *Gone*. Howard Law students picketed the film at theaters and expressed their reasons for displeasure in *The Hilltop*, the student newspaper.<sup>79</sup> In a speech at Northwestern University, Howard University English Professor Sterling Brown said the book celebrated the slave system and mischaracterized history.<sup>80</sup> Professor Carter G. Woodson called it "subtle propaganda" that "glorified slavery as a benevolent institution with which its victims were perfectly satisfied, and brands as cruel and inhumane the forces which destroyed that system."<sup>81</sup> Howard Thurman offered similar views. Of the decision to adapt the book into a movie, he warned:

The book is a part of an almost endless stream of propaganda direct and indirect which has as its purpose the defining and categorizing of at least one minority in American life. The basic meaning of this propaganda ought to be clearly understood and analyzed without emotionalism, so that ways and means may be found to circumvent it. Before anything constructive may be projected, this must be done. Such is the obligation of every Negro.<sup>82</sup>

Many of the black commentators who opposed *Gone* still tried to praise McDaniel's work. On June 3, 1940, the Howard Players, Howard University's student thespian organization, hosted McDaniel at an on-campus luncheon.<sup>83</sup> The NAACP's magazine, *The Crisis*, ran a piece attacking *Gone* in a March, 1940 issue, but featured McDaniel

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76. WATTS, *supra* note 23, at 174 ("Overwhelmingly, the vast majority of African-Americans objected to *Gone With the Wind* as a whole.")

77. Clarence Muse, *What's Going on In Hollywood*, CHI. DEFENDER, Jan. 27, 1940, at 21.

78. *Id.* (alteration in original).

79. *Law Students Present Reasons for Picketing "Gone With The Wind"*, HILLTOP, Mar. 26, 1940, at 3. Among other concerns, the students stated that the book contained a "crafty condemnation of the destruction of the slave system." *Id.*

80. Hollis Woods, *Professor Attacks 'Gone With The Wind': G.W.T.W. Novel is Attacked By Howard Prof.*, CHI. DEFENDER, Mar. 2, 1940, at 9.

81. HILLTOP, Mar. 26, 1940, at 3.

82. *Id.*

83. HOWARD UNIV. BULLETIN, July 1, 1940, at 19.

on the cover of an April issue.<sup>84</sup> In a 1943 issue, *The Crisis* featured McDaniel among several other women in a series on “First Ladies of Colored America.”<sup>85</sup>

While *Gone* gave McDaniel national attention, it did not swing Hollywood’s doors wide open for her. Her long-term contract with Selznick Pictures, common in the industry, stripped her of creative control of her own career.<sup>86</sup> Narrow-minded audiences and film-makers embraced her as their Mammy and held on tightly, pointing stubbornly only toward more domestic servant roles.<sup>87</sup> Negro patrons proved cool when she presented her *Gone* character “Mammy” in a road show.<sup>88</sup>

Her career took an upward turn in 1947 when she took over the lead role in the radio program, *The Beulah Show*, a voice role previously played by a white male actor pretending to be a black woman.<sup>89</sup> With *The Beulah Show*, McDaniel became the first black woman with her own radio show.<sup>90</sup> Later, McDaniel would play the character Beulah on television.<sup>91</sup> But critics again charged her with offering up a host of stereotypical portrayals.<sup>92</sup> The United States Army ceased broadcasting *The Beulah Show* in Asia as a result of black troops complaining that the show perpetuated stereotypes of black men that undercut their ability to conduct their mission.<sup>93</sup>

Some modern commentators have wanted to say that McDaniel was more than a great actress; they have wanted to clothe her in the accoutrements of a civil rights leader, both in the acting profession

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84. CRISIS, Apr. 1940 (depicting McDaniel on the cover, in a fur coat).

85. *First Ladies of Colored America*, CRISIS, Sept. 1943, at 337.

86. JACKSON, *supra* note 16, at 65, 70; WATTS, *supra* note 23, at 183-84, 195.

87. *Id.*

88. JACKSON, *supra* note 16, at 65, 70 (noting small Negro audiences for these shows); WATTS, *supra* note 23, at 188-90. Watts argues that McDaniel was attempting to present a broader picture of Mammy than *Gone* had allowed. WATTS, *supra* note 23, at 186-89.

89. WATTS, *supra* note 23, at 253.

90. Rea, *supra* note 28.

91. WATTS, *supra* note 23, at 267. Ethel Waters was initially chosen but later withdrew. *Id.* at 266.

92. The show involved a black maid, cook, babysitter for a well to do white family. See generally *The Beulah Show* (ABC television 1950-1952) (depicting McDaniel as Beulah). The white wife wore nice dresses and pearls in the show. The white husband wore a suit and tie. *Id.* Their young son looked on. *Id.* Beulah’s boyfriend could never hold a job and after nine years had still not proposed. *Id.* True to stereotype, she was required to roll her eyes and grin widely. *Id.*

93. Milton A. Smith, *Offensive to GI’s, Banned: Army Drops ‘Beulah’ Show Taken Off Air After Fighters Complain*, BALT. AFRO-AMERICAN, Feb. 17 1951, at 1.

and beyond.<sup>94</sup> Certainly, she had to overcome both racism and sexism. It remained true throughout her life that, because she was a Negro, she could not live anywhere she wanted,<sup>95</sup> stay in any hotel she wished, be served in any restaurant or store, or sit or perform in any theater.<sup>96</sup> She could not assume that her nieces and nephews could attend any school they desired,<sup>97</sup> nor could she marry outside of her race.<sup>98</sup> In addition to racism, Hollywood sexism limited her to the roles that that women were allowed to play and specifically black women. She had to stand in the shadows while white women were offered the leading or favored parts in those limited roles.<sup>99</sup> The medical profession would give little attention to her health care needs as a woman.<sup>100</sup> Even after she became successful, her vast talents would have to share the stage with comments about her weight, race, and breast size.<sup>101</sup> From salary, to movie roles, to accolades, to seating at the Academy Awards, black actors of either gender could not expect to be treated the same as whites.<sup>102</sup>

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94. See, e.g., Sean Michael O'Donnell, *(mis)Understanding Mammy: The Hattie McDaniel Story*, SHOW BUS. MAG. (Nov. 25, 2007), [http://showbusinessweekly.com/article-289-\(mis\)understanding-mammy-the-hattie-mcdaniel-story.html](http://showbusinessweekly.com/article-289-(mis)understanding-mammy-the-hattie-mcdaniel-story.html) (criticizing a play that does not characterize McDaniel as a civil rights icon).

95. When she and other blacks moved into their new neighborhood in the Sugar Hill ("West Adams") section of Los Angeles, a group of whites banded together to kick them out through enforcement of restrictive covenants banning the sales of the properties to blacks. WATTS, *supra* note 23, at 237-39, 259; see also *Coast Whites Move to Oust Movie Stars*, BALTIMORE AFRO-AMERICAN, Mar. 27, 1943, at 24. While it appears McDaniel's white neighbors gave up the fight, others did not. The California Supreme Court continued to uphold racially restrictive covenants as valid contracts. See, e.g., *Cumings v. Hokr*, 193 P.2d 742 (Cal. 1948). The U.S. Supreme Court finally outlawed courts' enforcement of restrictive covenants as valid contracts in *Shelley v. Kraemer*, 334 U.S. 1 (1948).

96. See, e.g., *Heart of Atlanta Hotel, Inc. v. United States*, 379 U.S. 241 (1964) (defining businesses as public accommodations and finding Congress has the power to enforce Civil Rights laws against them).

97. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

98. For most of McDaniel's life, interracial marriage was a felony in the overwhelming majority of the states in the United States. California barred interracial marriage by law until 1948. See generally *Perez v. Sharp*, 32 P.2d 17 (Cal. 1948) (overturning California statute barring interracial marriage). Virginia and some other states kept such bans in force until 1967 when the U.S. Supreme Court finally declared them unconstitutional. *Loving v. Virginia*, 388 U.S. 1 (1967).

99. Lewis, *supra* note 56.

100. McDaniel developed breast cancer, an illness that disproportionately affects black women. WATTS, *supra* note 23, at 270; see also, e.g., Maya Jackson Randall, *Women's Health Research Improves but Not Enough*, WALL ST. J., Sept. 23, 2010, at 1 (discussing lagging research on women's health issues and higher incidents of breast cancer in black women).

101. Don Ryan, *God First, My Work Next and a Man Last! That's Hattie McDaniel Who's Free, Forty and Famous; A Personality Study*, L.A. TIMES, Feb. 11, 1940, at I3, I8 (calling her "200 odd pounds of buxom colored girl" and "the best 200 pound catch on Central Avenue.").

102. See discussion *supra* at p. 128. The Screen Actors Guild ("SAG") played an important role in improving the lot of black actors. WATTS, *supra* note 23, at 113-14 (discussing black

However, if one desires a more stringent test for a civil rights leader, then McDaniel might well fail. She only nibbled at the edges of the discrimination that she and others encountered daily. She distanced herself from the black community's efforts to build a base of independent black films.<sup>103</sup> While she remained socially active in the black community and hosted legendary parties,<sup>104</sup> she generally did not publicly participate in or lend her name to civil rights struggles.<sup>105</sup> A notable exception occurred when she was a defendant in a lawsuit attempting to remove her from the mansion she had purchased in a white neighborhood.<sup>106</sup> In that case, however, her own financial interest was directly affected. She was regularly involved in charity work and the War effort;<sup>107</sup> but so were many others. She steered clear of involvements that would negatively affect her career or her purse.<sup>108</sup> When appointed to head a "Negro subcommittee" to entertain troops during World War II, she pleaded to have the opportunity to appear before white troops as well since "all of the boys" needed entertainment.<sup>109</sup> But, while she asked not to be subjected to segregation her-

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actors joining SAG); *id.* at 270-71 (explaining that SAG formed the Negro Employment Committee, whose members were subsequently accused of communism).

103. WATTS, *supra* note 23, at 141 (absence from independent black films); *id.* at 185 (turning down opportunities to promote film in black film houses seeking to perform in white houses first).

104. See, e.g., JACKSON, *supra* note 16, at 148; WATTS, *supra* note 23, at 258.

105. WATTS, *supra* note 23, at 139 (discussing McDaniel's consideration of film as a career not about activism); *id.* at 141 (discussing McDaniel being conspicuously absent from Black films); *id.* at 156-57 (explaining that participating in *Gone* sealed image as participant in racism); *id.* at 160 (indicating that McDaniel helped to perpetuate racism by refusing to directly challenge the bigotry she faced); *id.* at 163 (discussing contemporary and *Gone* co-star Butterfly McQueen labeling McDaniel a sellout for not challenging racism); *but compare id.* at 281 (claiming that in private life McDaniel was a "militant and outspoken" proponent of civil rights but offering no evidence of public participation).

106. See *supra* text accompanying note 95; WATTS, *supra* note 23, at 144. While she has been at times attributed with changing offensive language in scripts, there is little evidence to back up the claim. *Id.* at 160-61. According to Watts, near the end of her life, McDaniel insisted that studios soften the dialect on *The Beulah Show*, but again, this objection related directly to how she would be perceived; other aspects of the show remained objectionable. *Id.* at 254, 257. McDaniel did apparently try to open opportunities for those close to her once she became established. For example, she arranged to have her secretary, Ruby Goodwin, hired as a writer of *The Beulah Show*. *Id.* at 254.

107. *Id.* at 126-27, 209-10.

108. Watts struggles admirably to offer evidence to rebut the interpretation that McDaniel and others were willing to be a vehicle for racism so long as it advanced their careers. See WATTS, *supra* note 23, at 223-24.

109. Letter from Hattie McDaniel to Mr. Arch Reeve (Apr. 22, 1942) (on file with author).

self, she never publicly criticized the segregated military and grossly unequal treatment of black troops at that time.<sup>110</sup>

Nor was McDaniel an obvious leader among those who sought more rights for actors generally or even for black actors specifically. Studio control would be the common denominator that would bind actors of all backgrounds into unions.<sup>111</sup> McDaniel joined the Screen Actors Guild (“SAG”) in 1934, a year after its formation, at the urging of Clarence Muse, a founding member.<sup>112</sup> But, unlike Muse, she took no public role in SAG’s battles against studios or against segregationist policies outside of Hollywood.<sup>113</sup> There is no evidence that she joined Actors Equity, the union which brought the National Theater in Washington D.C. to its knees through a year and a half boycott, protesting its ban on black patrons.<sup>114</sup> She did not join the Negro Actors Guild (“NAG”) until 1947, very late in her career.<sup>115</sup> NAG assisted black actors and their families financially when they struggled financially, and paid for their funerals when they could not afford it.<sup>116</sup> Indeed, it seems that McDaniel steered clear of what could be deemed on any level to be “political” involvement that could be detrimental to her career.

Perhaps the best indicator of her approach was McDaniel’s response when columnist Hedda Hopper asked her to distribute Richard Nixon placards.<sup>117</sup> McDaniel returned them saying that she did not endorse candidates. She continued, “I have always felt that people expect for me to entertain them but not to try to influence them as

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110. Washington would finally agree to begin to desegregate all military units in 1951. *U.S. Army to Stop Segregation, End All Negro Regiment*, *BALT. AFRO-AMERICAN*, July 19, 1951, at 1; John W. Finney, *Segregated Units Ended By The Services*, *WASH. POST*, Oct. 31, 1954, at M6.

111. See Ken Orsatti, *How SAG Was Formed: The Actor’s Road to Empowerment*, *SCREEN ACTORS GUILD*, <http://www.sag.org/node/22> (last visited on Oct. 27, 2011).

112. *WATTS*, *supra* note 23, 113-14.

113. Muse was a charter and active member of SAG.

114. *Legitimate Theater Returns to Capital*, *N.Y. TIMES*, Mar. 7, 1950, at 23. The National Theater had closed rather than admit Negroes. *Id.*

115. NAG’s newsletter would regularly list renewing and new members, but McDaniel does not appear on earlier lists. See, e.g., *NAG NEWSLETTER* (Negro Actors Guild), Feb. 1946, at 8 (listing members, but McDaniel not on list); Dewberry, *supra* note 34, at 150-51 (listing NAG members printed in the NAG Imperial Theater Souvenir Book of 1951, which showed Hattie McDaniel).

116. *Over 125 Performers Aided During the Year*, *BALT. AFRO-AMERICAN*, Dec. 30, 1950, at 8. But, the Guild would provide her with financial assistance when she was in need.

117. Letter from Hattie McDaniel, to Hedda Hopper, Columnist, *L.A. Times* (Sept. 13, 1950) (on file with Academy of Motion Picture Arts and Sciences, Hedda Hopper Papers, Special Collections, Margaret Herrick Library) (indicating McDaniel’s refusal to endorse Nixon’s congressional candidacy).

a political authority.”<sup>118</sup> Noting that she adopted that approach in her current role as Beulah, she said, Beulah is “everybody’s friend.”<sup>119</sup> Whether she was following the advice of her agent or simply going her own way,<sup>120</sup> staying away from politics included for McDaniel, staying away from civil rights issues.

But even as she professed universal friendship, McDaniel put the gloves on when she perceived a threat to her career. To everyone’s surprise, in 1944, she used the term “nigger” when making remarks about Lena Horne’s success in a principle address at the First Annual Awards of the Committee for Unity in Motion Pictures.<sup>121</sup> McDaniel immediately corrected her statement with the term “Negro.”<sup>122</sup> But columnist and *Los Angeles Sentinel* managing editor, J. Robert Smith called her out in print,<sup>123</sup> resulting in a public battle in the newspapers.<sup>124</sup>

She challenged Walter White, executive director of the NAACP who was on the warpath against Hollywood’s portrayal of Negroes.<sup>125</sup> Perhaps unhappy with White’s staunch support of upstart Lena Horne, she claimed that he had addressed her in a tone that a Southern colonel would use with a slave and that he was prejudiced against darker-skinned blacks.<sup>126</sup> (Walter White, though proudly claiming his

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118. *Id.*

119. *Id.*

120. McDaniel signed with white agent William Meiklejohn; he was one of the few white agents who would agree to represent black talent. WATTS, *supra* note 23, at 129.

121. J. Robert Smith, *Miss McDaniel Accused of Using Offensive Epithet*, BALT. AFRO-AMERICAN, Apr. 29, 1944, at 6.

122. *Id.*

123. *Id.*

124. Smith claimed that he confronted her about the word afterward and allegedly received only a smile and, “I have no statement to make.” *Id.* McDaniel responded through the *California Eagle*. In a long defensive letter, she attacked Smith for alleged mistakes in his columns and stated that she had made an “error of speech.” J. Robert Smith, *Hattie McDaniel Speaks Mind on ‘Slip of Lip’*, CAL. EAGLE, May 4, 1944, at 6 [hereinafter *McDaniel Speaks Mind*]. She further claimed that she had apologized to those who deserved an apology. *If Slipped So What Says Hattie*, CAL. EAGLE, May 4, 1944, at 1. The exact statement in which the slip occurred was apparently disputed. The *Eagle* reprinted a copy of McDaniel’s written speech (likely provided by McDaniel). It says, “Lena Horne glorified Negro womanhood.” *McDaniel Speaks Mind*, *supra* at 6. However, columnist Smith reported her as referring to Lena Horne as “a representative of the new type of “nigger womanhood” and states that after, marked silence by the 3000 people present, McDaniel corrected herself and added, “I said Negro womanhood.” Smith, *supra* note 121. For further discussion of the incident and McDaniel’s angry response see WATTS, *supra* note 23, at 231-32. Like Smith, based on her review of the period, this writer doubts the notorious word would have been accidentally used by a black person in her time – unless the speaker was simply regularly accustomed to saying it.

125. See WATTS, *supra* note 23, at 241-44.

126. *Id.* at 242. Watts pointed out her lack of evidence given White’s determined fight on behalf of all Negroes. *Id.* On the other hand, if gender is considered, one does find evidence

black ancestry, was himself blond with blue eyes.)<sup>127</sup> She wrote the War Department and other branches of the U.S. government, suggesting that White's attacks on Hollywood were harming national interests, thus indirectly offering up the NAACP's larger civil rights efforts in exchange for her economic security.<sup>128</sup> Fearing their roles would dry up, she and a group of black actors insisted to SAG that Walter White's meetings with studios on black stereotyping were usurping the union's role.<sup>129</sup> SAG responded that the conflict was not a union matter.<sup>130</sup>

When under attack from black critics, McDaniel also turned to questionable allies to defend her cause. She asked state senator Jack B. Tenney, a leading figure in "communist" investigations, for help in advancing her film career, noting that she was without steady work despite her Oscar success.<sup>131</sup> She even posed for a photograph with him.<sup>132</sup> She sought the aid of Hollywood columnist Hedda Hopper, no friend of Negro equality.<sup>133</sup> After talking with McDaniel, Hopper wrote that she had "discovered" that McDaniel "had not been victimized by the whites."<sup>134</sup> Instead, said Hopper, McDaniel "had been attacked by certain members of her own race" simply because she had tried to earn an honest dollar by playing roles those critics thought degrading to Negroes.<sup>135</sup> McDaniel carried on a long correspondence with Hopper, and stood aside as Hopper blamed blacks both for McDaniel's problems and their own problems.<sup>136</sup> Moreover, she never took Hopper to task in those letters or otherwise for Hopper's treatment of blacks or civil rights in her columns.<sup>137</sup>

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that lighter-skinned *women*, like Lena Horne, were considered to be more beautiful and were emerging as Hollywood favorites. Whereas in McDaniel's earlier days, while Hollywood did not cast black women as beautiful, it preferred darker-skinned black women in roles. See discussion *supra* p. 113; see also WATTS, *supra* note 23, at 82-83, 133. Just as significant for women may have been the issue of weight. As Watts notes, Horne was light skinned *and* thin. *Id.* at 218. McDaniel was dark-skinned and close to or more than 200 pounds. *Id.* at 249.

127. WALTER WHITE, *A MAN CALLED WHITE* 3 (1995).

128. WATTS, *supra* note 23, at 235.

129. *Id.* at 227.

130. *Id.*

131. *Id.* at 249.

132. *Id.* at 252.

133. Hopper regularly justified film roles that demeaned blacks and attacked those who criticized them. See generally Jennifer Frost, *Hedda Hopper, Hollywood Gossip and the Politics of Racial Representation in Film, 1946-48*, *J. OF AFRICAN-AM. HISTORY*, Winter 2008, at 36-59.

134. Hedda Hopper, *Screen and Stage: Own People Slow Hattie McDaniel Up*, *L.A. TIMES*, Dec. 14, 1947, at H3.

135. *Id.*

136. See *id.*

137. *Id.*

The idea expressed by Howard Thurman—that blacks had an obligation to reject participation in events that demeaned other blacks no matter what the economic gain<sup>138</sup>—caused McDaniel and other black actors of that time great difficulty. Hollywood offered but one sure path to achieving wealth and fame for a black actor. McDaniel argued that if she and other actors rose through taking such roles, the race would too.<sup>139</sup> She publicly characterized black criticisms of her work in terms of “class,” as if her critics were simply embarrassed by “mammies” and maids.<sup>140</sup> Under this theory, she was the proud defender of the legacy of black mothers, daughters, and sisters.<sup>141</sup> White commentators trumpeted one response she gave to critics—that she would rather play a maid for \$700 a week than be one for \$7 a week.<sup>142</sup>

Near the end of her life, Hattie McDaniel sold her Sugar Hill mansion and moved into a smaller home on Country Club Drive.<sup>143</sup> She explained that with growing health problems, she needed a home “all on one floor.”<sup>144</sup> Thereafter her health continued to fail.<sup>145</sup> In August 1951, she suffered a stroke and thereafter was belatedly diagnosed with advanced heart trouble and diabetes.<sup>146</sup> Thereafter, her breast cancer was discovered in its advanced stages.<sup>147</sup> She sought to borrow money from friends and finance companies.<sup>148</sup> In December 1951, she executed her last will and testament.<sup>149</sup> Within months of that, she was forced to move into the Motion Picture Country House, a nursing home/hospital complex supported by the movie industry and offering both free acute and long term care to those who could not afford it.<sup>150</sup> According to biographer Watts, she was the first black to

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138. See discussion *supra* p. 119.

139. WATTS, *supra* note 23, at 242.

140. *Id.* at 176-77 (describing roles as opportunity to celebrate working class women and to glorify “Negro womanhood”).

141. *Id.*

142. *Id.* at 139 (citing a variant of this quote in BOGLE, *supra* note 32, at 82).

143. Harry Levette, *Hollywood Shy About Jo’s Salary*, BALT. AFRO-AMERICAN, Apr. 21, 1951, at 8 (reporting on McDaniel’s move).

144. WATTS, *supra* note 23, at 265.

145. *Id.* at 263-64, 268-72.

146. *Id.* at 268.

147. *Id.* at 270.

148. JACKSON, *supra* note 16, at 149; WATTS, *supra* note 23, at 271.

149. Last Will and Testament of Hattie McDaniel, December 16, 1951 [hereinafter McDaniel Will] *in* In the Matter of the Estate of McDaniel, Probate Record, on file at the Los Angeles County Records Center, Los Angeles, CA [hereinafter McDaniel Probate Records].

150. Joseph N. Bell, *Down Memory Lane at the Movie Country House*, L.A. TIMES, Feb. 26, 1967, at A29.

be admitted.<sup>151</sup> Ten months later, on October 26, 1952, McDaniel died there.<sup>152</sup>

Even her last wish was denied by racism. In her will, she asked that she be buried in the Hollywood Cemetery.<sup>153</sup> At the time, its governing association did not allow blacks to be buried there, and McDaniel was no exception.<sup>154</sup> She was buried in her second choice, Rosedale Cemetery.<sup>155</sup>

Despite the tensions, in the end, black Hollywood and the black community showed up for McDaniel's funeral.<sup>156</sup> Few of her white Hollywood colleagues actually attended, instead sending beautiful flowers and nice cards as their proxies.<sup>157</sup> Two notable exceptions were Edward Arnold, President of SAG, who was invited to speak and James Cagney, who apparently came on his own.<sup>158</sup>

McDaniel appeared in more than one hundred films.<sup>159</sup> She would achieve fame and income that allowed her to purchase the accoutrements of wealth: fur coats, a Packard,<sup>160</sup> and a mansion in a white neighborhood.<sup>161</sup> But, she would fall to the depths of loneliness and despair that would lead her to attempt suicide.<sup>162</sup> She would suffer an early widowhood and three failed marriages.<sup>163</sup>

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151. WATTS, *supra* note 23, at 271.

152. *Hattie McDaniel, Beulah of Radio*, N.Y. TIMES, Oct. 27, 1952, at 27.

153. McDaniel Will, *supra* note 149.

154. *Id.*; see also WATTS, *supra* note 23, at 274-75.

155. WATTS, *supra* note 23, at 275. Watts states that just by requesting to be buried in the Hollywood Cemetery, McDaniel had made a point. *Id.* at 274. True enough, yet, it is not clear at all that she intended to make a point. She may simply have desired to finally be accepted among her Hollywood peers, if not in life, then in death. In 1999, new owners at Hollywood Cemetery would atone for previous actions and offer her a final resting place. *Oscar Winner Hattie McDaniel Memorialized at Hollywood Cemetery Which had Refused to Bury Her*, JET MAGAZINE, Nov. 15, 1999. When the family declined the opportunity to move her body, she was honored with a pink granite memorial instead. *Id.*

156. WATTS, *supra* note 23, at 273-75.

157. *Id.* at 272 (flowers from Gable). *Thousands Crowd Church at Hattie McDaniel Rites*, L.A. TIMES, Nov. 2, 1952, at A5 (noting flowers from "all branches of the motion picture industry and Clark Gable's "special tribute of flowers")

158. See *This is Hollywood*, CHI. DEFENDER, Nov. 15, 1952, at 23 (noting Cagney's presence); *Thousands Attend Last Rites for Hattie McDaniel*, JET MAGAZINE, Nov. 13, 1952, at 59. White Councilman Kenneth Hahn was also present. *Id.*

159. Estimates as to the number of films in which McDaniel appeared have varied widely. Watts documents approximately 90 films but also notes that McDaniel appeared in hundreds of others as an extra. WATTS, *supra* note 23, at 283-86. Jackson states that the actual figure is close to 300. JACKSON, *supra* note 16, at 171-74.

160. See BOGLE *supra* note 32 (displaying a photograph of McDaniel with her Packard).

161. WATTS, *supra* note 23, at 210-12.

162. JACKSON, *supra* note 16, at 146-47.

163. WATTS, *supra* note 23, at 45, 55, 200-04, 259-65.

One cannot seriously doubt that class prejudice has led some to criticize her roles. This writer thinks that apart from McDaniel's acting talent, her self-promotion skills have also been vastly underappreciated. And, it is likely that some of those who criticize her today might not measure up against the stiff moral yardstick they apply to her life when faced with choices that involve economic risk. But, the evidence is compelling that the criticisms against her were not all rooted in class bias; her critics were not requiring that she commit to a life of poverty in the name of "the cause." Hattie McDaniel had every right to make a dollar on her own terms in a racist society. But, those who saw her as consistently facilitating racism for the sake of her own purse, understandably refrained from a full embrace when she returned back home to show them her new fur coat and Packard. *They* had loved ones and purses that were affected by her choices too.

Despite her success, to many in white America, their beloved "Hattie," was beloved because she did not rock the Hollywood racial boat. In their minds, she remained not primarily "an actress," but rather their black, female, house servant. On the occasion of her death, an article in the *Los Angeles Times* summarized her life thusly: "To millions of film, radio and television fans, Hattie McDaniel was the personification of all that is good, wise and lovable in the Negro woman."<sup>164</sup> It should surprise no one that her legacy was controversial back then or that it remains controversial today.

## II. THE WILL AND THE PROBATE RECORDS

Upon the death of an individual, living persons must take up the mantle of escorting the decedent's property to its new place. Those who write wills, as McDaniel did about a year before she died,<sup>165</sup> normally designate in the will an "executor" to perform this task. McDaniel named two: John Charles Gross and the California Trust Company.<sup>166</sup> She chose a well-known Hollywood law firm, Zagon, Aaron & Sandler, to assist the executors in closing out her estate.<sup>167</sup>

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164. *Hattie McDaniel Negro Star Dies: Only Actress of Her Race to Win Academy Award Passes at Motion Picture Home; Ill a Year*, L.A. TIMES, Oct. 27, 1952, at A1.

165. McDaniel Will, *supra* note 149.

166. *Id.* at 11 ¶ 12. The California Trust Company had long been a wholly owned subsidiary of the California Bank organized for this purpose. *See Bank's Most Important Subsidiary: Backed By An Ideal Its Founders Dreams Have Been Justified*, L.A. TIMES, Sept. 24, 1923, at I 10 (noting that its work includes acting as executor and managing trusts). For more on executor John Charles Gross and the Zagon Firm see *infra*, note 449 and 452.

167. McDaniel Will, *supra* note 149, at 12 ¶ 13.

Barring a will contest or other controversy, the process of “probating a will” is relatively straightforward. It begins with one being appointed as an executor to represent the estate. The executor then makes sure that the will is filed; takes control of the decedent’s property; notifies beneficiaries, potential beneficiaries, and creditors; pays the descendant’s debts and taxes; and then distributes the remaining property to beneficiaries or heirs. McDaniel’s estate was complicated by three factors. First, she had intellectual property interests that had to be negotiated and settled.<sup>168</sup> Second, she apparently owed both federal and state back taxes.<sup>169</sup> Finally, as would later become obvious, she was insolvent.<sup>170</sup>

Despite the fact that McDaniel had named two executors, John Gross was appointed the sole executor of the McDaniel estate on December 1, 1952.<sup>171</sup> The reason the California Trust Company backed out is clear from Gross’ filing which estimated the McDaniel estate at a mere \$10,000.<sup>172</sup>

#### A. The Will

McDaniel’s will is thirteen pages long and indicates that she gave her legacy a great deal of thought.<sup>173</sup> She asked that her executor, after taking control of her assets, allow her trusted secretary, Ruby Goodwin, access to her papers for the purpose of finishing a book the two were planning about her life pursuant to a written agreement.<sup>174</sup> The executor would allow Goodwin the access, but he and the lawyers did not treat the papers as an asset or account for them in their filings.<sup>175</sup> The book was never published.

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168. The executor would end up having to review the contracts of her agent, MCA Artists, who claimed a 10% commission on her royalties, negotiate a second agreement with MCA to represent it in putting her Beulah interests on the market, and then approve contracts regarding the sale of her Beulah Interests. See McDaniel Probate Records, *supra* note 149 at 5-6 (Second Account Current and Report of Executors, Petition for Allowance of Commissions and Fees on Account of Extraordinary Services of Executor and His Attorneys, and for Reduction of Executor’s Bond, Oct. 30, 1954, 2-3 (“Second Accounting”).

169. See discussion *infra* Parts II. A-C.

170. See *id.*

171. WATTS, *supra* note 23, at 325 n.26.

172. *Id.*

173. McDaniel Will, *supra* note 149.

174. *Id.*

175. Goodwin did, however, spur the establishment of a scholarship fund in McDaniel’s name. *Hattie McDaniel Memorial Scholarship Available*, CHI. DEFENDER, Feb. 26, 1955, at 15. And ironically, she published her own book, *It’s Good to Be Black*, which whites embraced as a positive turn on the experience of being black. *San Dimas Clubwomen to Hear ‘Best Book’*

Her estate plan set up a testamentary trust<sup>176</sup> for her brother Sam, her closest heir, and his wife Lulu hoping to give them \$75 a week for the rest of their lives. But after the creditors, the executor and the lawyers were paid, there was nothing to put into the trust.<sup>177</sup>

In the fourth paragraph of her will, she set out sixteen groups of specific bequests to friends and family.<sup>178</sup> In the last of these, she stated: “*TO HOWARD UNIVERSITY of Washington, D.C., my ‘Oscar,’ which was awarded to me by the Academy of Motion Picture Arts and Sciences, for my acting in ‘GONE WITH THE WIND.’*”<sup>179</sup> Sixty years after her death, no one knows where the famous Oscar is.<sup>180</sup>

#### B. Notices and the Creditors

The executor gave the required public notice to the sixteen beneficiaries named in her will, including Howard University. He immediately began to take control of McDaniel’s assets.<sup>181</sup> Of all the beneficiaries, only Sam and Lulu McDaniel by their attorney Hugh Culler, formally appeared.<sup>182</sup> The failure of the others to appear was not unusual or negligent. The probate of an uncontested will is not an adversary proceeding. Her debts, by law, had to be paid, and appearing would probably have required Howard University to hire local counsel.<sup>183</sup>

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Author, L.A. TIMES, Feb. 19, 1956, at F11 (noting book wins best nonfiction book by a California writer and describing it as a “bright panorama” of her life).

176. A testamentary trust is a trust established by the terms of a will.

177. McDaniel Will, *supra* note 149, at 8 ¶ 6(a).

178. *Id.* at 2-7 ¶ 4(a)-(p).

179. *Id.* at 7 ¶ 4(p) (emphasis added).

180. See discussion *supra* pp. 108-09.

181. McDaniel Probate Records, *supra* note 149 (First Account, Petition for Authority to Pay Debts and for Allowance on Account of Executor’s Commissions and Attorneys’ for Ordinary and Extraordinary Services, Sept. 21, 1953, at 4 (“First Accounting”)).

182. Parties who filed an “appearance” with the court were entitled to “special notice,” e.g., being served with all of the papers generated by the proceeding. CAL. PROB. CODE § 1202 (West 1931). Those who did not appear did not receive such service. *Id.*

183. Howard University also had its hands full on the East Coast. Members of Congress, supported by the American Legion and some states had accused several Howard faculty members of being communists and were threatening to cut off its federal funding—for Howard, these investigations ranged over a decade. See *Federal Agents Again Investigating Howard University*, BALT. AFRO-AMERICAN, Sept. 7, 1935, at 4; *Commies on H.U. Campus Says, FBI Agent: Labels Student Club, Professor Red Members*, BALT. AFRO-AMERICAN, July 14, 1951, at 3; *Wants End to Teacher Inquiries: Congressmen Hits ‘Witch Hunters’ at HU Meeting*, BALT. AFRO-AMERICAN, Mar. 21, 1953, at 19. In addition, Howard’s then general counsel George E.C. Hayes was working with Howard law professor James Nabrit, Jr. (who would become the President of Howard during the tumultuous ‘60s) and Thurgood Marshall (a Howard law alumnus and later U.S. Supreme Court Justice) on the seminal companion cases of *Bolling v. Sharp*, 347 U.S. 497 (1954) and *Brown v. Board of Education*, 347 U.S. 483 (1954). There was little time to be concerned about Hattie McDaniel’s Oscar.

McDaniel's creditors, however, did not miss the party. The IRS claimed tax liability back to 1949, seeking \$11,677.15 in taxes and penalties.<sup>184</sup> It would inform the executor that it had attached liens to all of her property on June 13, 1952; June 14, 1952; August 8, 1952; and November 6, 1952.<sup>185</sup> The State of California would claim that she owed \$2,100 in back taxes.<sup>186</sup> The Motion Picture Relief Fund, which had subsidized her care at the Country House, sought \$904.05 in delinquent monthly payments.<sup>187</sup> There was a doctor's bill for \$10.<sup>188</sup> She owed a finance company approximately \$300 for items purchased for her Country Club Home.<sup>189</sup> The funeral home had to be paid for, and there is no evidence that she had any life insurance to pay it.<sup>190</sup>

When she moved into her Country Club Drive home, McDaniel told everyone that the move was because her health required a single-level house.<sup>191</sup> One would have expected the new house to be in her estate. It wasn't. The true owner showed up to say that McDaniel was three months behind in rent payments when she died.<sup>192</sup>

### C. The Assets

Hattie McDaniel's assets at death were modest. Her file reflects no real estate, no Packard, and no cash.<sup>193</sup> The most valuable tangible

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184. McDaniel Probate Records, *supra* note 149 (December 1952 statement for claim of taxes due to the United States in the amount of \$8,712.86).

185. *Id.*

186. *Id.* (Allowance and Approval by Executor of Amended Claim of California Franchise Tax Board (\$2108.81), June 6, 1955).

187. *Id.* (Creditors' Claim of the Motion Picture Relief Fund, Inc., Dec. 3, 1952).

188. *Id.* (Creditors' Claim, E.W. Stratten, Jr. MD, Nov. 3, 1952).

189. *Id.* (Letter from City Financial Plan to Zagon, Aaron, & Sandler law firm (Feb. 4, 1953)).

190. The funeral home was eventually paid \$ 1,150.87. *Id.* (Receipt of Payment by Angelus Funeral Home and Withdrawal of Its Request for Special Notice, Oct. 24, 1953). Life insurance passes outside of probate, but in McDaniel's time, it was normally purchased at least in part to pay for one's funeral. Even though it is not a part of the probate estate, the executor is usually also required to report it as an asset for tax purposes.

191. *See* Bell, *supra* note 150.

192. McDaniel Probate Records, *supra* note 149 (Creditor's Claim, Lillie Hart, Nov. 6, 1952). The home was put up for sale less than a month after her death, but the seller was not the executor. *Hattie McDaniel's Mansion for Sale*, BALT. AFRO-AMERICAN, Dec. 6, 1952 (describing an 8 room ranch style house with two baths, a pool, barbecue pit and a guest house). Friends told her biographer Jackson that she directed that, after she died, the house be sold. JACKSON, *supra* note 16, at 151. But any such property would be reflected in the file and the sale recorded in the executor's accountings.

193. An executor who handles an estate usually creates an inventory of all items of property within it. In 1952, California's statutes required that an appraiser appointed by the county appraise the items. CAL. PROB. CODE §§ 600, 605 (West 1931). As new property was found, a supplemental inventory or inventory and appraisal would have been filed. Today, California allows the executor to appraise in many instances. CAL. PROB. CODE § 8900 (West 2011). While

property in her estate was her right to royalties from *The Beulah Show*. The radio rights were appraised at \$2,500<sup>194</sup> and television rights at another \$1,200.<sup>195</sup> During the probate process, the estate would receive an additional \$7,338.38. More than \$7,000 of it was income in royalties from *The Beulah Show*.<sup>196</sup>

One item among her assets is of particular interest. In all filings, the executor would reference it simply as item number “35.” In column one of a document appearing to be from the first inventory, he described it as a “metal statute [sic] (commonly known as ‘Oscar’) awarded by the Academy of Motion Picture Arts and Sciences.”<sup>197</sup> Column two indicated that the item was “[b]equeathed to Howard University.”<sup>198</sup> In column three was the handwritten value assessed by the state appraiser: “no value.”<sup>199</sup>

#### D. Oscar On Sale

With the estate’s debts exceeding its liquid assets and the IRS at the door, the executor did the only thing he could do. He began selling off her assets, starting with unbequeathed depreciating items

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the record reflects that an inventory and accounting was filed on July 13, 1953, the first inventory does not appear as a complete document in the file. See First Accounting, *supra* note 181, at 2. Various pages with the appraiser’s notations or typed appraisal amounts are scattered throughout the file. See McDaniel Probate Records, *supra* note 149 (listing items 5-35 of the undated Inventory and Statement of Assets). Two supplemental inventories do appear in the file. See *id.* (Supplemental Inventory and Appraisal of Assets (Television Beulah Rights \$1200), March 25, 1954); *id.* (Second Supplemental Inventory and Appraisal (Additional Personal Items \$300), Oct. 18, 1954). The file also contains other documents indicating her property such as the three accountings, the returns of sale and petitions for approval of sales, and the list of what the auctioneer sold when her depreciating residual bequests went on sale at public auction. For the public auction list, see *id.* (Letter from Marvin H. Newman to Executor John Gross, (Feb. 20, 1953)).

194. Second Accounting, *supra* note 168, at 2-3.

195. *Id.*

196. Between Oct. 20, 1952 and July 23, 1953, the estate received \$7095.56 in royalties. First Accounting, *supra* note 181, Sched. A. Presumably she would have drawn about the same amount in a nine month period had she been living, a little under \$800 per month.

197. McDaniel Probate Records, *supra* note 149 (undated Inventory and Statement of Assets).

198. *Id.*

199. *Id.* As to the appraisal, admittedly, “Oscar” was not then, the man he is today. In 1950, a *Los Angeles Times* writer described the Academy Awards as “a Southern California event and attraction.” Edwin Schallert, *Unique Oscar Event Seems Here to Stay*, L.A. TIMES, Feb. 8, 1950, at A4. Eastern film houses would not commit to supporting the awards financially. See *Film Academy Awards May Get TV Sponsor*, L.A. TIMES, Feb. 5, 1953 at A1 (discussing negotiations and hope that television would resolve the Academy’s financial problems). But, a year earlier, showman Sid Grauman’s Honorary Oscar (of Grauman’s Chinese theater fame) was purchased at public auction for between \$425 and \$450 dollars. The winning bidder was the Academy itself. Alice Mosby, *Sid Grauman “Museum” in Auction Sale*, CEDAR RAPIDS GAZETTE, Dec. 21, 1950, at 16; *Highlights and Sidelights*, INDEPENDENT, Feb. 20, 1951, at 26.

first.<sup>200</sup> On February 9th through February 12th of 1953, hundreds of McDaniel's items went up for sale at a public auction.<sup>201</sup> Through another auction and a series of private sales the executor would get rid of the remainder of the residue.<sup>202</sup> He would employ her agent, William Micklejohn, to negotiate the sale of her radio and television rights from *The Beulah Show*.<sup>203</sup> Initially appraised collectively at \$3,700, these TV and radio rights would fetch only \$2,500 on April 20, 1954, resulting in a loss of \$1,200.<sup>204</sup>

On November 3, 1954, the executor asked for an order to sell the remainder of the property which consisted of all specific bequests.<sup>205</sup> The list attached to his petition included item number "35," the Oscar "bequeathed to Howard University" and again listed at "no value."<sup>206</sup> On December 1, 1954, the court not only authorized, but "instructed" the executor to sell these items.<sup>207</sup> At this point the executor was required to put the Oscar up for sale.<sup>208</sup>

Two days later, on December 3, 1954, the executor sold numerous personal items to a Lucille Hamilton of South Central Avenue in Los Angeles through a private sale.<sup>209</sup> Exhibit A of his return indicates her purchase of items 6-14 and 16-34 (appraised at \$124.50) described generally as miscellaneous household and personal items including four ladies dresses that were appraised at "no value."<sup>210</sup> Exhibit B is missing but the return states that she also purchased certain miscella-

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200. Unbequeathed assets are what are left after the testator gives out specific gifts. Such assets usually pass all to one or more persons as a group. They are also called the "residue" or "residuary assets." The residue is normally sold first on the theory that the testator gave specific thought to the other gifts. But, the rule is often criticized because the residue is also reserved for the person who is closest to the testator. Such was the case here – the items that would have formed the basis for Sam McDaniel's trust went first.

201. McDaniel Probate Records, *supra* note 149 (Letter from Marvin H. Newman to Ex'r John Gross (Feb. 20, 1953)); *see also* First Accounting, *supra* note 181, at Exhibit B (referencing other auctions).

202. McDaniel Probate Records, *supra* note 149 (Notice of Hearing Return and Petition for Order Approving Sale of Depreciating Personal Property, Apr. 28, 1954).

203. Second Accounting, *supra* note 168, at 5; *see also* WATTS, *supra* note 23, at 129.

204. Second Accounting, *supra* note 168, at 2-3.

205. McDaniel Probate Records, *supra* note 149 (undated Petition of Executor for Instructions and For Authority to Sell All Specifically Bequeathed Property of Estate In Order to Pay Debts and Expenses of Administration). Specific bequests are specific items designated for specific persons.

206. *Id.* at Ex. B (listing Oscar among other items to be sold).

207. *Id.* at (Order, Dec. 1, 1954).

208. The executor may have requested that the court "require" him to sell the Oscar so that his actions in selling the items could not later be questioned.

209. McDaniel Probate Records, *supra* note 149 (Return and Petition for Order Approving Sale, Dec. 4, 1954, 1-2 ("First Hamilton Return")).

210. *Id.* at Ex. A (list); *id.* at 1 (appraisal).

neous items listed on the second supplemental inventory valued at \$250.<sup>211</sup> She paid \$375 collectively for all of these items.<sup>212</sup> Item 35, the Oscar, appraised at no value, is missing from the list.<sup>213</sup>

After Hamilton's purchase, only a few items were left in the estate. On the very same day that Hamilton purchased the personal items, the executor sent letters to McDaniel's family and friends informing them that the remainder of the specifically bequeathed property was going up for sale and inviting them to bid.<sup>214</sup> The family made no offers.<sup>215</sup> Between March and April of 1955, the executor sold fur items and jewelry.<sup>216</sup> On May 11, 1955, Lucille Hamilton returned to buy a fur choker for \$75.<sup>217</sup> Then, around December 9, 1955, McDaniel's secretary, Ruby Goodwin appeared and offered to purchase six unpublished musical compositions McDaniel had written more than twenty-five years earlier along with the renewal copyrights.<sup>218</sup> The executor sold the compositions to Goodwin.<sup>219</sup> In seeking the court's approval, the executor told the court, "[o]ther than cash, those compositions constitute the sole remaining assets of the estate."<sup>220</sup> He also stated that he had attempted to interest music publishing houses and songwriters in the items but received no offers.<sup>221</sup>

In June of 1956, the executor's filed his third and final accounting, covering the period of November 1, 1954 to June 22, 1956.<sup>222</sup> It stated that "all assets of said estate have been reduced to cash as aforesaid,"

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211. *Id.* The copy of the Second Supplemental Inventory has no description page and thus may be missing a page. It bears only a final sum of \$300.00. McDaniel Probate Records, *supra* note 149 (Second Supplemental Inventory, Oct. 18, 1954). However, the executor described the items, in the Second Accounting, as "clothing, personal effects and miscellaneous household goods" and two of McDaniel's musical compositions. Second Accounting, *supra* note 168.

212. Second Accounting, *supra* note 168, at 2.

213. First Hamilton Return, *supra* note 209.

214. McDaniel Probate Records, *supra* note 149, at 2 (undated Return of Sale of Personal Property and Petition for Confirmation ("Second Hamilton Return")).

215. *Id.*

216. McDaniel Probate Records, *supra* note 149 (Order Confirming Sale of Personal Property, Apr. 14, 1955); Goodwin did, however, spur the establishment of a scholarship fund in McDaniel's name. *Hattie McDaniel Memorial Scholarship Available*, CHI. DEFENDER, Feb. 26, 1955, at 15.

217. Second Hamilton Return, *supra* note 214.

218. McDaniel Probate Records, *supra* note 149, at 2 (Return of Private Sale of Renewal Copyrights and All Rights of Estate in Musical Compositions Written by Deceased and Petition for Confirmation Thereof, Dec. 3, 1955 ("Goodwin Return")).

219. *Id.*

220. *Id.*

221. *Id.*

222. McDaniel Probate Records, *supra* note 149 (Third Accounting).

and, the estate is now in condition to be finally settled.<sup>223</sup> The accounting included a list of items sold in that period, including Hamilton's items. Missing in these lists was item 35, the Oscar that he earlier had been instructed to sell in his November 3, 1954 petition.<sup>224</sup> On July 17, 1956, the court declared that the only thing left in the estate was money and ordered that the attorneys receive a final installment payment, with the remaining balance going to the IRS.<sup>225</sup> On September 26, 1956, the court further ordered McDaniel's estate closed.<sup>226</sup>

The court file contains no further indication of what happened to the Oscar.<sup>227</sup> We can speculate about two possibilities. Either the executor lost control of the Oscar, or Hamilton bought it and her purchase was not properly recorded. The second scenario seems the most credible. There is no evidence in the record or any other sources I have reviewed that either the lawyers or the executor thought the Oscar was financially valuable. Moreover, as they were quite well heeled; they had no need to steal it.<sup>228</sup> The types of items that Hamilton bought clearly indicate that she, or her principal, had a personal relationship with McDaniel. The person who listed the items Hamilton had purchased, listed "a metal *statute* [sic] commonly known as an Oscar" as item number 35.<sup>229</sup> Not finding the Oscar's taller alter ego, the list maker may have assumed that the "plaque" was one of the unspecified miscellaneous personal items that Hamilton also purchased from the second supplemental inventory list.<sup>230</sup>

However, who was this Lucille Hamilton? One possibility stands out. There was a Lucille Hamilton, who was a prominent member of the First African Episcopal Methodist ("AME") Church, the oldest

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223. *Id.*

224. *Id.*

225. *Id.* (Order Settling Final Account and Report of Executor, July 17, 1956).

226. *Id.*

227. The law firm handling McDaniel's estate has dissolved and this writer has not located any files.

228. There is no evidence of this need.

229. See discussion *supra* p. 139 (emphasis added).

230. If he discovered the error, the executor could have informed the court and parties at a hearing. No transcripts survive. But, if he did not, the executor still correctly represented that the Oscar was sold, and the right person did indeed receive the items she paid for.

African American congregation in Los Angeles.<sup>231</sup> Hattie McDaniel was raised in the AME church.<sup>232</sup>

### III. OSCAR MOVES FROM SCREEN TO STAGE AT HOWARD UNIVERSITY

#### A. “Send It To Howard”

It made perfect sense that McDaniel would have wanted her Oscar to go to Howard University. The Howard Players had honored her with a luncheon in 1940.<sup>233</sup> She had met some members of Howard’s faculty, including E. Franklin Frazier and James Nabrit.<sup>234</sup> By the time she drafted her will in 1951, McDaniel was probably aware of the Howard Players’ 1949 Scandinavian tour as the first U.S. undergraduate group to perform abroad at a country’s invitation, or of their performance before U.S. troops in Germany.<sup>235</sup> Maybe she also knew that three faculty advisors in that trip had just formed a Department of Drama at Howard in 1950.<sup>236</sup>

There was another likely reason McDaniel chose Howard. With institutions led by whites affording little or no value to preserving black history, black educational institutions had become central depositories for its preservation, and Howard University was playing a leading role. A network of blacks across the U.S., Africa, the Caribbean, would direct items to Howard and to other historically black institutions.<sup>237</sup> A challenged staff with limited financial resources

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231. See, e.g., *First AME Women’s Fashion Show Due Next Sunday*, L.A. TRIBUNE, Apr. 4, 1958, at 15 (identifying Lucille Hamilton as Co-chair of Women’s Day); *FASHION CAPERS*, Apr. 11, 1958, at 10 (picture of First AME’s Lucille Hamilton with other participants in Women’s Day Fashion Show).

232. See, e.g., WATTS, *supra* note 23, at 53 (mother’s funeral); *id.* at 202 (returning to worship at AME church in Denver). Note however, that in her later life, McDaniel adhered to the principles of Christian Scientists. *Id.* at 270.

233. See discussion *supra* note 83, at 16.

234. E. Franklin Frazier had attended one of her parties while he was visiting Los Angeles. *Id.* at 258. James Nabrit, then on the Howard University School of Law faculty, was among those who attended the 1940 luncheon. See HOWARD UNIV. BULLETIN, *supra* note 83.

235. See, e.g., Richard Coe, *An Award Awaits Howard Travelers*, WASH. POST NOV. 21, 1949 (noting American Public Relations Association to give award to Howard for trip and accounting trip details); Richard Coe, *Howard U. Players Report on Europe*, WASH. POST, Nov. 29, 1949, at 14.

236. See The Howard Players and the Drama Department (on file with Howard University Moorland-Spingarn Center; see JAMES HATCH, *SORROW IS THE ONLY FAITHFUL ONE* 151-164 (1995) (giving Owen Dodson’s account of the tour) [hereinafter *SORROW*].

237. E.g., Thomas C. Battle, *Resources for Scholars, Four Major Collections of Afro-Americana: Part 2 Two University Library Collections*, 58 LIBRARY Q. 143, 145-151 (1988); Avril J. Madison & Dorothy Porter Wesley, *Dorothy Burnette Porter Wesley: Enterprising Steward of Black Culture*, 17 PUBLIC HISTORIAN, Winter 1995 at 15, 29-50, 37.

bore the weight of a growing collection of book and non-book items.<sup>238</sup> The historical value and range of the materials on black life, history, and culture that came to Howard as reflected in annual reports, inventories, intake lists, and card catalogs is both remarkable and breathtaking.<sup>239</sup>

## B. Two Collections

In the 1950s and 1960s, the main Howard University library, “Founders,” housed and had authority over two relevant special collections that would eventually have separate destinies. First, there was the “Moorland Foundation,” also then called the “Negro Collection.”<sup>240</sup> In 1973, it spun off from Founders into the separately-run Moorland-Spingarn Research Center.<sup>241</sup> This Collection was anchored by Reverend Jesse Moorland’s 1914 gift of his sizeable private library and later supplemented by the purchase of Arthur Spingarn’s private library in 1946.<sup>242</sup> Dorothy Porter was its “Supervisor.”<sup>243</sup> Through her numerous contacts and tireless energy, Porter and her husband, Howard Art Department Chairman James

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238. In her 1960-61 report, then Acting Director, Dorothy Porter would lament the libraries space and staffing concerns, which she said were exacerbated by the school’s inability to compete salary-wise with other institutions, budgetary problems, and the use of “precious” library space for other ongoing operations. ANNUAL REPORT OF THE ACTING DIRECTOR OF UNIVERSITY LIBRARIES TO THE PRESIDENT OF HOWARD UNIVERSITY 1 (1960-61) [hereinafter LIBRARIES ANN. RPT.].

239. My knowledge of the collection is based upon reviewing the various documents cited in this article, some internal documents that record the collections, and conversations with former and present staff at Moorland-Spingarn and Founders’ Library about the collections. There are also several publications that discuss Moorland-Spingarn’s holdings. See, e.g., Madison & Wesley, *supra* note 237.

240. The initial collection established through the Moorland gift was called the “Moorland Foundation. The Library of Negro Life and History.” Apparently, outside entities assumed “Moorland Foundation,” was a charity and submitted numerous funding requests. The collection thus began to be co-referenced as “the Negro Collection.” In 1930, the collection was separately designated from Founders’ library though it remained then under its jurisdiction. LIBRARIES ANNUAL REPORT, *supra* note 238, at 24, n\*.

241. In 1973, Moorland was given expanded space and became the official place for the storage of University archival materials. *Id.* Though not a separate 501(c)(3), it can separately fundraise under the charitable/educational status of Howard University. See *id.* Winston Interview, *supra* note 13.

242. LIBRARIES ANN. RPT., *supra* note 238, at 6-8. Spingarn was a civil rights attorney, President of the NAACP from 1940-1965, and its Vice President from 1911-1940. *Id.*

243. Porter had the title “Supervisor” of the Negro or Moorland Collection up until 1969-70. She then was called “Librarian/Curator” or Librarian. Compare ANNUAL REPORT OF THE NEGRO COLLECTION (1969-70) (“Supervisor”), with LIBRARIES ANN. RPT., *supra* note 238, at 250 (“Librarian”). She is believed to be the first person of African descent to graduate from Columbia University’s Library School, earning her Master’s in Library Science there. See Madison & Wesley, *supra* note 237 at 2. Early on, Moorland made sure that Africa was prominently featured in its collection items. See Madison & Wesley, *supra* note 237, at 22-37.

Porter, would secure items from across the United States and throughout Africa and the Caribbean.<sup>244</sup> Moorland holds rare books, artwork, artifacts, photographs, music, rare personal papers, and other items relating primarily to the black American and African experience.<sup>245</sup>

The second key collection, one that remains under Founders Library's jurisdiction today, is the Channing Pollack Collection. Channing Pollack's daughter, Helen, with strong support from Drama professor Owen Dodson, brought the basic collection to Howard in 1952.<sup>246</sup> Founders would later expand the Pollack Collection to include other drama items.<sup>247</sup> The Pollack collection holds more than ten thousand books on English and American drama (including but not limited to drama on the black experience), plus a sizeable amount of news clippings, playbills, photographs, memorabilia, music, and artifacts.<sup>248</sup>

### C. A Gift from Leigh Whipper Arrives

In 1956, when the executor closed McDaniel's estate, Howard University's Drama Department operated out of a makeshift theater in Spaulding Hall.<sup>249</sup> There, students attended classes and mingled

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244. See, e.g., Battle, *supra* note 237, at 143-151; Madison & Wesley, *supra* note 237, at 29-30, 36-37. There are also numerous references in the Annual Libraries Reports. See generally *supra* note 243 (acquisitions from and about Africa). In the early 1960s, Porter went to Lagos to serve as a consultant to the National Library of Nigeria in Lagos. *Id.* at 35.

245. *Id.* at 24-26.

246. Pollack visited Dodson both on the campus and at his apartment to discuss bringing the Collection to Howard, and the two of them met together with President Mordecai Johnson. Letter from Owen Dodson, Chair, Drama Dep't, Howard University, to Carl Von Vechten, Arts Patron (June 14, 1950) (on file in the Owen V. Dodson Papers at Emory University Robert C. Woodruff Manuscripts, Archives and Rare Books Library [hereinafter Emory Dodson Papers]); see also *Howard to Get Theater Data*, WASH. POST, May 4, 1952, at L2 (noting that Howard was to be presented with the Collection). Although technically she was responsible for just Moorland, Dorothy Porter played a key role in working with Owen Dodson to secure the Channing Pollack Collection, assessing it for Howard and handing the acquisition. Letter from Dorothy Porter to Owen Dodson (Aug. 1, 1950) (in possession of Prof. Joe Selmon, Drama Dep't, Howard Univ.) [hereinafter Selmon Papers].

247. See discussion *infra* part III.C. (discussing the addition of Whipper donations).

248. I understand Channing's holdings largely from the wealth of information in the card catalog and the various Founders Annual Reports. See generally ANNUAL REPORT OF THE NEGRO COLLECTION, *supra* note 243. While acquisition lists exist for books, it is my understanding that no such lists have been located for artifacts. I have not yet been afforded the opportunity to review any administrative files from these earlier periods although that subject is now under discussion. Wright Discussion, *supra* note 13.

249. Telephone Interview with Oscar Criner, Professor of Computer Sci. & Physics, Tex. S. Univ. (Apr., 2010) [hereinafter Criner Interview].

among boxes of costumes and pieces from old theater sets.<sup>250</sup> But, in December of 1960, the Drama Department moved into the newly erected LuLu Vere Childers Hall along with the Music and Art Department, thus, forming the College of Fine Arts.<sup>251</sup> By the fall of 1961, Owen Dodson had become the Chair of the Drama Department.<sup>252</sup>

In April of 1961, the university librarian, Joseph Reason, took a two-year leave to advise the University of Rangoon in Burma.<sup>253</sup> From April 24 to July 1, 1961, Dorothy Porter, who was the librarian for the Negro Collection, temporarily served as head librarian.<sup>254</sup> The task of filing the Director's 1960-1961 annual report fell to her.<sup>255</sup> This writer believes that in her June 23, 1961 report, Mrs. Porter provides the link as to when the Oscar arrived at Howard. On page 9, she noted gifts to the Pollack Collection: Arthur Spingarn's gift of "his entire collection of Negro music," and additional gifts by Channing Pollack's daughter Helen.<sup>256</sup> Then, there is this notation: "*Leigh Whipper donated the bronze shoes of the late Bill "Bojangles" Robinson, a plaque, and about 200 music scores.*"<sup>257</sup> In the very next academic year, the pair of "Bojangles" shoes and McDaniel's Oscar "plaque" would show up together in a glass case in the Drama Department with Professor Owen Dodson as its chief caretaker.<sup>258</sup>

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250. *Id.* Criner was a 16-year-old freshman when he ventured over to the theater to participate in the Howard Players Orientation. His heart never left, and under Professor Owen Dodson's "very kind" and "gracious" direction," he became an actor. Criner says he distinctly remembers talk one evening among persons in the theater of some members of the McDaniel family not wanting Howard to have the Oscar, but had it already been in Spaulding he, an excited 16-year-old, would have seen it. *Id.* He entered Howard in 1956 – the year that the McDaniel estate was finally settled. *Id.*

251. The official celebration was in June of 1961. *Rites Slated for Howard's Fine Arts Hall*, WASH. POST, June 4, 1961, at G4. However, the building was in use before then. *E.g.*, Richard L. Coe, *A Boon To Us All*, WASH. POST, Feb. 23, 1961, at B4.

252. Letter from Owen Dodson to Edith Dodson (Oct. 29, 1961) (on file with Emory Dodson Papers).

253. ANNUAL REPORT OF THE NEGRO COLLECTION, *supra* note 243, at 1.

254. *Id.* at 48.

255. *Id.*

256. *Id.*

257. *Id.* at 9. In earlier times, people bronzed shoes to commemorate important events or people, such as to commemorate a child's birth. Deborah Hofmann, *Bronzing Memories Happily*, N.Y. TIMES, Mar. 18, 1993, at C2. The usually thorough Porter omits the Whipper gifts – the shoes and the plaque and the music – from a list of all gifts received appearing at the end of the 1960-61 report. ANNUAL REPORT OF THE NEGRO COLLECTION, *supra* note 243, at 30-41.

258. One can only speculate as to the reason behind the terse description of the plaque. In the world of Howard University Collections, that Oscar was not a showstopper. And by this time, McDaniel had been dead almost a decade. There also may have been a need for secrecy. In March of 1961, the Capitol Theater in Washington kicked off a "Centennial" Civil War showing of *Gone With the Wind*. Article 5, WASH. POST, Mar. 26, 1961, at G1. From April until June of 1961, notices for showings spread like wildfire at area theaters and notices ran virtually every

D. A “Shrine” in the Drama Department

Theodis “Ted” Shine joined the Howard Drama faculty in the fall of 1961.<sup>259</sup> Shine is certain that the Oscar was not there when he first arrived in the fall. However, one day, “shortly after [he] got there,” Dodson invited him into the “green room” in Childers Hall.<sup>260</sup> Shine stated, “I think the head of the Department, Owen said something like ‘Chile come in here; we got Hattie McDaniel’s Oscar’ and he took me in and showed it to me. When I saw it, it was already in the little glass enclosure. . . . He didn’t indicate where it had come from.”<sup>261</sup> Shine continued:

It was in the Green Room in the theater department when I was teaching there. . . . They said it was a ‘Wartime Oscar.’ It was about 6 inches tall and looked like a plaque. About 5 or 6 inches wide. Gold-Plated. My reaction was that I was disappointed in how it looked. There was also one bronze shoe from Bill Bojangles Robinson. The thing that threw me was when they said Oscar, I thought of the tall Oscar. But I was so amazed that it was a little plaque. I was very proud of it and I was happy to see an Oscar that close up.<sup>262</sup>

Donal Leace, a student at Howard in 1961, remembers that same little plaque—and two shoes.<sup>263</sup> He was thinking about leaving Howard when Professor Owen Dodson suggested that his unhappiness sprang from being an artist trapped in the wrong major.<sup>264</sup> As a new drama major, Leace saw the glass case recessed into the wall. As you walked into the Green Room, it was on the right. If you turned and faced the direction that you came in, you would see it by the door, then on your left. It had several shelves, he remembers, and a long lock like a slide rule. The top shelf was memorabilia about Langston Hughes. The Oscar was on the second shelf, and, Leace seems to remember, some type of letter or statement with a signature. On the

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day in the Washington Post. *E.g.*, *Show Times for Saturday*, WASH. POST, Apr. 1, 1961, at C18 (subsequent daily showings under Capital Theater); *Neighborhood Movie Attractions*, WASH. POST, May 21, 1961, at G3 (showings at VA theaters).

259. Telephone Interview with Professor Ted Shine, Retired Professor, Prairie View A&M Univ.; retired Professor, Drama Dep’t, Howard Univ. (Apr. 21, 2010) [hereinafter Shine Interview].

260. *Id.*

261. *Id.*

262. *Id.*

263. Telephone Interview with Donal Leace, Student in the Class of ‘66; Singer/Songwriter/Musician (Apr. 11, 2010) [hereinafter Leace Interview]; see also DONAL LEACE, <http://www.donalleace.com/> (last visited Oct. 17, 2011).

264. Leace Interview, *supra* note 263.

shelf below, he recalls seeing the bronzed-colored “Bojangles” shoes.<sup>265</sup> Some have also referred to a pair of “black” dancing shoes being in the case as well.<sup>266</sup> Leace remembers that the introduction to the Oscar and the other artifacts in the department became a rite of passage for theater students.<sup>267</sup>

The 1960-1961 Founders Annual Report also indicates that the Library received another important item the same fiscal year: a rosewood piano converted to a desk, once owned by Howard’s founder, General Oliver Howard.<sup>268</sup> Leace also remembers a piano being in the Green Room.<sup>269</sup> The 1962-1963 Annual Report for the University Libraries confirms that it was General Howard’s piano.<sup>270</sup> Noting limited library space for storing artifacts, as well as a desire to ensure that such items can be seen, Acting Director Stevens writes that the library has often “stored” such three dimensional historical items in other parts of the campus.<sup>271</sup> He adds, “General Howard’s desk and piano, for example, have been lent to the Green Room of the Fine Arts-Auditorium Building until a more permanent facility can be provided.”<sup>272</sup>

Charles “Buddy” Butler of the Howard class of 1969, also first saw the Oscar in the Green Room.<sup>273</sup> According to Butler, Dodson would hold classes in that room and students were able to see the glass case with the Oscar, the shoes, and other items. Butler remembers

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265. *Id.* That Shine saw only one shoe at first and Leace saw two suggests that Shine was among the first to see the display, perhaps even as Dodson was putting it together.

266. Discussion with Professor Joseph Selmon, Howard Univ. (Sept. 15, 2011) (regarding comment made to him over the years about the shoes). Shoes can be “antiqued” and made to look black by spraying them after bronzing or adding a oil to the bronzing mixture. See *How Bronzing Works*, AM. BRONZING COMPANY, <http://www.americanbronzing.com/howbronzing.html> (last visited Oct. 17, 2011).

267. Leace Interview, *supra* note 263 (explaining that he “held it in his hands”). *C.f.* Telephone Interview with Lynda Gravátt, Student in Class of ‘71, Howard Univ.; Actor and Director (July 2010) [hereinafter Gravátt Interview] (noting that she thought she saw it during orientation). This rite is probably why Richard Wesley saw the shoes but missed the Oscar. He arrived on campus in the wee hours of the morning and the next day did his own “self tour” of the department. Telephone Interview with Richard Wesley, Student in Class of ‘67, Howard Univ., Chair, Dep’t of Dramatic Writing, New York U. Tisch Sch. of the Arts (June 9, 2011) [hereinafter Wesley Interview]. He remembers seeing the recessed glass cases in the Green Room and the “Bojangles” shoes but no Oscar. *Id.* He acknowledges today that as a freshman he probably would have disregarded a plaque only 6 inches high. *Id.*

268. ANNUAL REPORT OF THE NEGRO COLLECTION., *supra* note 243, at 7.

269. Leace Interview, *supra* note 263.

270. ANNUAL REPORT OF THE NEGRO COLLECTION, *supra* note 243, at 7.

271. *Id.*

272. *Id.* (emphasis added).

273. Telephone Interview with Charles Butler, Student in Class of ‘69, Howard Univ.; Theater Professor, San Jose State Univ. (May 20, 2011) [hereinafter Butler Interview].

three shelves: one with items relating to Langston Hughes; the second, with McDaniel's Oscar; and the third devoted to Bill "Bojangles" Robinson. There were photographs as well. Butler also remembers the Green Room because he was a member of the Howard Players, and they regularly met there.<sup>274</sup>

About a year after Dodson erected his encased "shrine" in the Green Room, he set up a second room across the hall, which he personally dubbed the "Ira Aldridge Room."<sup>275</sup> He installed drapes and special lighting. He placed furniture from Howard's founders in it.<sup>276</sup> There, Dodson also kept numerous drama artifacts. In January of 1962, a "wives" group visited Howard and was taken on a Theater and auditorium tour by Art Professor James Porter. Thanking the university, one of the visitors would write, "My only regret is that we could not see more, and that we had to cut short our stay in the museum. Mr. Porter received us so graciously, and the exhibits were so beautiful."<sup>277</sup> Geoffrey Newman insists that Ira Aldridge is where *he*, as a student, first saw the Oscar.<sup>278</sup> Indeed, it appears that Dodson regularly moved his artifacts and the furniture in his rooms around.<sup>279</sup> Lynda Gravátt, of the Howard class of 1971, also remembers that whenever guests visited, Dodson would take them into the Ira Aldridge room.<sup>280</sup>

Dodson did more to build the Department of Drama. He invited speakers to Howard to inspire his students. Leace and Richard Wesley remember a visit in 1966 by Sir John Gielgud and Vivien Leigh, the very same "Scarlett" who played opposite Hattie McDaniel in *Gone with the Wind* in 1940.<sup>281</sup> The two were in town to appear in *Ivanov*, which was on a two-week pre-Broadway run at the National Theater.<sup>282</sup> Dodson had simply written to them, inviting them to come to speak to his students during their time in Washington. They

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274. *Id.*

275. Telephone Interview with Geoffrey Newman, Student in Class of '68, Howard Univ., Dean Coll. of the Arts, Montclair State Univ. (May 11, 2011) [hereinafter Newman Interview].

276. Gravátt Interview, *supra* note 267.

277. Compare Letter from Elizabeth F. Hitchcock, to James E. Nebrit, Jr. (Jan. 24, 1962) (on file with Howard University Moorland-Spingarn Research Center), with SORROW, *supra* note 236, at 208 (explaining that one of Dodson's first acts after moving into Childers was to turn the Green Room into "a museum" with glass cases on either side).

278. Newman Interview, *supra* note 275.

279. Wesley Interview, *supra* note 267; Email from William Brown to W. Burlette Carter (July 20, 2011) (on file with the author).

280. Gravátt Interview, *supra* note 267.

281. Leace Interview, *supra* note 263; Newman Interview, *supra* note 275.

282. *The Marquees of Broadway*, WASH. POST, Apr. 17, 1966, at G2.

came and talked to the students for two hours.<sup>283</sup> It was likely that Dodson showed them the Oscar and that students asked their visitors about McDaniel.

But who was Leigh Whipper and how would he have gotten the Oscar? Born in South Carolina to free parents, Whipper, attended Howard University School of Law and was admitted to the South Carolina Bar.<sup>284</sup> However, one day, he did what some law students dream of doing; he left the practice of law and became an actor. Indeed, he was one of the best-known black actors of his time, and ultimately a leader in the New York artistic community.<sup>285</sup> In 1913, he became the first black member of Actors Equity (although he later said that they did not know that he was black when they admitted him).<sup>286</sup> In New York, he was a founding member of the NAG,<sup>287</sup> and served as its president from 1957-1960.<sup>288</sup> On several occasions, he headed the Guild's Welfare Committee that gave aid to sick and financially struggling actors and their families. He was active in SAG<sup>289</sup> and also active in New York politics.<sup>290</sup> He caused controversy when he challenged Samuel Goldwyn in the latter's film production of *Porgy and Bess*.<sup>291</sup> Whipper was one of the few blacks who had been able to

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283. Letter from Owen Dodson to Rosey Pool (July 6, 1967) (on file with Emory Dodson Papers). He even visited Leigh in her dressing room at the National Theater beforehand. *Id.*

284. Whipper's father was Brigadier General William J. Whipper who "reverse migrated" to South Carolina from Pennsylvania during reconstruction. See *All We Ask Is Equal Rights*, U. OF S. CAROLINA SCH. OF L., [http://law.sc.edu/equal\\_rights/5w-whipper.shtml](http://law.sc.edu/equal_rights/5w-whipper.shtml) (last visited Oct. 19, 2011). He became a circuit judge and served as a member of two Constitutional Conventions. *Id.* His mother was a physician. *Id.*

285. *Leigh Whipper, 98, Character Actor; First Black in Equity, Dead – 65 Years on the Stage* N.Y. TIMES, July 27, 1975, at 35; see also *Louis Calta, Character Actor, 91, Is Honored at the St. Regis; Leigh Whipper Blazed Trails for Negro Performers Law Graduate's Career on Stage Spanned 65 Years*, N.Y. TIMES, Jan. 8, 1968, at 31; *First Black Actor to Join Stage Union*, WASH. POST, July 21, 1975, at C4 [hereinafter *First Black Actor to Join Stage Union*].

286. *First Black Actor to Join Stage Union*, *supra* note 285; see also Meeting Notices from Committee to Examine the Constitution and Bylaws of Actor's Equity (1952) (on file with Howard University Moorland-Spangarn Research Center).

287. Certificate of Incorporation of the Negro Actors Guild of America 2 (Oct. 1, 1936) (listing Whipper among founders).

288. Twenty Fifth Anniversary Program of the Negro Actors Guild of America 9 (listing Whipper as President from 1957-1960).

289. *E.g.*, Letter from Florence Marston, E. Representative, Screen Actors Guild (Jan. 28, 1953) (on file with Howard University Moorland-Spangarn Research Center) (explaining that she served on the SAG Advisory Counsel for three years).

290. *A Salute*, N.Y. TIMES, Oct. 31, 1962, at 26 (listing Leigh Whipper as a member of the Arts and Entertainment Committee for Rockefeller along with sixty others).

291. *Leigh Whipper Resigns "Porgy" Role in Protest*, L.A. TIMES, Aug. 7, 1958, at B30 [hereinafter *Leigh Whipper Resigns*]; Thomas Pryor, *Actor Quits Role in Film of Porgy, Negro Guild Head Scores Mamoulian Ouster, and Preminger Hiring*, N.Y. TIMES, Aug. 7, 1958, at 21 (detailing Whipper resigning as a "matter of conscience"). Whipper objected to the firing of Rouben Mamoulian and the substitution of Otto Preminger saying that Preminger was insensitive to race

break the chains of consistently stereotypical roles.<sup>292</sup> Along with others, he established a black-run theater in Newark, The Orpheum<sup>293</sup> and helped to establish an Ira Aldridge Chair at the Shakespeare Memorial Theater at Stratford-on-Avon.<sup>294</sup>

Whipper was also passionate about preserving the history of Negroes in theater. He would write to institutions inquiring about their interest in historical items.<sup>295</sup> Because of his efforts, a bronzed pair of “Bojangles” shoes sits in The Museum of the City of New York.<sup>296</sup> He also made sure black colleges, including his beloved Howard University, Negro theater collections.<sup>297</sup> Whipper would stay active in

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issues, and he would not participate in a project that would be derogatory to his race. Goldwyn arranged statements supportive of his position from other cast members, black leaders and the Hollywood community. *E.g.*, Thomas Pryor, *Porgy Producer Backed on Ouster*, N.Y. TIMES, Aug. 8, 1958, at 11. In the end, Goldwyn produced *Porgy* without Whipper. It is worth noting that Whipper was older and consequently probably more established than the other actors in the film who backed Goldwyn.

292. Whipper portrayed Halle Selassie in *Mission to Moscow* (1943) and had roles in *The Oxbow Incident* (1943) and *Of Mice and Men* (1939). *E.g.*, *Leigh Whipper Resigns*, *supra* note 291. But, he also had his share of stereotypical roles. *Id.* The website for the Internet Movie Database purports to give a list of at least some of Whipper’s films. *See Biography for Leigh Whipper*, IMDB, <http://www.imdb.com/name/nm0924181/bio> (last visited Nov. 18, 2011). Whipper would become the longest living Howard alumnus, dying in 1975 at the age of 98. *Leigh Whipper Resigns*, *supra* at 291; *see also* Calta, *supra* note 285, at 31; *First Black Actor to Join Stage Union*, *supra* note 285, at C4.

293. *Leigh Whipper Defies the T.O.B.A., Fighting Manager of the Orpheum in Newark Says Booking Agents Can’t Bulldoze Him*, BALT. AFRO-AMERICAN, Dec. 5, 1925, at 5.

294. *\$1000 Fund for Aldridge Chair Contributed*, BALT. AFRO AMERICAN, Aug. 3, 1929, at 7. The list which has more than 100 names is a virtual “Who’s Who” in entertainment and black history. Hattie McDaniel would have been thirty-four, not yet in California and still a struggling performer. JACKSON, *supra* note 16, at 16 (noting McDaniel’s role in *Showboat* in Chicago in 1929, the company’s bankruptcy in October, subsequent to the gift, and McDaniel’s picking up work as a washroom maid).

295. *E.g.*, Correspondence (1950-58) (on file with Schomburg Center for Research in Black Culture); Letter from Mendel L. Peterson to Leigh Whipper (June 20, 1951) (on file with Howard University Moorland-Spingarn Research Center) (responding to Whipper’s letter and the Smithsonian indicating it has no theater collection and recommending the Museum of the City of New York).

296. The shoes were presented to the Museum by Robinson’s widow and New York City Mayor Vincent R. Impellitteri at the December 9, 1950 NAG Annual Charity Banquet. The Museum’s Annual Report expresses “our thanks [to] . . . Leigh Whipper, the famous actor, who arranged the presentation.” ANNUAL REPORT OF THE MUSEUM OF THE CITY OF NEW YORK 6-7 (1960).

297. The Moorland files include numerous letters from black institutions thanking Whipper for his theater-related gifts. *See, e.g.*, Letter from Jessie P. Guzman, Dir. Dep’t of Records and Research, Tuskegee Inst., to Leigh Whipper (Dec. 12, 1951) (on file with Howard University Moorland-Spingarn Research Center). In 1949, Whipper was honored at Howard University’s Charter Day Ceremonies for his contributions to drama. *Civil Rights Program Can’t Be Blocked Insists Senator*, BALT. AFRO AMERICAN, Mar. 12, 1949 at C3A.

alumni activities all his life, posing in a November 1967 photograph with Howard's homecoming queen at the age of ninety-one.<sup>298</sup>

Leigh Whipper knew the key players in this Oscar drama. He visited McDaniel's home many, many times.<sup>299</sup> He had roles in two episodes of *The Beulah Show*.<sup>300</sup> He was present when she made her notorious epithet gaffe.<sup>301</sup> When McDaniel was sick, he made sure NAG sent her flowers and later a check for \$25.00.<sup>302</sup> When she died, Whipper called McDaniel's Secretary Goodwin to offer his condolences. Goodwin acknowledged the flowers he sent to McDaniel's funeral stating "[r]emembering the beautiful floral arrangement Hattie received some time ago from the Guild, I am sure she was aware of your love for her."<sup>303</sup> He also knew the university librarian Joseph

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298. *Age and Beauty*, BALT. AFRO-AMERICAN, Nov. 11, 1967, at 14 (depicting a photo of Whipper with Frank Avant Homecoming Queen Anita James). Whipper died in 1975 at the age of 98. *Leigh Whipper*, 98, *Character Actor*, N.Y. TIMES, July 27, 1975, at 35.

299. *E.g.*, WATTS, *supra* note 23, at 209 (noting McDaniel selected Whipper for her Negro War Victory Committee which met at her home); *Count Basie Feted on Coast; First Navy Film Planned; Hattie McDaniel is Host*, CHI. DEFENDER, Aug. 15, 1942, at 22 (noting Whipper as guest at McDaniel Count Basie Party).

300. Letter from Erline Wallace to Leigh Whipper (Dec. 15, 1950) (on file with Howard University Moorland-Spingarn Research Center) (regarding payment for Whipper roles as Jay Watkins in 1950 and Mr. Wiley in 1951 on *The Beulah Show*).

301. *See discussion supra* p. 124.

302. Letter from Ruby Goodwin to Leigh Whipper (Nov. 3, 1952) (on file with Howard University Moorland-Spingarn Research Center) (referencing earlier flowers from NAG and a check for \$25.00 sent by Whipper, but arriving too late for McDaniel to cash). Biographer Carlton Jackson reports that Whipper sent McDaniel a letter enclosing money for flowers and said that McDaniel would receive a similar check each week. JACKSON, *supra* note 16. A NAG-approved continuing gift seems unlikely; it would have been considered an extravagance given how desperately other NAG members needed assistance. NAG did approve a disbursement of \$7.50 for flowers in February of 1952. *Cash Receipts and Disbursements (Feb. 1952)* (in Negro Actors Guild Papers, Schomburg Center for Research in Black Culture). It also strikes this author as unusual to give a sick person money to buy flowers (rather than the flowers themselves). The gesture and the money may have been Whipper's himself, his way of giving McDaniel money when she was too proud to say that she needed it. For more on Whipper contacts with McDaniel, see also NAG Minutes from December 9, 1952, in NAG Papers, where Whipper explains why he sent flowers to McDaniel's funeral in his own name instead of NAG's name.

303. Letter from Ruby Goodwin to Leigh Whipper (Nov. 3, 1952) (on file with Howard University Moorland-Spingarn Research Center).

Reason,<sup>304</sup> Negro Collection supervisor Dorothy Porter,<sup>305</sup> and Professor Owen Dodson.<sup>306</sup>

But how did Whipper get the Oscar if Lucille Hamilton had it in her possession? That I cannot say. Given his status and the church's reputation, the likelihood is that Whipper would have known members from the First AME Church in Los Angeles.<sup>307</sup> Whipper did know McDaniel's brother, Sam<sup>308</sup> and her secretary Ruby Goodwin. Goodwin died in San Francisco in 1960,<sup>309</sup> while Sam McDaniel passed away in 1962.<sup>310</sup> Did Leigh Whipper suggest that Sam McDaniel try to fulfill his sister's last wish before Sam passed away himself?

#### IV. OSCAR LANDS A ROLE IN A 60s DRAMA

##### A. Act I: Protest

One of the theories of the Oscar's disappearance is that Howard students took it and threw it into the Potomac.<sup>311</sup> This section explains why the claim does not hold water. While the sixties was a period of substantial campus unrest, the evidence discussed here strongly suggests that by the time the protests had calmed, the Oscar still rested in the glass case at Howard.

In the 1960s, Howard University was just one of the many universities across the nation where students were flexing their muscles.<sup>312</sup>

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304. Reason wrote Whipper in 1952 to thank him "for his many contributions of material to our Moorland Foundation and your suggestion that other people do likewise"—as well as to inform Whipper of the new theater collection's anticipated opening. Letter from Joseph Reason, Univ. Librarian, to Leigh Whipper (June 9, 1952) (on file with Howard University Moorland-Spingarn Research Center).

305. Whipper had allowed Dorothy Porter to go through the files of the NAG and collect contacts for Moorland Spingarn. Letter from Dorothy Porter to Leigh Whipper (May 29, 1951) (on file with Howard University Moorland-Spingarn Research Center).

306. Whipper joined other actors in doing a preview public read of Dodson's script, *A New World A-Comin*, written as a celebration of Negro Troops and Black Patriotism in New York. *Preview to "New World a-Coming"*, *BALT. AFRO-AMERICAN*, June 3, 1944, at 8 (showing a picture of Dodson, Whipper, and others at reading).

307. Founded in 1872, the Church is the oldest African American founded church in Los Angeles and claims some 19,000 members. See FAME—FIRST AFRICAN METHODIST EPISCOPAL CHURCH, <http://famechurch.org/about.html> (last visited Oct. 5, 2011).

308. See discussion *supra* notes 178-179.

309. See *Ruby Berkley Goodwin, Actress-Writer Dies*, *L.A. TIMES*, June 3, 1961, at A8.

310. *Comedian Brother of Late Hattie McDaniels Buried*, *AFRO-AMERICAN*, Oct. 13, 1962, at 11.

311. See discussion *supra* pp. 604-05.

312. In the sixties, everything was up for grabs. *E.g., Columbia Squashes Renewed Protests, Wisconsin Protestors Firebomb Building*, *WASH. POST*, May 19, 1968, at A3 (explaining that Columbia students protested university expansion into nearby poor neighborhoods and Wisconsin investments in companies doing business in South Africa); *Protests Rock Campuses all Over U.S.*, *WASH. POST*, Apr. 26, 1968, at 3. Richard Wesley remembers watching Mario Fazio's fa-

Five primary concerns drove student protests at Howard. First, there was the ongoing struggle for civil rights.<sup>313</sup> Second, there was opposition to the Vietnam War and a belief that black men were being channeled into the War as fodder.<sup>314</sup> Third, students wanted social restrictions eased so they could more freely drink and socialize with the opposite sex on and off campus.<sup>315</sup> Fourth, the right to protest, taken for granted today, generally was not assured anywhere in the nation.<sup>316</sup> Fifth, students challenged a Eurocentric curriculum and Eurocentric values that they argued denigrated black culture while elevating European culture.<sup>317</sup>

While the protests were dramatic, disruptive, and sometimes violent, this author has seen nothing that indicates that the Oscar—or any of its companion artifacts—were ever even threatened. One of the largest protests occurred in 1968 when students occupied the ad-

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mous “machine” speech from Sproul Hall at Berkeley in 1964 on the television and being inspired. Wesley Interview, *supra* note 267. Indeed, students were protesting all over the world. E.g., *Japan’s Angry Students Battle Police Anew in Anti-War Protest; Japan Youth Clash Anew With Police*, WASH. POST, Oct. 22, 1968, at A1 (protesting U.S. military operations in Japan and discussing protests in other countries); *Madrid Students Out on Strike*, WASH. POST, Dec. 5, 1968, at A26; *Sit-Ins by Students Spread in Poland*, WASH. POST, Mar. 22, 1968, at A17.

313. Interview with Charles Franklin Jr., President, Howard Univ. Student Body, 1967 (July 2011) [hereinafter Franklin Interview].

314. Protestors shut down the speech of Selective Service Director, Lewis B. Hershey, forcing him off the stage. *Hershey Retreats After Attack, Apologies and Invitation Extended*, HOWARD HILLTOP, Apr. 7, 1967, at 3. See Wallace Turner, *Criticism and Evasion of Draft Grow with Unpopularity of the Vietnam War*, N.Y. TIMES, May 14, 1969, at 20; Ivan Brandon, *Vietnam War Denounced by Blacks*, WASH. POST, Nov. 12, 1969, at A7.

315. According to then student body president Charles Franklin, Howard’s students watched from the sidelines as white institutions relaxed intersex visitation dormitory rules, allowed alcohol in dorms, and dropped or extended campus curfews for women. Compare Franklin Interview, *supra* note 313, with *Liquor Now Permitted in GW Women’s Dorms*, WASH. POST, Feb. 5, 1967, at B11.

316. On February 16, 1968, the *Howard Hilltop* led with a story on the killings of several protesting students at a fellow historically black institution, South Carolina State College in Orangeburg, SC. *More Trouble Expected at SC, Three Students Murdered in Cold Blood in Peaceful Desegregation March*, HOWARD HILLTOP, Feb. 16, 1968; *Curfew Stills College Town: South Carolina School Still in Shock After Killing of Three Youths*, WASH. POST, Feb. 10, 1968, at A1, A4. The protesting students, some of whom allegedly threw rocks, were shot and killed by state police officers and about thirty-seven others were wounded.

317. Ivan Brandon & Robert Hinton, *Law Students End Lock-In at Howard*, WASH. POST, Feb. 10, 1968, at A1; Jack White & Ivan Brandon, *120 Walk Out on Nabrit at Howard Talk*, WASH. POST, Sept. 19, 1967, at 1.

ministrative building.<sup>318</sup> They held it for a day.<sup>319</sup> Faculty waited the students out.<sup>320</sup>

The protests also directly affected Fine Arts. In November of 1968, a group of protestors, students and outsiders, interrupted a performance of Langston Hughes' *Simply Heavenly* in the Ira Aldridge Theater.<sup>321</sup> One individual ordered "every white person" to get out.<sup>322</sup> In November of 1969, a group of students interrupted the Art show of a visiting West African artist, complaining that the African artist's exhibit was too westernized.<sup>323</sup> Two pieces of that same artist's work were stolen from the gallery shortly thereafter.<sup>324</sup> Howard filed a police report for the stolen art. It did not mention the Oscar.<sup>325</sup>

In March of 1969, students took over the Fine Arts Building for three days.<sup>326</sup> Fine Arts Department Dean Warner Lawson responded with U.S. Marshalls and a temporary restraining order against the students.<sup>327</sup> Again, none of the paperwork in this matter mentioned the Oscar.<sup>328</sup>

There was violent behavior and destruction of property as well. A Molotov cocktail was thrown through the windows of each of the homes of Howard University President James Nabrit and Liberal Arts Dean Frank Snowden.<sup>329</sup> In May of 1969, students and other protesters took over six university buildings and forced a shutdown. All of

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318. Jack White, Jr., *Picnic Mood Prevails At Beseiged Building*, WASH. POST, Mar. 21, 1968, at A8 (explaining that students were taking over operations, singing, directing traffic, acting as security, and emptying trashcans).

319. *Id.* *A Glimpse of History: Scenes from the Howard University 1968 Takeover*, PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/race/etc/history.html> (last visited Nov. 18, 2011).

320. *Id.*

321. *Id.*

322. Then alumnus, Donal Leace, happened to be attending the performance that night. Leace Interview, *supra* note 263. Lynda Gravatt, then a student, was in the interrupted play. See Gravatt Interview, *supra*, note 267.

323. Charles Aikens, *Student Critics Hit Howard Art Exhibit*, AFRO-AMERICAN, Nov. 15, 1969, at 19.

324. *\$300 in Art Stolen from Howard U.*, WASH. POST, Dec. 4, 1969, at A30 (reporting police report filed).

325. *Id.*

326. *Id.*

327. *E.g.*, Complaint for Injunctive Relief, *Howard University v. Smith*, Civ. Act. No. 602-69 (D.D.C. Mar. 10, 1969). This writer's review indicates that none of the documents in the file—complaint, motion, affidavits, memoranda, orders etc.—indicate any destroyed or stolen property.

328. This author reviewed the entire file in *Howard University v. Smith*, Civ. Act. No. 602-69 (D.D.C. Mar. 10, 1969) as well as available civil case files involving Howard protest matters prior to 1969. These documents are stored at the National Archives.

329. *Firebomb Case Sent to Jury*, WASH. POST, Feb. 29, 1968, at F1 (explaining that the former student was tried but the Molotov cocktails did not cause a fire).

the streetlights were eventually smashed out. U.S. Marshalls were forced to saw and cut their way into buildings where students had barricaded themselves.<sup>330</sup> Twenty students who refused, after negotiations, to obey a U.S. Marshall's request that they vacate were arrested, and several were prosecuted. Two stragglers were pulled out of Fine Arts.<sup>331</sup> The Reserved Officers Training Corps ("ROTC") building was set on fire.

There was a sharp backlash against the traditional formulations of black culture and history within the community. Hearing of a commotion in May of 1969, new dean, Michael Winston, also a professor of history, went over to see if Moorland-Spingarn was alright.<sup>332</sup> Its front doors had been chained. Some students told Winston that outsiders had come onto campus and had put gasoline in the stacks of the library.<sup>333</sup> According to the students, an individual was reportedly saying that "[w]e are going to burn this place down" and that the library's books were about "Negros" and "we are black."<sup>334</sup> These plans were ended when U.S. Marshalls took control of the building and cleared the campus.<sup>335</sup>

There is no doubt that the '60s was a chaotic time. Still, the available evidence rebuts the notion that students or even members of the community took the Oscar. None of the available depositions, affidavits, or other documents filed in the various civil cases that Howard instituted or that were instituted against Howard, mention a missing Oscar or any missing Fine Arts artifacts.<sup>336</sup>

There are no references to the Oscar's arrival or presence in the Howard University student newspaper, or the Howard University Yearbooks, black newspapers and magazines, or the majority white magazines.<sup>337</sup> Howard University's histories do not even mention

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330. C. Gerald Fraser, *20 Arrested as Campus Seizure Ends*, N.Y. TIMES, May 10, 1969, at 14.

331. *Id.*

332. Winston Interview, *supra* note 13.

333. *Id.*

334. *Id.*

335. *Id.*

336. *See supra* note 328.

337. This writer personally reviewed the microfilms of *The Hilltop* and the hard copies of the Howard Yearbooks; searched Proquest's Historical Databases for the *Baltimore Afro-American*, *The Chicago Defender*, *The New York Times*, *The Los Angeles Times*, *The Washington Post*, and Proquests Afro American Newspapers database. The result was not a single reference to the McDaniel Oscar being at Howard. She looked for a photograph of the Oscar in the Yearbooks, in the photograph collections at the Manuscripts Division of Moorland Spingarn Research Center and in Owen Dodson's Papers at Moorland Spingarn and elsewhere.

it.<sup>338</sup> Ironically, today, some former Fine Arts faculty do not remember ever seeing it.<sup>339</sup>

Perhaps the most compelling evidence that the artifacts were not in jeopardy is the fact that Owen Dodson's many letters during that period show no concern for them, even when he is away. For example, when students occupied the Fine Arts building, he was on sabbatical in Arizona. He wrote to a friend from there:

The students are pounding away at the vital parts of Howard. Fine Arts is now a target. *They tell me it is funny and ironic* that all they have learned from the administration and the faculty, they are now turning against them. For instance, a quartet of unexcelled student voices serenade the Dean with *Joshua fit the battle of Jericho and the walls come tumblin down*. The art students have painted placards of the top artistic quality and the Drama students carry them. They all hung a wreath on the Dean's door saying, The Dean is DEAD.<sup>340</sup>

It would not have been "funny and ironic" had the Oscar been missing. Later, speaking of the violence in the May riots, he would say, "I'm glad I was not there. I would have had a stroke."<sup>341</sup>

Some students shared Dodson's concerns about tactics. His secretary wrote him while he was away about the interruption of *Simply Heavenly*. She said that some students were complaining that the disruptions were interfering with their education, and they were thinking of transferring.<sup>342</sup>

Students did not get everything that they wanted,<sup>343</sup> but they did accomplish change. First, they discovered themselves. "Jimmy" Christian remembers the impact upon him, coming out of segregated

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338. See generally RAYFORD W. LOGAN, HOWARD UNIVERSITY: THE FIRST HUNDRED YEARS, 1867-1967 (1969) (detailing Howard's history from its inception as a theological seminary).

339. William Brown, Whitney LeBlanc, Former Professor of Music, Vada Butcher (incidentally, married to Drama Professor James Butcher) all say they did not remember seeing it. Email from William Brown to W. Burlette Carter (Apr. 21, 2010) (on file with the author). Telephone Interview with Whitney LeBlanc, Former Assistant Professor Howard Univ. (May 10, 2010); Telephone Interview with Vada Butcher, Former Professor of Music and Former Dean, Col. of Fine Arts, (Apr. 21, 2010).

340. Letter from Owen Dodson to Rosey Pool (Mar. 19, 1969) (on file with Emory Dodson papers) (emphasis added). At the time, Dodson was residing at the Ruth Stephan Poetry Center in Tucson. *Id.*

341. *Id.*

342. Letter from Marion Fontaine, Secretary, Drama Dep't, to Owen Dodson (Nov. 29, 1968) (one file with Emory Dodson papers).

343. But see *Student Joins Trustees of Howard U.*, BALT. AFRO AMERICAN, May 9, 1970, at 7.

Louisiana.<sup>344</sup> Christian had gone home after Howard students occupied the administration building in the spring of 1968.<sup>345</sup> On his way back to Howard, he had to purchase a bus ticket.<sup>346</sup> The bus station was in a restaurant that did not serve blacks; thus, those who wanted to buy a ticket had to go to a window and purchase tickets from outside.<sup>347</sup> Under the watchful eyes of his parents, he walked into the restaurant and asked to buy his ticket.<sup>348</sup> The clerk and restaurant crowd stared, but Christian got his ticket.<sup>349</sup> Charles Franklin notes that the protest movements gave students a tremendous education in leadership and possibilities.<sup>350</sup> Many went on to successful careers, some even joining Howard University's faculty or administration.<sup>351</sup>

The students also changed Howard and universities across the nation. The black studies movement took off in America's universities. In her 1968-1969 report on the Negro Collection, Dorothy Porter noted, "[e]very aspect of Negro Life and history, it would seem has been investigated by students here and elsewhere, as well as by faculty, visiting researchers, and the Washington community. It looks like 'black Awareness' is here to stay."<sup>352</sup> In 1969-1970 she wrote, "[b]lack studies continues to be 'big business.'"<sup>353</sup> Moorland's use increased, but use of the Pollack Collection plummeted.<sup>354</sup> The latter's

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344. Telephone interview with James Christian, Attorney (June 20, 2011) [hereinafter Christian Interview].

345. *Id.*

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.*

350. Franklin Interview, *supra* note 313.

351. Franklin, head of the student government in 1967, is a doctor in Silver Spring. *Id.* His successor, Ewart Brown, who led the 1968 administration building occupation, became the Premier of Bermuda. (Through a representative he declined to speak with the writer.) A participant in the 1968 administration building occupation, Tritobia Benjamin is now a dean at Howard University. Interview with Tritobia Hayes Benjamin, Assoc. Dean, Division of Fine Arts, Howard Univ. College of Liberal Arts (July 20, 2011) [hereinafter Benjamin Interview]. Scott Baker served as a Freshman Student Representative in the meetings with the Fine Arts Faculty regarding the curriculum in 1968 and is now the Assistant Director of the Howard University Art Gallery. Interview with Scott Baker, Assistant Dir. of the Univ. Gallery of Art, Howard Univ., (May 20, 2011) [hereinafter Baker Interview]; *see also* Leace Interview, *supra* note 263; Butler Interview, *supra* note 273; Gravatt Interview, *supra* note 267; Wesley Interview, *supra* note 267; Christian Interview, *supra* note 344.

352. DOROTHY PORTER, ANNUAL REPORT OF THE NEGRO COLLECTION 1968-1969.

353. *Id.*

354. In 1968-69, 24,844 book and non-book items circulated through Moorland, reflecting an increase from 15,001 the prior year, with more than 20,000 of that reflecting student borrowing. *See* JOSEPH H. REASON, 1968-69 ANNUAL REPORT OF THE DIRECTOR OF UNIVERSITY LIBRARIES TO THE PRESIDENT OF HOWARD UNIVERSITY 22 (1969). By contrast, Channing's numbers reflected a circulation of 1,408 for books only (1,349 of them by students), down from 1,560 the

fate was likely due not only to a movement, which looked to a new “black” theater, but also to the opening of opportunities for blacks outside of the world of entertainment, and, later, the retirement of the collection’s chief cheerleader, Owen Dodson.

The university also witnessed a rapid turnover in administration and faculty. In May of 1968, liberal arts student protesters achieved the deanship resignation of Frank Snowden, Dean of the College of Liberal Arts. At Howard since 1940, he remained as a professor of classics.<sup>355</sup> Medical students accomplished the removal of William Montague Cobb, as Chair of the Department of Anatomy, a post he had held some twenty-two years.<sup>356</sup> Nabrit resigned as President of the University, and on July 1, 1969, James Cheek replaced him.<sup>357</sup>

Perhaps nowhere was the impact of faculty change more acutely felt than in fine arts. Professor Ted Shine left in the spring of 1967,<sup>358</sup> while William Brown left in 1971.<sup>359</sup> Professor Whitney LeBlanc left in the spring of 1967.<sup>360</sup> Nature also played a role. Art Department Chairman James Porter died suddenly in early 1970,<sup>361</sup> and Dean Warner Lawson died in 1971; and, facing medical issues, Owen Dodson retired in 1970.<sup>362</sup>

In his 1968-1969 report on the Department of Drama, James Butcher provided his views on the impact of the protests on the faculty agenda.<sup>363</sup> “The many student meetings to formulate demands and the many faculty meetings called to respond to these demands resulted in further damage in the area of teaching.”<sup>364</sup> He mentions “[t]wo unfortunate incidents—the invasion of Ira Aldridge during in-

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prior year. *Id.* In 1969-70, the Moorland circulation number for students and faculty rose to 25,717, while the Channing number for students and faculty use fell dramatically to 585. *Id.*

355. See Don Robinson, *Dean Quits at Howard, Was Under Student Fire*, WASH. POST TIMES HERALD, May 8, 1968, at B4.

356. See Bernadette Carey, *Howard Aide Ousts Target of Students*, WASH. POST TIMES HERALD, Feb. 14, 1969, at A1 (reporting on the decision by the Dean of Howard University College of Medical school to remove Cobb).

357. *Brief History of Howard University*, HOWARD U., <http://www.howard.edu/explore/history.htm> (last visited Nov. 16, 2011).

358. Shine Interview, *supra* note 259.

359. See E-mail from William Brown to W. Burlette Carter, *supra* note 279.

360. Telephone Interview with Whitney LeBlanc, Drama Dep’t Professor, Howard Univ. (May 10, 2010).

361. See *Headed Art Department at Howard, James A. Porter Dies at 64*, WASH. POST TIMES HERALD, Mar. 4, 1970, at C12.

362. See Ivan C. Brandon, *Warner Lawson, Howard Arts Dean*, WASH. POST TIMES HERALD, June 4, 1971, at C4.

363. See James Butcher, *Report of the Drama Department*, in 1968-69 ANNUAL REPORT OF THE COLLEGE OF FINE ARTS 41-43 (1969).

364. *Id.*

termission by a group of black militants causing a cancellation of its final performance (*Simply Heavenly*) and the resignation early in the semester of a very competent instructor who felt unable to adjust to the demands of his students.”<sup>365</sup> He added, “[t]he latter incident I believe suggests very strongly the need for careful evaluation of the validity of student demands for immediate relevance only and the complete rejection of universal standards in the arts and training for the arts.”<sup>366</sup>

## B. Act II: Fade to Black

### 1. Dodson Drafts a Will

As a black artist in the early 60s and 70s, Dodson lacked the same opportunities as his white artistic counterparts. He was gay,<sup>367</sup> and society suggested that he was, therefore, deviant and immoral. Moreover, racially discriminatory behavior was not limited to straight America. As the student protests waged on, Dodson was facing his own problems with debilitating arthritis and was also drinking heavily.<sup>368</sup> In the spring of 1967, the administration finally intervened, forcing Dodson to get medical and psychological treatment and take a one-year leave of absence.<sup>369</sup>

In the spring of 1967, Dodson seemed to be making a transition; he drafted a handwritten will.<sup>370</sup> In it, he left everything he owned relating to drama and the arts to the Pollack Collection, suggesting again how dear that collection was to him.<sup>371</sup> In July of 1967, he resigned the Chairmanship of the Drama Department.<sup>372</sup> And, he began transferring his personal papers to Moorland-Spingarn, sending some in 1967 and two large boxes the following year.<sup>373</sup>

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365. *Id.* Butcher does not name the faculty member of whom he is speaking.

366. *Id.*

367. *See, e.g.,* HATCH, *supra* note 236, at 58-59, 220.

368. *Id.* at 227-28, 242.

369. *Id.* at 228.

370. *See* Last Will and Testament of Owen Vincent Dodson (March 18, 1967) (*in the Probate of Will of Owen V. Dodson, No. 2938-83*) [hereinafter *Dodson Probate Papers*].

371. *Id.*

372. Letter from Owen Dodson, Drama Dep’t Chair, Howard Univ., to Rosie Pool, Anthropologist (July 6, 1967) (on file with Emory Dodson papers).

373. *See* ETHEL M. ELLIS, 1967-68 ANNUAL REPORT OF THE NEGRO COLLECTION 3 (1968); ETHEL M. ELLIS, 1968-69 ANNUAL REPORT OF THE NEGRO COLLECTION 7-8 (1969) (“Dodson placed with [Moorland] two large boxes of his personal papers.”). The finding aid prepared by Moorland-Spingarn reflects that the items Dodson gave were papers and photographs. *See* GRETA WILSON, FINDING AID (1980).

Although he was on leave from teaching in 1967-1968, Dodson produced three one-act plays in that fall.<sup>374</sup> He had planned to produce an Opera, *'Till Victory is Won'* with Dean Warner Lawson and Associate Dean Mark Fax in the spring of '68, but, as he would complain in a letter to a young Jessye Norman ('67), the performance was later cancelled due to "race riots and legitimate student sit-ins."<sup>375</sup> He requested another leave for the years of 1968-1969, which was granted. In the fall of 1968, he traveled throughout England; he spent the spring as a poet in residence at a poetry center at the University of Arizona.<sup>376</sup>

In Dodson's absence, Howard's Drama Department attempted to adjust to the new environment. In July of 1968, Chair James Butcher announced that he was "reorganizing" Howard's Drama Department.<sup>377</sup> The press release announced the appointment of four new full time replacements.<sup>378</sup> In the fall of 1969, Vera Katz was hired,<sup>379</sup> and the Department's plays began to reflect the new movement in black theater.<sup>380</sup>

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374. See *Theater Promptbook; New Plays Given Hearing at Howard*, WASH. POST, Dec. 3, 1967, at H2 (announcing Dodson's direction of plays by Floyd Barrington Barbour); see also Letter from Owen Dodson, Drama Dep't Chair, Howard Univ., to Bill Reardon, Dir. of NDEA Inst. in Repertory Theatre, Dep't in Dramatic Arts, Univ. of Cal., Santa Barbara (Nov. 12, 1967) (on file with Howard University Moorland-Spingarn Research Center) (noting rehearsals for three one act plays); Letter from Owen Dodson, Drama Dep't Chair, Howard Univ., to Bill Reardon, Dir. of NDEA Inst. in Repertory Theatre, Dep't in Dramatic Arts, Univ. of Cal., Santa Barbara (Feb. 13, 1968) (on file with Howard University Moorland-Spingarn Research Center) (noting that he was working in the fall of 1967 and joking that he had had no "vacation" in the fall of 1967). The plays had only a short run when the playwright pulled his approval because he was unhappy with Dodson's resistance to changes he requested. See Richard Coe, *The Brookses Are in Action*, WASH. POST, Dec. 7, 1967, at B11.

375. Letter from Owen Dodson, Drama Dep't Chair, Howard Univ., to Jessye Norman, Performer (Apr. 30, 1968) (on file with Emory Dodson Papers).

376. Letter from Stanton L. Wormley, Academic Vice President, Howard Univ., to Owen Dodson, Drama Dep't Chair, Howard Univ. (June 26, 1968) (on file with Emory Dodson Papers) (approving research grant for sabbatical travel); Letter from Owen Dodson, Drama Dep't Chair, Howard Univ., to Rosey Pool, Anthropologist (Mar. 19, 1969) (on file with Emory Dodson Papers).

377. See Press Release, Howard Univ. Dep't of Drama, Howard University Department of Drama Reorganized and Expanded (July 26, 1968) (on file with Howard University Moorland-Spingarn Research Center); see also *Wilde's 'Earnest' Will Open McLean Season*, WASH. POST TIMES HERALD, Sept. 22, 1968, at E10.

378. See Press Release, *supra* note 377.

379. Telephone Interview with Vera Katz-Korth, Former Drama Professor, Howard Univ. (July 14, 2011) [hereinafter Katz-Korth Interview].

380. See Richard Coe, *Over and Over, Say It Black*, WASH. POST, Mar. 8, 1969, at C1 (reviewing Paul Carter Harrison's play *Tabernacle*); Richard Coe, *Malcolm X Drama*, WASH. POST, Mar. 12, 1971, at B9 (reviewing the play *El Haj Malik*); Holly I. West, *Genet's The Blacks*, WASH. POST, Apr. 28, 1971, at B6 (reviewing the play).

Dodson observed the changes at Howard with both hope and unease. In the spring semester of 1968, he would write to a friend:

When I see you I will tell you about the more intimate developments at Howard, such as bombings, burnings, demonstrations, picketing, walkouts and such . . . . It is an exciting and miserable time to be alive, but there are rewards in seeing the emergence of new culture, and a new determination to make our world believable and hopeful.<sup>381</sup>

But, Dodson would never become comfortable with a new approach to describing the black experience that he believed mischaracterized black life as primarily urban poverty with no middle class.<sup>382</sup> He found the foul language that characterized some of the new ghetto-centered drama's difficult to accept.<sup>383</sup> After Langston Hughes' passing in the spring of 1968, he wrote to a friend, "[o]ur Negro world now is a new presence. Langston recorded the old. Now he is dead."<sup>384</sup>

Needing hip surgery, Dodson would request medical leave once again for the spring of 1970.<sup>385</sup> The fall of 1969 would end up being his last on Howard's faculty.<sup>386</sup> With so many changes, department

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381. Letter from Owen Dodson, Drama Dep't Chair, Howard Univ., to Eve Lee, Former Student (Jan. 29, 1968) (on file with Howard University Moorland-Spingarn Research Center).

382. Letter from Owen Dodson, Drama Dep't Chair, Howard Univ., to Ted Shine, Professor, Prairie View A&M Univ. (Jan. 28, 1969) (referencing the Metropolitan Museum of Art Exhibit called "Harlem, Harlem, Harlem On My Mind" that showed no black artists, doctors, lawyers, professionals, and "Negro handicrafts," but had plenty on soul foods and words like "mother fuckin and shit"). He calls the exhibit "stunning and confusing." *Id.*

383. *Id.*

384. Letter from Owen Dodson, Drama Dep't Chair, Howard Univ., to Rosey Pool, Anthropologist (July 6, 1967) (on file with Emory Dodson papers).

385. Letter from Owen Dodson, Drama Dep't Chair, Howard Univ., to Mark Fax, Acting Dean, Howard Univ. (June 28, 1970) (on file with Emory Dodson papers) (requesting immediate retirement due to disability).

386. In the spring of 1970, Dodson sought retirement based upon full disability from Howard. *See* Letter from William Brown, Dep't Chair, Drama, Howard Univ. to Mark Fax, Acting Dean, Howard Univ. (June 25, 1970) (on file with Emory Dodson papers). Supported by William Brown, then Department Chair, and Mark Fax, Acting Dean of the College of Fine Arts, he asked for a unique arrangement that essentially would have given him an early pension in recognition of what he believed was his unusual contribution to Howard. *Id.* Dodson was still in his fifties. The board accepted his retirement, but did not grant the unusual pension arrangement. *Id.* (Indeed, it seems unlikely that they could not grant such an unusual arrangement to him without affording the opportunity to others.) Because they had accepted his retirement without giving him a chance to change his mind (even though he had said he was disabled and could not teach), Dodson then concluded that they were trying to force him out. *See* HATCH, *supra*, note 236, at 244. There is little doubt that Howard was concerned that Dodson had not handled his significant drinking problems, which the University believed was affecting his judgment. *Id.* at 259, 263-64. Of course, the University had already granted him the two consecutive years of leave. *Id.* Now retired with no steady stream of income and health problems, he subsequently faced significant financial distress as well as mounting health challenges. *Id.*

chair Butcher was pressed to find new faculty again for the fall of 1970. Responding to the Cheeks administration's directive that departments needed to recognize because of the new black studies movement, he brought on Sam Wright, Robert Wesley, and Glenda Dickerson.<sup>387</sup>

## 2. Oscar Exits, Stage Left (Or Was it Stage Right)?

Vera Katz joined Howard in August of 1969 as a young white female hired in the midst of an emerging "black studies" movement.<sup>388</sup> She remembers that as one entered the door of the Green Room in the Drama Department, there were glass cases on either side. In one, she saw the pair of "Bojangles" shoes tied together with a shoestring.<sup>389</sup> There were also photographs from the Howard Players' 1949 trip. She does not remember an Oscar. However, at the time, Katz was unaware that an Oscar could be a plaque just five inches wide and six inches tall, and she does remember that there were several plaques in the case.<sup>390</sup>

Linda Gravátt attended Howard from 1966 to 1971.<sup>391</sup> She believes that the Oscar was there her entire time at Howard. She was also a member of the Howard Players.<sup>392</sup>

Indeed, while the formal visits to the shrine might have ended, there is no indication that the Oscar was not there, along with its constant companion, the shoes. When did the Oscar disappear? A controversy over posters may well signal the time period.

St. Claire Christmas, a former Dodson apartment mate, kept Dodson apprised of events in their old neighborhood.<sup>393</sup> He joined Howard's Drama Department as an instructor in the fall of 1970.<sup>394</sup> An affiliate of the prior generation, Christmas was not happy with the approach of the new faculty.<sup>395</sup> Still, the day before Thanksgiving, in

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387. See HATCH, *supra* note 236.

388. Katz-Korth Interview, *supra* note 379.

389. *Id.*

390. *Id.*

391. See Gravátt Interview, *supra* note 267.

392. *Id.*

393. Letter from St. Clair Christmas, Dep't of Drama Instructor, Howard Univ., to Owen Dodson, Drama Dep't Chair, Howard Univ. (Feb. 24, 1970) (on file with Emory Dodson papers).

394. Letter from St. Clair Christmas, Dep't of Drama Instructor, Howard Univ., to Owen Dodson, Drama Dep't Chair, Howard Univ. (Nov. 25, 1970) (on file with Emory Dodson papers).

395. *Id.*

1970, Christmas wrote to Dodson that “everything is going well at Howard,” and he noted, “James Butcher is the head of the department.”<sup>396</sup>

By January 1971, Christmas’s tone had changed. As part of their effort to make the theater more “black,” Wright and West had tossed out theater posters that Dodson commissioned students and faculty to create and had used to decorate the department walls.<sup>397</sup> Of course, Dodson was no longer the chair, and the old needed to make way for the new. But, the fact that they had not taken care to preserve the posters riled some. With some regrets, Lynda Gravátt (‘71) remembers the general mood of many students in the day. “We wanted to be ‘black,’ not ‘Negro,’” she says.<sup>398</sup> However, Gravátt also remembers that when she and other drama students discovered some of the posters were in the trash cans in early 1971, they ran out and grabbed them as treasures.<sup>399</sup>

The news of the posters mishandlings spread like a fire among those affiliated with Howard’s older guard. Former Howard Professor Ted Shine heard about it all the way out at Prairie View.<sup>400</sup> Former Drama Chair William Brown, then at the University of Maryland, heard about it when he called his old friend James Butcher for a chat.<sup>401</sup> Brown still calls the news “shocking”; however, he does not remember Butcher expressing any concern over an Oscar, the shoes, or the other items in the glass cases.<sup>402</sup> Indeed, none of those who remember the poster incident remembers the items in the glass cases being trashed or an Oscar being taken.<sup>403</sup>

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396. *Id.*

397. See Letter from St. Clair Christmas, Dep’t of Drama Instructor, Howard Univ., to Owen Dodson, Drama Dep’t Chair, Howard Univ. (Jan. 29, 1971) (on file with Emory Dodson Papers) [hereinafter Letter from St. Clair Christmas on Jan. 29, 1971].

398. See Gravátt Interview, *supra* note 267.

399. *Id.*

400. See Shine Interview, *supra* note 259.

401. Brown learned of the poster incident when he called James Butcher around that time; Butcher told him that he was trying to recover them. E-mail from William Brown, Former Drama Chair, Univ. of Maryland, to W. Burlette Carter, Author (July 20, 2011, 06:10 EST) (on file with author). Similarly, Lynda Gravátt remembers the poster incident but is sure that the glass cases were not violated at that time. See Gravátt Interview, *supra* note 267.

402. E-mail from William Brown, Former Drama Chair, Univ. of Maryland, to W. Burlette Carter, Author (July 18, 2011, 13:42 EST) (on file with author). Brown remembers the glass cases and the artifacts, but, as previously mentioned, he does not specifically remember the Oscar. See *supra* text accompanying note 339.

403. Shine Interview, *supra* note 259.

Dodson heard about the incident in New York. In a January 29, 1971 letter, Christmas, clearly biased towards Dodson, expressed anger at the new regime.

The Drama Department posters and etc. still have not been replaced by Mr. Wright or Mr. West as ordered by Mr. Butcher so our halls that you made a showplace are vacant, dark . . . They seem to like it that way, but really the students complain daily about why the posters and etc . . . everything that said this was the Drama Department has not been replaced. They want to restore the halls to their previous glorious status.<sup>404</sup>

Christmas also mentions that Butcher has been absent, sick for three weeks (a fact that might explain how the posters were removed without his approval).<sup>405</sup>

But, the poster controversy was a harbinger of the changes that were to come. Gravátt graduated in the spring of 1971.<sup>406</sup> She was asked to join the teaching faculty at Howard University the next semester, the fall of 1971. Oddly, she does not remember the Oscar or the shoes being there when she returned. She does not remember the Ira Aldridge room still being present.<sup>407</sup>

There is an interesting note in the Annual Report of Founders Library for 1971-1972 (covering fiscal year July 1, 1971 to June 30, 1972). It says: “[d]ue to the sabbatical leave of Mrs. Mahanand, curator. . . work in the department was limited to reorganizing the physical facilities, and processing of backlog. *Some additional Leigh Whipper artifacts were received and added to the collection.*”<sup>408</sup> Here is a theory: James Butcher, the last of the triumvirate that originally formed the Department of Drama, returned to the Pollack Collection an Oscar and a pair of bronzed shoes, both donated by Leigh Whipper. Butcher left the Department in 1972-73 transferring to the Office of the President.<sup>409</sup>

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404. See Letter from St. Clair Christmas on Jan. 29, 1971, *supra* note 397. There may in fact have been subsequent poster incidents triggered either by political or simply space concerns. Vera Katz reports she took posters out of trash cans behind the Drama Department in the 1980s, when unknowns discarded them not knowing their history and trying to make space in the department for ongoing operations. Katz-Korth Interview, *supra* note 379. This writer saw for herself throughout visits to the University during the summer of 2011 some of these early posters now stored in the Drama Department and in the Howard University Archives.

405. See Letter from St. Clair Christmas on Jan. 29, 1971, *supra* note 397.

406. Gravátt Interview, *supra* note 267.

407. *Id.*

408. WILLIAM D. CUNNINGHAM, 1971-1972 ANNUAL REPORT OF THE DIRECTOR OF LIBRARIES TO THE PRESIDENT OF HOWARD UNIVERSITY 25 (1972) (emphasis added).

409. Baker Interview, *supra* note 351.

But, what about Owen Dodson? Arguably, Dodson did have a motive to take the Oscar. He would bitterly conclude that the administration had not made sufficient efforts to keep him or honor him.<sup>410</sup> However, steadfast loyalty to Howard University Theater belies such intent. As noted, he had already placed much of his papers at Howard before he left.<sup>411</sup> Until 1983, he would repeatedly reject offers to place his papers at other institutions.<sup>412</sup> In November of 1974, he assured Dr. Michael Winston, then Director of the Moorland-Spingarn Research Center, that whatever he had left, including new work, would be sent to Howard University.<sup>413</sup> He specifically referenced the Pollack Collection for any theater items, which he said he would donate in the name of Dorothy Porter.<sup>414</sup>

No one ever saw the Oscar in his home, and there is no evidence that it was ever there. In 1973, Michael Winston, then, the new Director of Moorland-Spingarn, visited Dodson in New York at Dodson's request to retrieve more papers.<sup>415</sup> They did not discuss the Oscar.<sup>416</sup> In 1973, Winston had not heard rumors that Dodson had taken the Oscar or that it had been stolen.<sup>417</sup>

Dodson's 1967 will attempt, though invalid because it lacked the requisite number of witnesses, remained his wish for fifteen years after leaving Howard University. Finally, in 1983, working with his caretaker, a very ill Dodson would catalog all that he had in his New York apartment and where he wanted it to go in preparation for a new will. That list and his 1967 will would become the subject of litigation after his death, which is how we know what it said and what he might

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410. Saying his disability prevented him from working, Dodson, in his fifties, sought to retire early. With his Department's support, he sought a unique pension arrangement that was probably not legally within the University's power to grant. Howard rejected the arrangement, but accepted the retirement offer. Afterward, he would face constant financial struggles and mounting medical costs—and he continued to drink. See HATCH, *supra* note 238, at 263.

411. See text *supra* accompanying notes 384-87.

412. See Letter from Bernard Kreissman, Chief Librarian, City College, to Owen Dodson, Drama Dep't Chair, Howard Univ. (Nov. 18, 1970) (on file with Emory University).

413. Letter from Dr. Michael Winston, Dir., Moorland-Spingarn Research Ctr., to Owen Dodson, Drama Dep't Chair, Howard Univ. (Nov. 22, 1974) (on file with Emory University).

414. *Id.*

415. *Id.*

416. *Id.*

417. See HATCH, *supra* note 236, at 290-91. Winston left empty handed, as the indecisive Dodson could not decide what he wished to give. Winston Interview, *supra* note 13.

have been intending.<sup>418</sup> He listed no Oscar.<sup>419</sup> He would die soon thereafter.<sup>420</sup>

Significantly, in that 1983 list, Dodson mentioned Howard University. He said that he wanted to leave to the Pollack Collection all theater posters and other posters *that are housed there*.<sup>421</sup> This reference is consistent with Butcher having put the posters in the Pollack Collection for safekeeping after the 1971 poster incident. If the new regime at Howard University was discarding the posters, then arguably they had been abandoned, and Dodson could claim them as his own. But, he did not want them for himself. He wanted to preserve them so that future generations of Howard Drama students would know more about the Department's history. If Butcher put the theater posters in the theater collection, would he not have also taken the time to take the Oscar—and the “Bojangles” shoes as well?<sup>422</sup>

Upon taking the helm of Moorland-Spingarn, Michael Winston would begin to reign in Howard University's various artifacts. In the first or second year, he would recover General Howard's piano from the Drama Department Green Room.<sup>423</sup> If an Oscar had been in the Green Room then, or the “Bojangles” shoes, would Winston or his agents not have either seen or heard about them?

One final story may confirm that the Oscar left the stage of the Drama Department at Howard University in the 1971-1972 period. In 1973-1974, Scott Baker, a Master's program graduate in 1975, who is now Assistant Director of Howard's Art Gallery, was a graduate student, working in the Art Department. During that period, a package

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418. Outline for the Last Will and Testament of Owen V. Dodson (on file with Dodson Probate Papers) *supra* note 370. The drafting, preservation, and validity of this will was the subject of the Depositions of Patrick Trujillo and Doris Jeffrey (Oct. 4, 1983) (on file with Dodson Probate Papers. Examination of Attending Witnesses, Patrick J. Trujillo and Doris Jeffrey, File No. 2938-83 (Surrogate's Court, NY Oct. 4, 1983).

419. Outline for the Last Will and Testament of Owen V. Dodson (on file with Dodson Probate Papers) *supra* note 238 (emphasis added).

420. See C. Gerald Fraser, *Owen Dodson is Dead at 68; Major Figure in Black Drama*, N.Y. TIMES, June 22, 1983, at A24.

421. Outline for the Last Will and Testament of Owen V. Dodson (on file with Dodson Probate Papers) (emphasis added) *supra* note 238.

422. There is another option. Butcher could have stored the Oscar and other items in the Drama Department instead of the Pollack Collection. But that approach would not make sense. He knew the Collection was where important items were stored. He remained on campus after leaving the department so he would have had plenty of time to get it to the Collection. And, as one of the original advisors on the Scandinavian tour, he would have known the significance of such artifacts (including the artifacts from the tour that had been in the case), and he knew of their importance to his colleague Owen Dodson.

423. See Winston Interview, *supra* note 13.

was delivered.<sup>424</sup> Inside, the department chair found a bronzed pair of Bill “Bojangles” Robinson’s shoes.<sup>425</sup>

According to Baker, both the Art Department Chair and the Art Gallery curator were unimpressed with these Drama items from a bygone era.<sup>426</sup> They directed Baker to take them to the Pollack Collection.<sup>427</sup> Young Baker did as he was told.<sup>428</sup> He remembers the name of the donor of the shoes: Leigh Whipper. Whipper was then ninety years-old.<sup>429</sup> This writer believes that this second pair of “Bojangles” shoes, which are stored with a metal plate with drill holes suggesting that they were once mounted, now rests in the Pollack Collection.<sup>430</sup> The first pair—unmounted and bronzed<sup>431</sup>—along with Hattie McDaniel’s Oscar, remain unaccounted for. Could it be that Whipper sent a second pair in 1973 because he had learned that the first pair was gone—and none of the new faces in the Drama Department knew where the items had been placed? Whipper could send a replacement pair of shoes. He could not send a replacement Oscar.

## V. THE FINAL ACT

What about the story of the Oscar hurdling over the gleaming waters of the Potomac River?<sup>432</sup> It was a curious tale from the start. Why would a black person so angry over racism as to violate the shrine, and watch as the Oscar was hurled into the Potomac river confess this fact only to Tom Gregory who is, well, a “white” guy? Why couldn’t Gregory, who cares so much about McDaniel and her Oscar, provide more details about the culprit?

I contacted Gregory by email and posed a list of questions in the hope of tracking down the illusive informant.<sup>433</sup> He responded by

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424. See Baker Interview, *supra* note 351.

425. *Id.*

426. *Id.*

427. *Id.*

428. *Id.*

429. See *id.*; note 285 (regarding Whipper’s age). When this author first spoke with Baker, he was unaware of an earlier pair of shoes. *Id.*

430. This writer saw the shoes for herself on September 15, 2011.

431. There may have been, then, three pairs’ of dancing shoes: two bronzed and one black pair not bronzed. See *supra* note 266.

432. Gregory has stated, “Like Hattie herself, it too is buried in the wrong place, a victim of misunderstanding and hate.” Gregory, *supra* at note 19.

433. See E-mail from W. Burlette Carter, Author, to Tom Gregory, Columnist, Huffington Post (May 11, 2011, 03:02 EST) (on file with the author).

email on May 11, 2011 stating that he was “traveling” but that the story “has acquired a different end recently.”<sup>434</sup> He continued:

In February I did a[n] interview for an independent producer who was taping a piece for a DC station. On it I asked—dared, whom-ever might have it to come forward. Lo and behold a person emailed me with the Oscar (plaque)! The base is long gone—with its identifying nameplate, but I highly suspect it belonged to [M]cDaniel! It’s an early plaque (it [i]s the first design) and seems to be spot-on. Obviously this new revelation means the earlier story I was told was inaccurate. At some point in the near future I will go public by offering this item back to Howard. Keep in mind I will never have HARD proof this is Hattie’s, but I’m personally satisfied by the circumstances, vintage, and patina of this Oscar-plaque.<sup>435</sup>

Gregory’s plans to “offer” the alleged Oscar plaque to Howard University said to me that he had control of, and indeed owned it. What good fortune.

I responded by email, again, posing the exact same questions about his informant. The lawyer in me led me to say the words “be careful.”<sup>436</sup> He did not respond. I sent another message on May 30, again posing the exact same questions.<sup>437</sup> Again, he did not respond. Then I decided to stop asking questions—and wait.

I was aware of two other facts at the time that I received Gregory’s email. First, I knew that on February 19th and 27th of 2011, the DC station WB50 had aired a special, *Hattie’s Lost Legacy*.<sup>438</sup> Second, I knew from previous internet searches that a plaque matching

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434. E-mail from Tom Gregory, Columnist, Huffington Post, to W. Burlette Carter, Author (May 11, 2011, 18:40 EST) (on file with the author).

435. *Id.*

436. E-mail from W. Burlette Carter, Author, to Tom Gregory, Columnist, Huffington Post (May 12, 2011 17:55 EST) (on file with the author). While I did not say it, apart from the obvious difficulties posed by any farce, if it were the McDaniel Oscar, it would have had to have been stolen. A thief does not have good title, and his disability affects everyone down the line of custody. Even an innocent purchaser who buys not knowing of the theft gets *nothing*. See generally *Brown Univ. v. Kaminski*, 1993 Mass. Super. LEXIS 23 (Mass. Super. Ct. Dec. 10, 1993) (stating that the thief could not legitimately auction an item stolen from Brown University, despite Brown not having called the police or filed an insurance claim); *Newman v. Stuart*, 597 So. 2d 609 (Miss. 1992) (holding that an innocent purchaser of a stolen pickup truck acquired no title); *Anderson Contracting v. Zurich*, 448 So. 2d 37 (Fla. Dist. Ct. App. 1984) (holding that an innocent purchaser of heavy equipment from thief acquires no title). And of course, knowingly buying or selling property one knows has been stolen is also illegal in every U.S. jurisdiction. See, e.g., 18 U.S.C. § 2315 (2006). *But see* *Snethen v. Okla. State Union of Farmers Educ. & Cop. Union of Am.*, 664 P.2d 377, 381-82 (Okla. 1983) (noting that despite general rule, an innocent purchaser for value may still have an insurable interest under an insurance contract).

437. See E-mail from W. Burlette Carter, Author, to Tom Gregory, Columnist, Huffington Post (May 30, 2011, 14:11 EST) (on file with the author).

438. See *supra* p. 111 and text accompanying note 22.

Gregory's description—one with the original base and nameplate missing—was sold on Ebay on March 19, 2011 at a winning bid of \$7,656, only weeks after the WB50 airing.<sup>439</sup> By the time I contacted Gregory, the eBay posting had been removed. However, with the help of the Archangel Google,<sup>440</sup> I was able to find it again. The advertisement, while speculating that the item might be the McDaniel Oscar, had clearly stated that the seller had no evidence of that fact and the item had been obtained in London.<sup>441</sup> I contacted the seller to inquire further about its origins. Understandably, the seller declined to name the buyer. Nevertheless, I would wager that the Potomac River story—informant and all—is a fish tale.<sup>442</sup>

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At press time, this writer cannot say where the McDaniel Oscar is *now*. She can only speak as to where it was as of 1972. It was not thrown into the Potomac River. Protesting students did not take it. Professor Owen Dodson did not slip it under his coat on his way out, nor did Professor Mike Malone take it. The story of its fate is a rather pedestrian one. In the midst of the dramatic changes wrought by the '60s, those in charge acted responsibly. They made room for the young to have their say, and they placed the Oscar, the shoes, and other artifacts back in the Pollack Collection.

## VI. LESSONS AND LEGACY

The journey of McDaniel's Oscar reveals much about the effect of race discrimination upon African American wealth development, preservation, and intergenerational wealth transfers. I make a few observations here.

McDaniel was born into a life of state-sponsored racism. As a result, her early life was one of desperate poverty.<sup>443</sup> Both her mother and father were former slaves.<sup>444</sup> They had little or nothing of financial worth to pass on to her as an inheritance. She began with no financial springboard—no money, no parental education, no long-

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439. See *Exceedingly Rare & Authentic Academy Award Oscar Statue*, EBAY, <http://cgi.ebay.com.sg/Exceedingly-Rare-Authentic-ACADEMY-AWARD-OSCAR-STATUE-/250786969733> (last visited Oct. 26, 2011).

440. I mean, of course, I am referring to the internet search engine, Google.

441. See *supra* note 439.

442. Indeed, it is arguably a fishtale that traded on a stereotype of angry, crazy, young, black people.

443. See WATTS, *supra* note 23, at 18, 19.

444. See *id.* at 2, 6.

standing name, and not even decent health care or food.<sup>445</sup> And she faced civil rights restrictions that benefitted her white counterparts. Her life was the exception, not the rule for blacks in America in her day.

The hand of racism would follow her throughout her career. It would restrict the amount of wealth she could acquire, irrespective of her talents.<sup>446</sup> It would also restrict the amount of wealth she could

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445. At age nine, her father, his eleven-year-old sister, and six-year-old brother were sold away as slaves from their parents in Virginia and taken to be slaves in Tennessee. *Id.* at 3. Her last name, “McDaniel,” comes from the surname of her father’s last slave holders. *Id.* at 3-4. Several writers have pointed out that one of the most valuable things that we pass on to our heirs is intangible. *See, e.g.,* Walter J. Blum & Harry Kalven, Jr., *The Uneasy Case for Progressive Taxation*, 19 U. CHI. L. REV. 417, 504 (1952). They largely discuss these issues in terms of class discrimination, not in terms of state sponsored racial discrimination. *Id.* For example, Blum and Kalven stated (ironically, in the year of McDaniel’s death):

[T]he gravest source of inequality of *opportunity* in our society is not economic but rather what is called cultural inheritance for lack of a better term. Under modern conditions the opportunities for formal education, healthful diet and medical attention to some extent can be equalized by economic means without too greatly disrupting the family. However, it still remains true that even today much of the transmission of culture, in the narrow sense, occurs through the family, and no system of public education and training can completely neutralize this form of inheritance. Here it is the economic investment in the parents and the grandparents, irrevocably in the past, which produces differential opportunities for the children.

*Id.* (emphasis added). Racism circumscribed the economic investment that slaves and the descendants of slaves could make in their children’s future.

446. The reasons for McDaniel’s insolvency remain a mystery to this writer. Her tax liability at death—some \$11,000—was simply not large enough to be the sole explanation (unless there were earlier claims as well). Indeed, the size of the 1951 claim (more than \$6,000), *see supra* text accompanying note 184, suggests that she may have failed to pay capital gains on the sale of the home that she sold that year. But where did that money go? She does not have the amount of debt one would expect in an insolvent estate. Some say her ex-husband looted her. *See, e.g.,* WATTS, *supra* note 23, at 264. The timing seems right, but there is no evidence. Others say that she was too cheerful a giver. *See, e.g.,* Harry Levette, *Story of Dwindling Fortune: Hattie Loved to Live; Was Cheerful Giver*, BALT. AFRO-AMERICAN, NOV. 22, 1952, at 7. It seems unlikely McDaniel would have donated herself into poverty. Some blame medical expenses, *see, e.g.,* JACKSON, *supra* note 16, at 150, but no significant medical bills are in the record, and McDaniel was an adherent to Christian Scientist approaches. WATTS, *supra* note 23, at 270. But, did she forgo medical care because of her financial situation? Clearly she had a habit of lavish spending that developed over the years. Among others, Jackson notes that she held lavish parties before she put her Sugar Hill Home up for sale in May 1950, including a party Jackson called a “party to end all parties.” JACKSON, *supra* note 16 at 147-48. She decorated her new rental home, with more than one hundred yards of draperies, some of which were custom made. *See* Letter from City Finance Corp. to Zagon Firm (Feb. 4, 1953) (on file with McDaniel Probate Documents) (detailing the conditional sales contract dated Oct. 8, 1951 and proposing a settlement of \$361.78). She may have considered these expenses investments in her career knowing that Hollywood does not suffer “broke” individuals. Yet, what emerged was a woman struggling to appear to be what she was not. In earlier years, she spoke of being frugal and saving for hard times. *See* Ryan, *supra* note 101. While an absence of racism would have given her a broader shoulder upon which to navigate her financial wrong turns, one sees a pattern that indicates she did not provide herself enough leeway for hard times. Her probable legal bills before her death for her divorce, the will drafting, and possibly IRS negotiations are also of interest. *See infra* note 453.

and would share with other members of her family; it would restrict the amount she could pass on to her heirs.

The impact of racism on the estates of blacks in McDaniel's time can be seen on at least four fronts. First, racism depressed the value of the property to be transferred. The market value of one's estate at death was inevitably tied to the value a larger society assigned one as a person, in this context, "white" or "black." Segregation and anti-miscegenation laws multiplied this effect by limiting the market of buyers for black-produced items and items associated with blacks. Thus, the McDaniel Oscar in McDaniel's day was worth less economically than a comparable Oscar awarded to a white person.

Second, racism narrowed the pool of persons in a family or in a community who would have the knowledge and resources to manage legacy property so that it could serve future generations. A knowledgeable person might die with assets, and the property could be lost or taken because those left behind would not know how to manage it or would not have the resources to protect it.

Third, racism restricted the availability of professional assistance from one's own community—persons knowledgeable about both money and culture—who could aid in the transfers at death. For cultures subject to discrimination, such persons are essential to wealth preservation, exploitation, and transmission. Indeed, the need for black lawyers to be trained in civil rights left fewer opportunities for training in business, tax, securities, corporations, intellectual property, wills and trusts, and other such legal areas.

Fourth, battling racism introduced inefficiencies into black life that whites did not face. Discrimination did not simply end full stop with a court decision.<sup>447</sup> The constant fight for civil rights did not only take place in courtrooms among lawyers wearing suits and ties. The battles were waged in the everyday lives of black Americans. Those battles consumed tremendous amounts of time and energy that might have been devoted to other forms of planning, including wealth acquisition and planning. A viable estate plan had to consider not just what

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447. Despite the Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), this author attended state sanctioned racially segregated elementary schools in South Carolina as late as 1970. Despite *Shelley v. Kraemer*, 334 U.S. 1 (1948), a 1967 Census Bureau study showed that more than half of the black families living in slum areas could afford better housing, but were kept out of such neighborhoods because of racially segregated housing patterns. See *Bias Not Poverty, Tied to Housing Segregation, More Than 50% of Negro Slum Families Can Afford Better Housing, U.S. Finds*, L.A. TIMES, Dec. 14, 1967, at A15.

would work for whites, but how racism or cultural considerations might change that calculus when the parties were black.

McDaniel's estate plan indicates that she was concerned about her brother's lack of financial knowledge. Her lawyers chose the vehicle of a testamentary trust to hold and distribute assets she hoped to leave for him and his wife. The trust vehicle is often used when one is concerned that an individual cannot providently handle assets or may be victimized by others. But, professional trustees, especially those the size of her co-designee, the California Trust Company, often apply a host of fees to trust transactions. Even if McDaniel had some money to pass on, the trust as designed would have been a costly way to leave a small to moderate legacy. Of course a plan with a testamentary trust is useless when an estate is insolvent as McDaniel's was. In a different world, Sam McDaniel might have had the opportunity to learn about money. He might have been able to receive an outright gift. If he needed a trust, perhaps a family member could have served as trustee. Perhaps, McDaniel would have had enough money that paying for professional management would simply not have been an issue and, indeed, professional management might have been *desirable*. Perhaps *intervivos* or nonprobate transfers would have been considered for her assets.<sup>448</sup>

McDaniel had access to professionals. She selected white celebrity lawyer Sam Zagon and his firm to write her will.<sup>449</sup> Zagon had represented her in her divorce from fourth husband Larry Williams.<sup>450</sup> Interestingly, having written the will, Zagon also expressly designated his firm in the will to handle her estate.<sup>451</sup> Her executor, John Charles

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448. An *intervivos* gift is a transfer during one's life. A nonprobate transfer allows property to pass outside of the will directly to its new owners without going through a court process. The use of such nonprobate transfers was more rare in McDaniel's day than it is today. See John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1108-09 (1984) (speaking of growth in use of nonprobate transfers that emerged in the twentieth century). Once the IRS lien attached, however, see *supra* text accompany notes 186-92, none of these options would have sufficed to protect any property.

449. Samuel Zagon had a long list of big name Hollywood clients. See, e.g., *Lawyers Ask \$290,000 of Lee Estate: Trio Helped Settle Tax Claims Against Radio Magnate*, L.A. TIMES, Dec. 21, 1953, at 21 (remarking on the fees for representation of radio magnate Thomas Lee, including defense against a tax claim of almost two million dollars against the estate). The original Zagon fee claim of more than \$290,000 was met with public disapproval. See *\$180,000 Fees Approved for Lee Estate Lawyers*, L.A. TIMES, Dec. 31, 1953, at 5.

450. See, e.g., Tomi Ayers, *West Coast Round-up*, CHI. DEFENDER, Oct. 28, 1950, at 9.

451. Such a designation is merely precatory. An executor has the power to hire whomever he or she pleases. Some might frown on this type of designation as the solicitation of business in violation of ethical precepts. See First Accounting, *supra* note 181, at 3 (requesting statutory fees).

Gross, is believed to have been the well-to-do socialite of the same name.<sup>452</sup> These professionals did a technically superb job of managing her estate, despite its small value. It is almost painful to see how the executor struggled to squeeze every dime for the creditors and how he documented every minute transaction that could have economic meaning. However, there was one item of “no value” that the executor and the lawyers neglected. Viewing that item in terms of market value, the omission, though regretful, was not commercially significant. But, considering the item’s cultural value, the omission was huge.<sup>453</sup>

In the world of Wills and Trusts, the dead can only protect their legacies through live persons. Interestingly, when showman Sid Grauman died and his family sought to sell off his assets, his friends camped out before the auction to try to purchase the items, desiring that the business be kept intact for the world to see.<sup>454</sup> Somehow, someone at the Academy discovered that Sid Grauman’s Oscar was up for auction, and the Academy sent its secretary, Margaret Herrick, out to purchase it—at whatever price.<sup>455</sup> No one from the Academy came to purchase McDaniel’s Oscar. Her Oscar did not go up for public auction; ultimately, it was probably tossed in among Hamilton’s purchases for free. If the Academy brass read only white newspapers,

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452. Although the identity is not confirmed, her executor John Charles Gross, may have been the well off socialite of the same name who was active in California charitable circles and, in particular, a group called the “Party of the Month Club” that raised money for charities by holding parties. He mingled with Hollywood’s leaders and stars. See Maxine Bartlett, *Pan Americana Ball to Draw Film Leaders: Vallee Will Direct Floor Shows Slated as Highlight of Defense Fund Benefit*, L.A. TIMES, Feb. 2, 1941, at D9. McDaniel’s biographer, Jill Watts, knew of no special connection McDaniel had with a John Charles Gross. See E-mail from Jill Watts, Biographer of Hattie McDaniel, to W. Burlette Carter (Oct. 3, 2011, 12:00 EST) (on file with author).

453. The size of her estate suggests that these lawyers and Gross either did not know her real assets when the will was drafted or that substantial assets were somehow quickly dissipated in the months leading up to her death. The lawyers do not claim against the estate as creditors, despite the fact that they handled a divorce and the will drafting for her. Consequently, we know they were paid. When she wrote the will, the divorce, though granted, was not yet finalized, which is a bit odd. And, the payment must have come before the IRS attached its liens. If they represented her on any negotiations with the IRS, that would have required an additional payment. Both the lawyers and the executor received their statutory fees (capped at a percentage of the estate, which was itself small), plus some extraordinary expenses given the need to negotiate her intellectual property interests and other complexities. But, the total of all claims amounted to only a few thousand dollars as the IRS was the chief creditor and there simply was no money.

454. See Aline Mosby, *Sid Grauman “Museum” in Auction Sale*, CEDAR RAPIDS GAZETTE, Dec. 21, 1950, at 16.

455. Telephone Interview with Bruce Davis, Exec. Dir., Acad. of Motion Picture Arts & Scis. (Mar. 29, 2010).

they would not have known much about her estate after her death. And, indeed, if there were no market for McDaniel's Oscar in the 1950s—as there was in Grauman's case—the Academy would have had no incentive to buy it.<sup>456</sup>

As Hattie McDaniel was fighting for a career in show business, blacks also were fighting back privately and in the courts to obtain equal rights. They would seek to forge their own strong viable markets apart from the white markets that excluded them, establishing their own newspapers and independent black movie houses.<sup>457</sup> In her career decisions, McDaniel faced a choice. If she participated in the market that blacks established, her income and opportunities would be limited because both her patrons and the segregated neighborhoods to which they were confined were burdened with racism. If she participated in the market whites controlled, she could make more money, but she would have to take roles that demeaned her people—and her opportunities would still be limited. Hattie McDaniel and other actors of her time were caught in the middle of these crossroads.

It seems that, for whatever reasons, McDaniel chose to package herself to sell just what the primary market of her time demanded. As she was heavily invested in a racist market, it is not surprising the value of her investment portfolio began to drop as the very civil rights struggles she had sought to avoid succeeded. With the emergence of a “new” black consciousness in the 1960s, that value plunged.

Her Oscar had a somewhat different fate. McDaniel could be placed into at least three categories—Negroes, women, and actors. As all three began to gain more rights and the class of buyers who would and could compete for her Oscar expanded, the market value of her Oscar began to rise as well.<sup>458</sup> It is, in fact, somewhat ironic

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456. Upon hearing from this author that Hattie McDaniel's Oscar was sold, former Academy Executive Director, Bruce Davis volunteered that had they known, the Academy would have purchased it. *Id.*

457. See, e.g., Dewberry, *supra* note 34. A website for the library of Congress gives a list of early black newspapers held there. See John Pluge, Jr., *Black Press Held By Library of Congress*, LOC.GOV, available at <http://www.loc.gov/rr/news/blackpr.html> (last visited Oct. 26, 2011). The Library also offers online access to some older newspapers including some black newspapers. See *Chronicling America: Historic American Newspapers*, LIB. OF CONGRESS, <http://chroniclingamerica.loc.gov/> (last visited Oct. 26, 2011).

458. Some would argue, still, the Oscar was not as valuable as if she had been white and male. Some academy members, like Steven Spielberg, have been active in purchasing earlier Oscars at auction with the goal of returning them to the Academy. See *Spielberg Buys Betty Davis Oscar at Auction*, ABCNEWS.COM (July 20, 2002), <http://abcnews.go.com/Entertainment/story?id=103555&page=1> (reporting that Spielberg purchased the Bette Davis Oscar for the 1938 performance in *Jezebel* for \$578,000 with the intention of returning “the award to the

that the Academy has declined to replace the McDaniel Oscar.<sup>459</sup> Had it agreed to do so, it might then have been able to tie the original to its right of first refusal. That way, if it were ever found, the original would be worth only \$1.<sup>460</sup> Today it is worth much more.<sup>461</sup>

Although they lacked economic resources, slaves like McDaniel's own parents *did* pass on something that was of tremendous economic value to their descendants. They passed on the story of their struggle, of how to navigate and survive in a world that oozed racism and that passed unearned benefits and unfair detriments to subsequent generations long after slavery. That knowledge was their contribution to the financial success of their descendants. That culture and history would be passed on through generations, and the stories of those who still had to battle for civil rights long after slavery had ended would be added to it. These stories would also be captured in items of no large economic value—papers, artifacts, photographs, and music. Howard University and other historically black educational institutions across the country, and others, would step up to become, often at their own expense, the chief repositories for what I will call, this “cultural property.”

Wills and Trusts law provided little protection for such cultural property. First, the law is primarily concerned with items of economic value: property that can satisfy debts or property that can be passed on to support a family when a head of household dies. But, cultural property may lack economic value. Second, the law of wills and trusts focuses upon “intrafamily” relations. Intestacy statutes that distribute property in the event that there is no will, for example, do so accord-

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Academy of Motion Picture Arts & Sciences, as he did when he bought Clark Gable's Oscar for *It Happened One Night* . . .”).

459. *See supra* text accompanying note 5.

460. Certainly, the Academy could have required that, in exchange for a replacement, Howard agree to bind the Oscar to the right. It could even have used its rules allowing it to issue Honorary Oscars to accomplish this task—or issued a “replica” instead that was not a reissue. Given the small number of plaque Oscars in public circulation (and “lost”), Howard is uniquely situated. But then, imagine a university owning an original Picasso that it cannot presently find, but likely has, and then agreeing to sign away the Picasso's value in exchange for a very fine poster of that same work—by a very fine Poster company! The original McDaniel Oscar is imminently more valuable financially and historically than any replica could ever be. It is not only the first ever to be awarded to an African American, it is also one of a small number of “plaque” Oscars in public circulation; and, in size and uniqueness, that “plaque” Oscar represents a time when all actors—and supporting and bit actors in particular—were struggling for respect. McDaniel also never exchanged her original “plaque” Oscar for the taller statuette, which she could have. *See The Official Academy Awards Database, supra* note 8. She may have realized that no replacement could ever measure up in value to the award that she tearfully and actually accepted into her hands on that historic night.

461. *See supra* text accompanying note 6.

ing to family relationships.<sup>462</sup> However, the oppression of slavery and its aftermath implicated “interfamily” relations. Trusts and estates law has no means of offsetting interfamily unfairness due to racism, no way of compensating when one family devastates another with the state’s active assistance and approval.<sup>463</sup> These concepts are segregated to the area of civil rights. Occasionally such notions arise in talk of reparations.

When both family and law fail to protect cultural property, for whatever reasons, those within disfavored groups who recognize the importance of culture and history must develop strategies to ensure the safe passage of cultural property. I will here call such persons “cultural trustees.”<sup>464</sup> In McDaniel’s case, I believe that Lucille Hamilton stepped up to rescue valuable cultural property—the Oscar. Leigh Whipper, stepped up to escort it to a destination where he believed it would be safe. Howard University stepped up to receive it and similar items. In 1972, Howard Drama Professor James Butcher, I believe, stepped up to return the Oscar to the Pollack Collection. The story of McDaniel’s Oscar calls us to consider not just that Oscar, but also the millions of artifacts of African American history languishing in storehouses in the United States today. It calls upon us to inquire whether the new cultural trustees of today who have possession of these items appreciate their worth, whether or not they are acting accordingly and whether or not these cultural trustees have sufficient resources to do the job that we expect of them. It calls upon us to consider the various legal questions of ownership, preservation and control that arise from the curious path that those items took to their present destination.

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462. California had “homestead laws” that protected a certain amount of marital assets from creditors. See CAL. CIV. CODE §1260 (1947) (allowing a \$7500 homestead exemption) (repealed in 1983). Such laws largely were designed to keep widows and their children off of the streets.

463. Thus, the law evidences some minimal concern that a family not end up on the public rolls (and a burden to taxpayers) due to an improvident testator. Dower used to require a husband to leave a forced share of all lands owned to a wife, normally one third, so that the wife and any children did not remain behind destitute. Today, spousal forced shares in various states accomplish the same. Also, several states allow spouses to set aside certain property allowances that will be exempt from creditors. See UNIF. PROBATE CODE §§ 2-401-404 (amended 2006) (discussing allowances that have priority over unsecured creditors and are exempted from the spousal share).

464. Under traditional Trusts and Estates law, a “trustee” is one who holds legal title to an item and controls it for the benefit of another who has equitable title. See BLACK’S LAW DICTIONARY 1357 (5th ed. 1979). The definition does not neatly fit here, thus, we are speaking of *constructive trustees* who are treated as trustees for an equitable purpose.

No doubt, great debate will continue over the legacy of McDaniel. But in this writer's view, how one interprets her legacy is irrelevant to the question of whether her Oscar still matters. The value of the Oscar lies not in McDaniel, but in the struggles of a people and the controversies of a country that put it in her hands. It matters not because McDaniel deserved it, for given fair opportunities, many more blacks might have deserved one as well. It matters not because her victory meant that the Academy had crossed over to higher ground in race relations or because it meant that Hollywood was sending a stern admonition to black actors about how to succeed there. McDaniel's Oscar deserves a place in history simply because it was *the first*, and her victory did, as Ed Sullivan suggested, send a message.<sup>465</sup> That message testified to both a soaring of the human spirit that reached beyond all racial groups and to a devastating continued embrace of racism. In the end, both yardsticks must be used to measure the length of the shadow that McDaniel and her famous Oscar still cast.

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465. *See supra* text accompanying notes 63-65.



## NOTE

# Romeo and Juliet—A Tragedy of Love by Text: Why Targeted Penalties That Offer Front-end Severity and Back-end Leniency Are Necessary to Remedy the Teenage Mass-Sexting Dilemma

MARYAM F. MUJAHID\*

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INTRODUCTION

Romeo<sup>1</sup> (Sat 2:34 AM): wat r u wearing?  
Juliet (Sat 2:35 AM): nothing ;)  
Romeo (Sat 2:35 AM): 4 real? send pic  
Juliet (Sat 2:36 AM): k, sending now. 4 ur eyes only<sup>2</sup>

If Romeo and Juliet were American teenagers in 2011, Juliet would not have to long ponder, “Wherefore art thou Romeo?”<sup>3</sup> Instead, she would inquire as to his whereabouts via text.<sup>4</sup> If she was feeling particularly bold, she may also include a nude picture of herself to ensure Romeo’s speedy reply (which may very well include a risqué picture of his own). Imagine that—Romeo and Juliet sexting! Though not an issue in sixteenth century Italy, sexting has become a part of modern-day American teenage culture.<sup>5</sup> Generally, sexting is the act of taking nude, semi-nude, or otherwise sexually explicit digital pictures of oneself or another, usually with a cell phone, and then

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1. These notes will follow a modernized version of William Shakespeare’s tragic teenage lovers, Romeo and Juliet. This twenty-first century duo does not face the inter-family rivalries featured in the classic tragedy. Instead, the complications to their romance arise from the ramifications of an ill-advised text message. While this hypothetical depiction of Romeo and Juliet is not based on any particular incident of teenage sexting, as this Note will demonstrate, there are many examples of teenagers engaging in this behavior to their detriment.

2. Through the exchange of a few late night texts, Romeo and Juliet have put themselves on a course that will have serious psycho-social and legal ramifications.

3. WILLIAM SHAKESPEARE, ROMEO AND JULIET act 2, sc. 2.

4. See generally discussion *infra* Part II.A (examining the role texting plays in teenagers’ lives).

5. See Rina Shah, *Reader’s Forum: Sexting Equals Teens, Sex and Pictures*, OAKLAND TRIB., Apr. 18, 2009, available at 2009 WLNR 7254942 (“Sexting[,] . . . [t]eens are doing it all the time.”).

*Romeo and Juliet—A Tragedy of Love by Text*

sending the picture via cell phone or email to another or many others.<sup>6</sup> Posting one of these pictures on the internet may also constitute sexting.<sup>7</sup>

Even a generation ago, the need to address the issue of sexting was unexpected, if not inconceivable.<sup>8</sup> However, with at least twenty percent of teenagers admitting to participating in the relatively new behavior, sexting has quickly made its way into the American teenage experience.<sup>9</sup> Now that cell phones have become ubiquitous in teenage life, the temptation to use cell phones for romance is too great for many teenagers to resist.<sup>10</sup> Though teenagers generally have less of a reputation to protect than adults, teenagers may suffer more severe psychological damage than adults by having their nude pictures exposed to the public.<sup>11</sup> Thus, it is imperative that the teenage mass-sexting dilemma be effectively addressed.

Teenage<sup>12</sup> sexting is particularly problematic because, in addition to the obvious implications of sexting,<sup>13</sup> there are unique legal and psychological implications that come with teenage sexting.<sup>14</sup> In order

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6. *See id.* (“Sexting is sending sexually explicit pictures (of yourself or another) from your computer or cell phone, to another.”).

7. *Id.* The electronic submission of sexually explicit messages, without images, can also constitute sexting. *See, e.g., The Heidi and Frank Show* (Feb. 21, 2011) (downloaded using iTunes and requires a “VIP” membership to heidiandfrank.com) (listing abbreviations for commonly exchanged “sext” messages: “TDTM” (Talk Dirty To Me) and “IWSN” (I Want Sex Now)). For reasons discussed more fully throughout this Note, this form of sexting does not have the legal implications of sending sexually explicit images and is therefore beyond the scope of this Note.

8. *See* KENT D. STUCKEY ET AL., INTERNET AND ONLINE LAW § 8.07, at 8-17 (2011) (“A generation ago, it is doubtful whether any lawmaker or social worker could have imagined that apparently normal teenagers in the twenty-first century would actually take nude photos of themselves and distribute them to their friends.”).

9. *See* discussion *infra* Part II. *See generally* Deborah Feyerick & Sheila Steffen, ‘Sexting’ Lands Teen on Sex Offender List, CNN (Apr. 7, 2009), [www.cnn.com/2009/CRIME/04/07/sext-ing.busts/index.html](http://www.cnn.com/2009/CRIME/04/07/sext-ing.busts/index.html) (referring to the results of an unscientific online survey conducted by cosmogirl.com and The National Campaign to Prevent Teen & Unplanned Pregnancy).

10. *See* discussion *infra* Part II.A.

11. *See* Wendy N. Davis, ‘Sext’ Education: States Look for Ways to Chastise Teens for Bawdy Cellphone Shots, A.B.A. J. May 1, 2011, at 20, available at [http://www.abajournal.com/magazine/article/sext\\_education/](http://www.abajournal.com/magazine/article/sext_education/) (“[T]eens who send explicit photos of themselves are leaving themselves vulnerable to victimization.”). *See generally* discussion *infra* Part IV (providing a comprehensive analysis of the psychological impact of sexting on teens).

12. Though this Note will use the term “teenage sexting” or “mass-sexting,” the behavior is not intended to be limited strictly to individuals between thirteen and eighteen years old. Instead, for the purposes of this Note, “teenager” is meant to encompass all adolescents from approximately ten years old to twenty-one years old.

13. For example, there is the possibility that unintended parties will see the picture.

14. For example, the person taking, sending, or receiving the picture may be implicated in child pornography and/or child exploitation based on current legislation in many United States’ jurisdictions. *See* discussion *infra* Part III.

to fully remedy the teenage mass-sexting dilemma, there will ultimately need to be a broad societal approach as opposed to just a legal one.<sup>15</sup> The legal remedies are being executed through the administration of criminal and, to a far lesser degree, civil penalties.<sup>16</sup> However, this Note will focus primarily on the criminal penalties of sexting. By-and-large, teenage sexting is being adjudicated via child pornography legislation.<sup>17</sup> The penalties for child pornography are particularly severe, and the legislation was not created to reach teenage sexting:<sup>18</sup>

Virtually all current laws regarding child pornography and sexual exploitation of minors were enacted at a time when any nude photo of a minor was indeed suspect, because, given the technology at the time, virtually any nude photo of a minor could have been made in circumstances involving sexual exploitation.<sup>19</sup>

However, in spite of the current state of the law, public policy concerns about punishing teenagers are creating a definite pattern towards decriminalization.<sup>20</sup> The inadequacy of current penalties for teenage sexting, paired with the ever-increasing prevalence of teenage sexting, makes it necessary to establish a viable penalty structure for teenage sexting.

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15. “The law . . . cannot work alone in dealing with this issue because, as the old adage goes, an ounce of prevention is worth a pound of cure.” Don Corbett, *Let’s Talk About Sext: The Challenge of Finding the Right Legal Response to the Teenage Practice of ‘Sexting’*, 13 No. 6 J. INTERNET L. 3, 7 (2009). For Romeo and Juliet’s sake, it is heartening to know that there are societal efforts in the works. See discussion *infra* Part II.D (providing examples of societal approaches to remedying teenage sexting). There have been commercial efforts as well. See Opinion Brief, *Apple’s War on ‘Sexting’*, WEEK (Oct. 14, 2010), <http://theweek.com/article/index/208144/apples-war-on-sexting> (detailing a pending iPhone application that will, among other things, allow parents to block their teenagers from sending sexually explicit text messages).

16. See Mathias H. Heck, Jr., *Highlights from the Prosecutor: Sexting and Charging Juveniles—Balancing the Law and Bad Choices*, 43 PROSECUTOR 28, 28 (2009) (“Criminal charges have been filed against teens for sexting in Pennsylvania, Ohio, Michigan, Alabama, Wisconsin, Florida, New York, New Jersey, Connecticut, Texas, Utah and other states.”).

17. See discussion *infra* Part III.

18. “The felony offense of child pornography carries some of the most draconian and long lasting penalties of our criminal justice system, which makes it fundamentally inappropriate for teen sexting.” Marsha Levick & Kristina Moon, *Prosecuting Sexting as Child Pornography: A Critique*, 44 VAL. U. L. REV. 1035, 1036 (2010); see also discussion *infra* Part III.

19. STUCKEY ET AL., *supra* note 8 at § 8.07, at 8-17.

20. See *id.* at § 8.07, 8-21 (“Although there are still efforts underway to categorize sexting as a crime in its own right, the clear trend seems to be decriminalization.”). Scholars and citizens alike have criticized the criminalization of sexting. See generally Levick & Moon, *supra* note 18 at 1041-42 (arguing that the ramifications of sexting are best addressed outside the juvenile justice system); STUCKEY ET AL., *supra* note 8 at § 8.07, at 8-20 (noting an unscientific Florida newspaper poll where sixty-nine percent of participants indicated that sexting should not be a crime). However, for reasons discussed in Parts IV and V, this Note takes a contrary position.

*Romeo and Juliet—A Tragedy of Love by Text*

This Note posits that the potential mass distribution of nude images of teenagers via text message (or “mass-sexting”),<sup>21</sup> stemming from otherwise innocuous text messages, can present the same level of psychological damage as non-consensual child exploitation and should be strictly penalized to adequately punish this type of behavior. Specifically, lawmakers should draft narrowly tailored legislation to address teenage sexting that imposes significant jail time. However, science has proven that teenage brains are immature, and this immaturity impedes their ability to make good judgments.<sup>22</sup> Thus, the penalties should include an option for non-felony status after successfully completing a mandatory jail term, with no imposition of long-term penalties (for example, a requirement to register as a sex offender). This penalty structure will sufficiently punish and deter the teenage offenders without causing them to suffer from their youthful indiscretions long beyond a time in their lives in which they are likely to repeat the behavior.<sup>23</sup>

Part II of this Note gives an overview of the teenage mass-sexting dilemma. Section A explains how cell phones have become an integral part of teenage life. Section B further identifies and defines the type of teenage sexting this Note targets. Next, Section C provides examples of the psychological impact of sexting.<sup>24</sup> Finally, Section D illustrates several examples of societal efforts to remedy the teenage mass-sexting dilemma.

Part III of this Note provides a comprehensive overview of the prosecutorial, judicial, and legislative reaction to sexting. Section A starts by providing a detailed overview of the history of teenage sexting adjudications by illustrating the first United States mass-sexting prosecution. Section B discusses teenage sexting incidents that have

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21. This behavior will be referred to throughout this Note as the “teenage mass-sexting dilemma.”

22. See generally discussion *infra* Part IV.

23. However, it is important to note that sexting is not limited to teenagers. See generally Bianca Bosker, *The Twitter Typo That Exposed Anthony Weiner*, HUFFINGTON POST: TECH (June 8, 2011), [http://www.huffingtonpost.com/2011/06/07/anthony-weiner-twitter-dm\\_n\\_872590.html](http://www.huffingtonpost.com/2011/06/07/anthony-weiner-twitter-dm_n_872590.html) (discussing how Representative Weiner “tweeted” pictures of his “bulging briefs” to females); Nancy Dillon & Corky Siemaszko, *Alleged Tiger Woods Mistress Joslyn James Releases X-rated Text Messages She Claims Are from Golfer*, N.Y. DAILY NEWS (Mar. 18, 2010), [http://www.nydailynews.com/gossip/2010/03/18/2010-03-18\\_alleged\\_tiger\\_woods\\_mistress\\_joslyn\\_james\\_releases\\_xrated\\_text\\_messages\\_she\\_clai.html](http://www.nydailynews.com/gossip/2010/03/18/2010-03-18_alleged_tiger_woods_mistress_joslyn_james_releases_xrated_text_messages_she_clai.html) (detailing Tiger Woods’s sexually explicit text message exchanges with an alleged extra-marital sexual partner). Because this Note is interested in the legal and psychological implications unique to *teenage* mass-sexting, adult sexting is beyond its scope.

24. The reasons for these tragedies are discussed further in Part IV.

been addressed via existing child pornography legislation. Section C discusses legislation specifically enacted to address the teenage mass-sexting dilemma.

Next, Part IV explores the general psychological condition of the teenager and provides a basis for explaining why penalties for teenage mass-sexting must be uniquely targeted. Section A explores how the immaturity of teenagers' brains contribute to their difficulty in handling stress and their resulting vulnerability to peer disapproval and depression. Similarly, Section B discusses how the immaturity of the teenage brain makes it difficult for teenagers to understand the ramifications of impulsive behavior, like mass distributing a sexually explicit picture of another teenager.

Next, Part V provides a solution to the teenage mass-sexting dilemma. First, it proposes legislation to address the teenage mass-sexting dilemma with two primary goals: (1) that the legislation appropriately punishes teenage mass-sexting; and (2) that the legislation is narrow enough to specifically address teenage mass-sexting without imposing a long-term stigma on the offender. Then, it explains why the proposed legislation will work. This Note concludes by briefly explaining the consequences of failing to enact a targeted, but strict, penalty structure for teenage sexting offenses.

## I. OVERVIEW OF THE TEENAGE MASS-SEXTING DILEMMA

Mercutio (Mon 5:48 PM): ur lyin

Romeo (Mon 5:48 PM): i swear. hav on phone

Mercutio (Mon 5:48 PM): show me

Romeo (Mon 5:49 PM): k<sup>25</sup>

Mercutio (Mon 5:51 PM): haha nice

To fully analyze the current penalties apportioned to teenage sexters, discuss the psychological perspective on teenage sexting, and ultimately propose a solution to the teenage mass-sexting dilemma via a strict and targeted teenage sexting penalty structure, it is necessary to first provide an overview of the teenage mass-sexting dilemma.

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25. Romeo seems to have forgotten Juliet's request for privacy. Romeo's single act of transmitting Juliet's picture to one friend has many unintended consequences. One consequence is Romeo's involvement in a possible crime: Romeo's actions are tantamount to disseminating child pornography in some jurisdictions. See discussion *infra* Part III.

*Romeo and Juliet—A Tragedy of Love by Text*

A. How Did the Teenage Mass-Sexting Dilemma Begin?

Teenage sexting is not the result of a newfound lust in teenagers—this lust has been around for quite some time.<sup>26</sup> Instead, teenage sexting represents the dubious combination of age-old teenage sexual awakening and modern-day technology that opens new doors for teenagers to express such longing. Cell phones are being introduced very early into the lives of young Americans.<sup>27</sup> As of 2008, the average American child received her first cell phone between ten and eleven-years-old.<sup>28</sup>

As recently as 2004, forty-five percent of teenagers owned cell phones.<sup>29</sup> That is a significant figure considering that most Americans of any age did not own cell phones prior to the turn of the twenty-first century.<sup>30</sup> However, six years later, the vast majority—a whopping seventy-five percent—of Americans between the ages of twelve and seventeen-years-old own cell phones.<sup>31</sup> In fact, teenagers view cell phones as a life necessity, much like clothing.<sup>32</sup>

Teenagers are particularly fond of texting. In fact, “[c]ell-phone texting has become the preferred channel of basic communication between teens and their friends, with cell calling a close second.”<sup>33</sup> Back

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26. After all, Shakespeare’s *Romeo and Juliet* were teenage lovers from many, many centuries ago—long before cell phones. Today’s teenagers’ feelings are not new; it is simply the introduction of technology that has complicated things. However, technology may give modern-day teenagers more exposure to sexual images than *Romeo and Juliet* had. See, e.g., *Facts and TV Statistics: “It’s Just Harmless Entertainment” Oh Really?*, PARENTS TELEVISION COUNCIL, <http://www.parentstv.org/ptc/facts/mediafacts.asp> (last visited Oct. 8, 2011) (noting that approximately 6.6 million children between two and eleven-years-old, and 7.3 million teenagers between twelve and seventeen years old were watching when Janet Jackson’s breast was exposed during the televised 2004 Super Bowl half-time show); see also Jan Hoffman, *A Girl’s Nude Photo, and Altered Lives*, N.Y. TIMES, Mar. 27, 2011, at A1 (“For teenagers, who have ready access to technology and are growing up in a culture that celebrates body flaunting, sexting is laughably easy, unremarkable and even compelling . . .”).

27. See generally Marguerite Reardon, *Teens View Cell Phones as Essential*, CNET NEWS (Sept. 15, 2008), [http://news.cnet.com/8301-1035\\_3-10041377-94.html](http://news.cnet.com/8301-1035_3-10041377-94.html) (discussing how “[n]early half of kids age 8 to 12 years old own cell phones in the U[nited] S[tates] . . . according to the [2008] Nielson report.”).

28. *Id.*

29. See Amanda Lenhart, *Teens, Cell Phones and Texting: Text Messaging Becomes Center-piece Communication*, PEW RES. CENTER (Apr. 20, 2010), <http://pewresearch.org/pubs/1572/teens-cell-phones-text-messages>.

30. See Diana Zuckerman et al., *Can Cell Phones Harm Our Health?*, NATIONAL RES. CENTER FOR WOMEN & FAMILIES (June 2011), <http://www.center4research.org/2011/02/can-cell-phones-harm-our-health-2/> (“The extensive use of cell phones is a relatively recent phenomenon . . . [C]ell phone usage in the 1980s and 1990s was much less frequent than it is today.”).

31. See Lenhart, *supra* note 29.

32. Reardon, *supra* note 27 (“Cell phones have become almost as important to American teens as the clothes they wear, according to a nationwide survey of teenagers . . .”).

33. See Lenhart, *supra* note 29.

in 2006, fifty-one percent of teenage cell phone users engaged in texting, but that figure had risen to eighty-eight percent by 2010.<sup>34</sup> Fifty percent of teens send about 1,500 texts per month.<sup>35</sup>

In and of themselves, these figures and statistics are rather benign. However, taking into consideration the startling social implications of obsessive teenage texting (beyond sexting), these figures and statistics indicate an unsettling reality. For example, teenage texting has overtaken other forms of teenage communication.<sup>36</sup> Not only do teens prefer texting, they will actually avoid interacting with peers who do not use cell phones.<sup>37</sup> Thus, for teenagers who hope to have any type of significant social interaction with their peers, it seems that cell phones are in fact as essential as clothing.

Additionally, teenagers have developed new social norms as it relates to cell phone use. For one thing, teenagers see no difference in face-to-face and over-the-phone interaction.<sup>38</sup> This is not altogether strange considering that video-phone technology is now available on the internet and through cell phones.<sup>39</sup> However, beyond this, what adult cell phone users might deem rude is well-accepted conduct between teenagers.<sup>40</sup> Specifically, teenagers will often sit with a group of friends while each of them is on her respective cell phone making calls or texting other friends.<sup>41</sup> This not only indicates that there may be a change in the next generation's concept of appropriate cell phone etiquette, but it also illustrates that American teenagers find a certain level of security and intimacy through cell phone communication that may not be present in their face-to-face interactions.<sup>42</sup> This may be

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34. *Id.*

35. *Id.*

36. *Id.* (“Among all teens, their frequency of use of texting has now overtaken the frequency of every other common form of interaction with their friends.”).

37. See Elisa Batista, *She's Gotta Have It: Cell Phone*, WIRED (May 16, 2003), <http://www.wired.com/culture/lifestyle/news/2003/05/58861> (“In the study, teens who had no cell phones and whose numbers were not included in someone's phone book could pretty much write off the possibility of speaking with any of the teens with cell phones . . .”). Teenagers who do not have cell phones are committing a “social faux pas.” *Id.*

38. *Id.*

39. See, e.g., *Apple iPhone*, APPLE STORE, <http://www.apple.com/iphone/> (last visited Nov. 5, 2010).

40. See Batista, *supra* note 37.

41. *Id.*

42. Consider a recent illustration of young people's bizarre reliance on technology: at a college lecture, pop culture icon and scientist Bill Nye collapsed and—instead of running to his aid—students immediately began sending texts and updating their Twitter statuses about this incident. See Christie D'Zurilla, *Bill Nye the Science Guy Faints From Exhaustion at USC*, THE ENVELOPE: LOS ANGELES TIMES NEWS & BLOGS (Nov. 17, 2010, 12:10 PM), <http://latimesblogs.latimes.com/gossip/2010/11/bill-nye-the-science-guy-faints-usc.html>. Another example involves a

part of the reason why teenagers are not uncomfortable with sending nude pictures of themselves over the phone.

Even more disturbing are the distractions that cell phone use, particularly texting, pose to teenage life (and the lives of those around them). In particular, school officials have complained that cell phone use has interfered with school performance and discipline.<sup>43</sup> Also, and more importantly, teenage texting has posed society-wide dangers. Specifically, teenagers who text while driving are particularly distracted and pose a threat to themselves, other drivers, and pedestrians.<sup>44</sup>

Lastly, and most relevant to the focus of this Note, teenagers' newfound reliance on texting as a form of communication has caused them to use it as a tool of romance.<sup>45</sup> Again, relatively benign on its face, but as the remainder of this Note will explore, teenage sexting is fraught with social, psychological, and legal ramifications that need to be decisively remedied.

#### B. What Is Teenage Sexting?

Sexting occurs in many forms that have varying legal and psychological ramifications. First, there is a mere possession form of teenage sexting in which one teenager takes a digital picture of herself and shows it (without sending it) to another teenager.<sup>46</sup> The photographed teenager could be in any level of undress or engaging in some form of sexual contact with another teenager.<sup>47</sup> This type of teenage sexting can present many legal problems because the teenager taking the picture could in many cases be charged with child pornography for merely possessing the nude picture of herself because she is under-

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teenager using his cell phone camera to record a school bus fight and then posting the video on the internet. See Allison T. Williams, *Cyber Danger for Teens*, DAILY PRESS, Dec. 11, 2009, at A1, available at 2009 WLNR 25033594.

43. See Lenhart, *supra* note 29.

44. See *id.*

45. See, for example, the discussion of teenager, Hope, *infra* Part II.C (detailing how Hope sent a nude picture of herself to her crush and the devastating consequences that followed).

46. For an example of this type of sexting, see *A.H. v. State*, 949 So. 2d 234 (Fla. Dist. Ct. App. 2007) (holding that the state has a compelling interest to prevent two teenagers from storing pictures of themselves engaged in sexual activity on their personal computers). However, even though it was not an issue in this case, the court brought up the possibility that one of the teenagers would show the picture to a third party as a means of showing off his sexual prowess or retaliating against the other when the relationship ends. *Id.* at 4. The court added that teenagers are not usually involved in the same mature, committed relationships as adults. *Id.* at 8. Clearly, Romeo and Juliet are not involved in one of those "mature" relationships.

47. See, e.g., *id.*

age.<sup>48</sup> However, because this type of sexting does not involve dissemination of any pictures, it is not very likely to cause some of the long-standing psychological damage that results when a teenager's nude picture is, voluntarily or involuntarily, made widely (and permanently) available for others to see.<sup>49</sup> For this reason, this type of sexting is generally not the type of sexting that requires the strict penalties further discussed in Part V and is beyond the scope of this Note.

Next, a more significant form of teenage sexting involves one teenager taking a picture of herself, and then either sending it to one or more persons who then pass the picture on to others (with or without the original sender's consent).<sup>50</sup> This type of sexting—mass-sexting—has broader implications because far more people are potentially involved, possibly including adults, and the consequences of the act may be greater by virtue of the fact that once a picture has been released into cyberspace, it can never really go away.<sup>51</sup> Texas Attorney General Greg Abbott has spoken about the permanence of sexting: "Once an image has been sent, it cannot be controlled . . . . A single instance of bad judgment can lead to long-term regret, embarrassment or worse."<sup>52</sup> Even if the cell phone or internet site on which it is stored is taken down or destroyed, there is nothing to prevent one who comes across the picture from saving it (and perhaps ensuring that the picture is posted and reposted for posterity).

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48. See generally discussion *infra* Part III (discussing the teenager's brain and the vulnerability caused by its level of development).

49. See generally discussion *infra* Part IV (outlining psychological damage caused by teenage sexting).

50. For an example of this type of sexting, refer to Part III for a discussion of the Phillip Alpert case.

51. Consider the story of 2010 Virginia congressional candidate, Kristall Ball: during her run for Congress, old pictures of her sucking a sex toy in the shape of a penis attached to her then husband's nose were posted on the internet. See Maureen O'Connor, *9 Pictures of a Politician Sucking a Dildo Attached to a Man's Nose*, GAWKER (Oct. 6, 2010 4:31 PM), <http://gawker.com/5657412/9-pictures-of-a-politician-sucking-a-dildo-attached-to-her-husbands-nose>. Also, Google Cache takes "snapshots" of pages, so when the page is updated (for example, to remove the offending picture), the older version is still available. See *Cached Pages*, GOOGLEGUIDE, [http://www.googleguide.com/cached\\_pages.html](http://www.googleguide.com/cached_pages.html) (last visited Aug. 29, 2011); see also INTERNET ARCHIVE, <http://www.archive.org/web/web.php> (last visited Oct. 25, 2011) (featuring the "Wayback Machine," which shows you snapshots of internet sites from as far back as the mid-1990s).

52. Jack Dennis, *Texas Has First Teen Advocates to Counsel Victims of Sexting Harrassment Says Attorney General*, SAN ANTONIO HEADLINES EXAMINER (Feb. 9, 2010), <http://www.examiner.com/headlines-in-san-antonio/texas-has-first-teen-advocates-to-counsel-victims-of-sexting-harrassment-says-attorney-general>.

Because of the permanence and likely resulting psychological damage,<sup>53</sup> the second form of teenage sexting discussed above is the specific form of sexting that requires particularly severe penalties to address it. These reasons will be discussed further in Part V.

### C. Why Is Teenage Mass-Sexting a Problem?

The most striking impact of teenage mass-sexting is the resulting depression. For example, a thirteen-year-old girl named Hope made the rash decision to send a topless picture of herself to a boy on whom she had a crush; she was hoping to get his attention.<sup>54</sup> In addition to getting the young man's attention, Hope also got the attention of the entire school when her crush mass-texted the image.<sup>55</sup> The taunting she received from her schoolmates put an "emotional weight upon Hope that she ultimately could not bear."<sup>56</sup> Because of this incident, Hope hanged herself.<sup>57</sup>

Eighteen-year-old Jessica Logan's case provides an equally sobering example of teenage mass-sexting.<sup>58</sup> While a senior in high school, Jessica sent her boyfriend a digital photograph of her nude body from the neck down.<sup>59</sup> Shortly thereafter, Jessica and her boyfriend broke up and he showed the picture to a group of other students.<sup>60</sup> These students then passed the picture around to students in Jessica's school and a nearby high school.<sup>61</sup> Jessica reported the issue to school officials in order to get the students to delete the photograph from their phones, and prevent further dissemination of the picture.<sup>62</sup> Jessica also made an anonymous report to a local television station.<sup>63</sup> Though she was disguised by a blurred face and altered voice, her classmates identified her.<sup>64</sup> In addition to the harassment via the repeated dis-

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53. See discussion *infra* Part IV.

54. Michael Inbar, 'Sexting' Bullying Cited in Teen Girl's Suicide, TODAY (Dec. 2, 2009, 10:26:16AM), [http://today.msnbc.msn.com/id/34236377/ns/today-today\\_people/t/sexting-bullying-cited-teens-suicide/#.TmukQOvucXw](http://today.msnbc.msn.com/id/34236377/ns/today-today_people/t/sexting-bullying-cited-teens-suicide/#.TmukQOvucXw); see also Kim Zetter, *Parents of Dead Teen Sue School Over Sexting Images*, WIRED, Dec. 8, 2009, 8:00 AM), <http://www.wired.com/threatlevel/2009/12/sexting-suit/> (discussing female teen sexter overcome by depression initiated by her ex-boyfriend's transmission of a nude photo of herself to multiple high schools).

55. See Inbar, *supra* note 54.

56. *Id.*

57. *Id.*

58. See Zetter, *supra* note 54.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. See Zetter, *supra* note 54.

semination of her nude photograph, after the news report, Jessica received harassing calls and text messages and was labeled a “whore” and “slut.”<sup>65</sup> Jessica began to miss school and her grades suffered; when she finally graduated from high school, she was “bombarded with objects” during the ceremony.<sup>66</sup> On the day that Jessica attended the funeral of a friend who committed suicide, Jessica, as if inspired, hanged herself in her bedroom.<sup>67</sup>

Further, the victims of sexting are not limited to females. For example, eighteen-year-old Anthony Stancl victimized thirty-one male teenagers (some as young as fifteen-years-old) via the online networking website, Facebook, through a particularly egregious solicitation of nude pictures.<sup>68</sup> Specifically, Stancl posed as a girl on Facebook using one of two female aliases.<sup>69</sup> While pretending to be a teenage girl, Stancl would ask the victims to send him nude pictures or videos of themselves.<sup>70</sup> Then, while still pretending to be a female, Stancl told the teenage boys that he would send the pictures or videos to their friends, or post them on the internet, if they did not have sex with a man (who was actually Stancl himself). At least seven of the teenage boys acquiesced.<sup>71</sup> After being sentenced to fifteen years in prison, Stancl acknowledged that he put the victims “through a terrible situation.”<sup>72</sup> Terrible indeed, considering that many of the victims were either hospitalized because of their suicidal ideations or required treatment including medication and therapy.<sup>73</sup>

Additionally, there are many nameless victims of mass-sexting whose stories may never be told. In Montgomery County, Maryland, while discussing her plan to address teenage mass-sexting in the area,<sup>74</sup> District Attorney Resi Vetri Ferman noted that she has en-

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65. *Id.* Though beyond the scope of this Note, this also speaks to the equally disturbing national trend of cyber bullying. See generally *Cyberbullying*, NATIONAL CRIME PREVENTION COUNCIL, <http://www.ncpc.org/cyberbullying> (last visited Mar. 11, 2011) (providing an overview of this unfortunate phenomenon among adolescents).

66. Zetter, *supra* note 54.

67. *See id.*

68. Ryan Smith, *Sexting Hell: Man Posing as Girl on Facebook Blackmails Boys into Sex*, CBS NEWS (July 15, 2009, 8:30 AM), [http://www.cbsnews.com/8301-504083\\_162-5159817-504083.html](http://www.cbsnews.com/8301-504083_162-5159817-504083.html).

69. *Id.*

70. *Id.*

71. *Id.* Note, however, Stancl’s subsequent sexual assaults of his victims are beyond the scope of this Note. *See id.*

72. Laurel Walker, *Stancl Gets 15 Years in Prison in Facebook Coercion Case*, J. SENTINEL, Feb. 24, 2010, available at <http://www.jsonline.com/news/waukesha/85252392.html>.

73. *Id.*

74. *See* discussion *infra* Part II.D.

countered many incidents of sexting in the area.<sup>75</sup> However, she declined to provide details of the incidents because the cases involved juveniles.<sup>76</sup> Ferman observed that, unfortunately, by the time the incidents of sexting come to light, damage to the teenagers involved has already occurred.<sup>77</sup>

As to the psychological impact on the Montgomery County teenage victims of sexting, Ferman provided information that the previous examples have already foretold.<sup>78</sup> Specifically, the result of sexting is discomfort, coercion, harassment, and intimidation.<sup>79</sup> The pattern of psychological damage to teenagers as a result of sexting is clear and, unfortunately, the aforementioned examples of victims of teenage sexting is not an exhaustive list. The list is growing every day.<sup>80</sup>

#### D. What Are the Non-Legal Efforts to Address the Teenage Mass-Sexting Dilemma?

The above-mentioned victims illustrate a pattern of far too many teenagers suffering from severe depression as a result of the ramifications of mass-sexting.<sup>81</sup> As a consequence of this growing problem, communities across the country have taken steps to address the teenage mass-sexting dilemma beyond the legal arena.

For example, the National Teen Dating Abuse Helpline (“NTDAH”) has established the United States’ first twenty-four hour helpline with teen advocates trained to counsel their peers about sexting and the ramifications that come with it.<sup>82</sup> Texas Attorney General Greg Abbott said “NTDAH and its trained teen advocates are working to counsel young Texans and help fellow teens learn to avoid the peer pressure, shame and damages associated with sexting.”<sup>83</sup> Ab-

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75. Carl Hessler, Jr., *D.A. Warns Teens About Dangers of ‘Sexting’*, *MERCURY*, Mar. 29, 2010, available at <http://www.pottstownmercury.com/articles/2010/03/29/news/srv0000007906417.txt?viewmode=fullstory>.

76. *Id.*

77. *Id.* (“We learn about [sexting] situations . . . when something bad happens.”).

78. *Id.*

79. *See id.*

80. *See, e.g., Police Investigating ‘Sexting’ Incident At Local Junior High School*, *WJACTV.COM* (Feb. 17, 2011, 6:37 PM), <http://www.wjactv.com/news/26906136/detail.html> (stating that a minor sent an explicit self-portrait that was viewed by at least two others at the local junior high school); Hoffman, *supra* note 26, at A1, A7 (explaining that the eighth grade sexting victim felt depressed and begged not to go to school after her boyfriend forwarded a naked picture of her to others).

81. Because of teenagers’ limited brain development discussed in Part IV, *infra*, *Romeo and Juliet* could not likely realize the unfortunate consequences that stem from sexting.

82. Dennis, *supra* note 52.

83. *Id.*

bott's office has also worked to provide advice for teens considering sexting.<sup>84</sup> The five tips that the Office advises "teens should consider before pressing 'Send'" are listed as follows: "[d]o not assume anything sent or posted is going to remain private; [a]nything sent or posted in cyberspace will never truly go away; [d]o not give in to the pressure to do something that causes discomfort, even in cyberspace; [c]onsider the recipient's reaction; [n]othing is truly anonymous."<sup>85</sup>

Miami-Dade County officials have offered similar tips to teens considering sexting, or those who have already been victimized.<sup>86</sup>

Also, Montgomery County District Attorney Rise Vetri Ferman has taken it upon herself to address the teenage mass-sexting dilemma confronting Montgomery County, Maryland.<sup>87</sup> Specifically, she has implemented a program that is meant to provide education about the many consequences of sexting to teenagers and their parents.<sup>88</sup> Ferman's program does not simply focus on the legal consequences of teenage sexting.<sup>89</sup> Instead, she also addresses the psychological impact of sexting.<sup>90</sup>

Ferman stated that "[a] teenage girl who sends a naked picture of herself to her boyfriend doesn't think about what's going to happen a month later when they break up . . . [or t]hink about how she's going to feel when her now ex-boyfriend" distributes the picture to others.<sup>91</sup> She added that she could not "think of too many teenagers who could withstand that humiliation."<sup>92</sup> As a result of the frank discussions in Ferman's educational program, parents have been "shocked into silence" upon hearing the grave reality of teenage sexting and its consequences.<sup>93</sup>

Additionally, in a Ringwood, New Jersey middle school auditorium, members of the community gathered to discuss the issue of sext-

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84. *Id.*

85. *Id.* (alteration in original). If only Juliet had been given these tips before sending her nude picture to Romeo, she may have exercised better judgment.

86. Carmen Caldwell, *Preventing Teens from Becoming Sexting Victims*, MOMS MIAMI (May 27, 2010, 12:15 PM), [http://www.momsmiami.com/?a=profile&u=11595&t=blog&blog\\_id=3021](http://www.momsmiami.com/?a=profile&u=11595&t=blog&blog_id=3021).

87. See Hessler, *supra* note 75.

88. *Id.*

89. *Id.*

90. *See id.* This is an important step in the right direction, and lawmakers need to follow suit.

91. *Id.* Juliet does not have the foresight to anticipate, much less protect against, these consequences. *See generally* discussion *infra* Part IV.

92. *See Hessler, supra* note 75.

93. *Id.*

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ing.<sup>94</sup> Parents, local public and private school students, school administrators, and police officers all gathered to tackle the teenage mass-sexting dilemma in their community.<sup>95</sup> Both parents and students found it helpful because it opened their eyes to the legal and psychological consequences of sexting.<sup>96</sup> To get an honest view of teenage sexting, police officers had private discussions with the students excluding parents and school officials, and asked the students frank questions about sexting.<sup>97</sup> Ultimately, these Ringwood community meetings were meant to educate the community and eventually eradicate the problem.<sup>98</sup>

Notwithstanding the NTDAH teen sexting hotline and other community efforts to help prevent sexting in the teenage community, the victims mentioned above, as well as the other tragic victims of sexting, provide a clear example of why sexting should be appropriately punished. However, the limitations of a teenager's ability to make good judgment calls cannot be ignored,<sup>99</sup> which is why the penalties must be targeted in such a way that can provide for the narrow circumstances of teenage mass-sexting. As it is now, most sexting penalties are neither appropriately severe nor narrowly targeted.<sup>100</sup>

## II. THE CURRENT STATE OF SEXTING PROSECUTION, JURISPRUDENCE, AND LEGISLATION<sup>101</sup>

Romeo (Mon 10:33 PM): y is j's pic on facebook. WTF!

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94. Teresa Edmond, *Ringwood Community Addresses Sexting*, NORTHJERSEY.COM (Feb. 22, 2010, 10:36 AM), [http://www.northjersey.com/news/education/84932002\\_Parents\\_students\\_get\\_the\\_4-1-1\\_on\\_sexting\\_.html](http://www.northjersey.com/news/education/84932002_Parents_students_get_the_4-1-1_on_sexting_.html).

95. *Id.*

96. *See id.*

97. *Id.*

98. *See id.*

99. The United States Supreme Court certainly has not ignored it. The Court has said: Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.

*Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (plurality opinion). For more information on the Court's analysis, see Levick & Moon, *supra* note 18, at 1037-38 (further explaining that the Court takes minors' immaturity into consideration when determining their culpability); *see also* *A.H. v. State*, 949 So. 2d 234, 239 (Fla. Dist. Ct. App. 2007) (“[C]hildren are not mature enough to make rational decisions concerning all the possible negative implications of producing . . . [sex] videos.”).

100. *See* Levick & Moon, *supra* note 18, at 1036.

101. Note that there have been sexting incidents causing civil liability. *See generally* Zetter, *supra* note 54 (discussing parents' lawsuit against high school because of students' “degrading

Mercutio (Mon 10:33 PM): haha sorry

Romeo (Mon 10:34 PM): j said we r goin 2 jail. FML

Mercutio (Mon 10:35 PM): we wont go 2 jail. we r just kids<sup>102</sup>

Although the legal consequences of sexting are impacting an ever-expanding segment of the national population, the federal government has not yet prosecuted a teenager for sexting.<sup>103</sup> Accordingly, as it relates to the state of sexting law, this Note will address various states' remedies for adjudicating sexting issues including legal sexting issues beyond teenage mass-sexting.<sup>104</sup>

The vast majority of these incidents are being addressed under the respective states' existing child pornography laws; however, the ultimate outcome of these adjudications varies widely from the imposition of long-term sex offender status to the recommendation of counseling programs.<sup>105</sup>

#### A. The First Sexting Prosecution

As teenage sexting is a relatively recent phenomenon, the legal problems arising from teenage sexting are limited compared to more longstanding legal issues. Consequently, the case law and legislation are relatively limited. Considering this, it becomes all the more important to look at the first case of criminalized teenage sexting as it may be instructive to subsequent cases as well as to potential future legislation meant to address the teenage mass-sexting dilemma.

Issues related to the first case involving the criminal prosecution of teenage sexting went as far as the United States Court of Appeals,

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sexual insults" that led their teen daughter to commit suicide). However, because this Note focuses on criminal penalties stemming from teenage sexting, these legal actions are beyond its scope.

102. As this section will discuss, Mercutio does not have an accurate understanding of the current penalties for sexting.

103. Shannon Shafron-Perez, Comment, *Average Teenager or Sex Offender? Solutions to the Legal Dilemma Caused by Sexting*, 26 J. MARSHALL J. COMPUTER & INFO. L. 431, 447 (2009). However, there is a push for federal prosecutors to handle these issues. See generally Isaac A. McBeth, Comment, *Prosecute the Cheerleader, Save the World?: Asserting Federal Jurisdiction Over Child Pornography Crimes Committed Through "Sexting"*, 44 U. RICH. L. REV. 1327, 1327 (2010) (making an argument that teenage sexting should be federally prosecuted under the Protection of Children Against Sexual Exploitation Act of 1977).

104. See discussion *infra* Part III.

105. For a full discussion of these inconsistent penalties, see the discussions in Part III. The question, of course, is whether these remedies will ultimately bring the Romeos and Juliets of the country to justice. This Note posits that they do not, and proposes a more effective, targeted penalty strategy. See discussion *infra* Part V.

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and it occurred in Pennsylvania.<sup>106</sup> The rural Pennsylvania town of Tunkhannock boasts a meager population of only 1,900 and does not seem to be a likely setting for one of the first legal actions against a teenage phenomenon that some may argue is representative of societal moral decay.<sup>107</sup> In October 2008,<sup>108</sup> school officials at Tunkhannock High School confiscated students' cell phones that had pictures of nude or semi-nude teenagers and children as young as eleven-years-old.<sup>109</sup> Examples of the images included: a seventeen-year-old girl with a towel wrapped just below her breasts; teenage girls in their underwear; and, a teenage girl in a bathing suit.<sup>110</sup> School officials found that male students were trading these pictures between their cell phones.<sup>111</sup>

After the cell phone confiscations, Wyoming County District Attorney George Skumanick Jr. ("Skumanick") started an investigation of the issue.<sup>112</sup> In November 2008, Skumanick addressed local newspaper reporters and a district assembly at Tunkhannock High School.<sup>113</sup> During his address, Skumanick told the crowd that students who possess provocative pictures of minors can be tried under 18 PA. CONS. STAT. ANN. § 6312 (for possessing or distributing child pornography) or 18 PA. CONS. STAT. ANN. § 7512 (for criminal use of a communication facility), as well as be required to register as sex offenders pursuant to Pennsylvania's Registration of Sexual Offenders Act ("Meghan's Law"), 42 P.S. ¶ 9791.<sup>114</sup>

In a move that turned out to be extremely controversial, District Attorney George Skumanick Jr. decided to charge the involved students, including those who merely possessed the pictures without disseminating them, under Pennsylvania's child pornography statutes.<sup>115</sup> On February 5, 2009, Skumanick sent letters to the parents of approximately twenty students alleged to have possessed the pictures and the

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106. Shannon P. Duffy, *3rd Circuit Panel Mulls if Teen 'Sexting' Is Child Pornography*, LEGAL INTELLIGENCER, Jan. 19, 2010, at 1; see also Davis, *supra* note 11, at 20 (noting that this incident was "one of the country's first major 'sexting' scandals").

107. See Dionne Searcey, *A Lawyer, Some Teens and a Fight Over 'Sexting'*, WALL ST. J., Apr. 21, 2009, at A17.

108. *Miller v. Skumanick*, 605 F. Supp. 2d 634, 637 (M.D. Pa. 2009).

109. Searcey, *supra* note 107, at A17.

110. *Id.*

111. *Skumanick*, 605 F. Supp. 2d at 637.

112. *Id.*

113. *Id.*

114. *Id.* at 637-38.

115. See Searcey, *supra* note 107, at A17; see also 18 PA. CONS. STAT. ANN. § 6312 (West 2011); 18 PA. CONS. STAT. ANN. § 7512 (West 2011).

subjects of those pictures; this group included minors as well as high school students who had reached legal majority.<sup>116</sup> Oddly enough, the parents of students who disseminated the pictures (as opposed to storing them) were not sent letters.<sup>117</sup>

In the letters, Skumanick indicated that the students were implicated in the possession and or distribution of child pornography.<sup>118</sup> It stated that the charges would be dropped if the students agreed to probation and a six-to nine-month education and counseling program.<sup>119</sup> The letter indicated that the program would focus on education and counseling.<sup>120</sup> For example, the program was intended to teach the students about the advantages and disadvantages of being a girl in today's society.<sup>121</sup> Homework would include assignments requiring the students to outline what they did and why it was wrong.<sup>122</sup> Skumanick warned that he would only drop the charges for those students who not only agreed to participate in the program, but also successfully completed it.<sup>123</sup>

Because some of the pictures were relatively innocuous—for example, the girl in a bathing suit—many parents were “dumbstruck” to find that their children were being charged with possessing child pornography.<sup>124</sup> Perhaps in anticipation of the parents' perplexity, Skumanick invited the involved parents to a meeting held at the Wyoming County Courthouse on February 12, 2009.<sup>125</sup> During the meeting, Skumanick reiterated the threat and recommendation in his letters.<sup>126</sup> A parent questioned how a picture of a child in a bathing suit could be construed as child pornography.<sup>127</sup> Skumanick retorted that the child in the picture was in a provocative pose.<sup>128</sup> He added that he was unwilling to argue the question of what makes a picture “provocative,” and told the parents it was “too bad” if they did not

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116. *Skumanick*, 605 F. Supp. 2d at 638.

117. *Id.* Because this Note is concerned about the psychological damage that results from these disseminations, this type of behavior would be punished under the proposed penalty structure. See discussion *supra* Part V.

118. *Skumanick*, 605 F. Supp. 2d at 638.

119. *Id.* The length of the offered program was eventually reduced to two hours per week for five weeks. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. See Searcey, *supra* note 107, at A17.

125. *Skumanick*, 605 F. Supp. 2d at 638.

126. *Id.*

127. *Id.*

128. *Id.*

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like “the rules.”<sup>129</sup> Skumanick admonished that he had the option of charging the children immediately, but instead he opted to offer the plea deal.<sup>130</sup>

During the meeting, Skumanick advised the parents to sign an agreement that the students would commit to the probation and participate in the program.<sup>131</sup> He initially gave the parents forty-eight hours to make a decision about signing the agreement.<sup>132</sup> Only one parent agreed, and the others objected.<sup>133</sup> Skumanick gave the remaining parents a week to make a decision.<sup>134</sup> Eventually, all but three sets of parents agreed to Skumanick’s plea deal.<sup>135</sup> Instead of acquiescing to Skumanick’s request, the parents of three of the photographed girls turned to the American Civil Liberties Union.<sup>136</sup>

On March 25, 2009, the American Civil Liberties Union filed a suit in the United States District Court for the Middle District of Pennsylvania on behalf of the three children and their parents against Skumanick.<sup>137</sup> The American Civil Liberties Union asserted that Skumanick had a “fundamental misunderstanding of child pornography laws,” and that even one of the topless pictures in question did not amount to the requisite probable cause for a charge of possessing child pornography.<sup>138</sup>

The complaint raised “three causes of action all filed pursuant to 42 U.S.C. § 1983”: (1) retaliation in violation of the plaintiffs’ constitutional right to free expression; (2) retaliation in violation of the plaintiffs’ constitutional right to be free from compelled expression; and (3) (for the parents themselves) retaliation against the parents for exercising their constitutional substantive due process rights as parents to direct their respective children’s upbringing.<sup>139</sup> Essentially, the American Civil Liberties Union insisted that “prosecutors have no right to threaten charges where there is no probable cause and where the images are constitutionally protected.”<sup>140</sup>

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129. *Id.*

130. *Id.* The implication is that he felt his plea deal was a gracious compromise.

131. *Id.*

132. *Id.* at 638-39.

133. *Id.* at 638.

134. *Id.* at 639.

135. *Id.* at 640.

136. See Duffy, *supra* note 106, at 1.

137. *Miller v. Mitchell*, 598 F.3d 139, 143 (3d Cir. 2010); *Skumanick*, 605 F. Supp. 2d at 640.

138. Duffy, *supra* note 106, at 1.

139. *Skumanick*, 605 F. Supp. 2d at 640.

140. Duffy, *supra* note 106, at 1.

Also, on March 25, 2009, the plaintiffs moved for a temporary restraining order as a means of enjoining Skumanick from initiating criminal charges against the three girls.<sup>141</sup> On March 30, 2009, District Court Judge Munley issued an order granting the temporary restraining order.<sup>142</sup> He held that the photographs did not amount to child pornography under Pennsylvania's law, and, thus, the photographs were considered protected speech under the First Amendment.<sup>143</sup>

Skumanick appealed to the United States Court of Appeals for the Third Circuit, but decided that he would no longer consider bringing charges against two of the three plaintiffs during the pendency of the appeal.<sup>144</sup> The third remaining girl had been topless in her pictures, while the other two did not have their breasts exposed in their pictures.<sup>145</sup> During the oral arguments held on January 15, 2010, "all three judges seemed skeptical of the prosecutor's claim that child pornography laws are violated when a teen transmits a nude image of herself."<sup>146</sup> Further, Judge Ambro, who would later draft the opinion of the court, noted that he was not aware of any legal authority giving the prosecutor the right to take on the role of a teacher.<sup>147</sup>

On March 17, 2010, the United States Court of Appeals for the Third Circuit issued a unanimous opinion holding that the plaintiff had "shown a likelihood of success on their claims that any prosecution would not be based on probable cause that [she] committed a crime, but instead in retaliation for [her] exercise of her constitutional rights not to attend the education program."<sup>148</sup> This case is instructive in that it shows jurist's and society's views on how the teenage mass-sexting dilemma should be penalized—leniently or not at all—particularly when there is no apparent damage to the victims. Of course, additional incidents of sexting have been prosecuted much more severely.<sup>149</sup>

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141. *Skumanick*, 605 F. Supp. 2d at 640.

142. *Id.* at 647.

143. *See* Duffy, *supra* note 106, at 1.

144. *Miller v. Mitchell*, 598 F.3d 139, 146-67 (3d Cir. 2010). Also, during the pendency of the appeal, Skumanick was defeated (after five terms) by Jeff Mitchell during the District Attorney election. *Id.* at 145; *see* Duffy, *supra* note 106, at 1.

145. *See* Duffy, *supra* note 106, at 1.

146. *Id.*

147. *Id.*

148. *Miller*, 598 F.3d at 155.

149. *See* discussion *infra* Part III.2.

B. Jurisdictions Penalizing Sexting Under Existing Child Pornography Legislation

Florida has proven to be a jurisdiction that severely punishes sexting under existing child pornography legislation. The case of then eighteen-year-old Phillip Alpert provides a particularly striking and highly publicized illustration of Florida's stance.<sup>150</sup> Specifically, when Alpert's relationship with his sixteen-year-old girlfriend took a turn for the worst, he retaliated against her by emailing nude pictures that she emailed to him during the happier times in their relationship.<sup>151</sup> Alpert sent the pictures to over seventy individuals, including his girlfriend's parents and grandparents.<sup>152</sup> Alpert acknowledged that his behavior was "stupid," but he did not anticipate the far-reaching legal repercussions to come.<sup>153</sup>

These repercussions included Florida prosecutors charging Alpert with transmitting child pornography pursuant to Florida statute, § 943.0435.<sup>154</sup> After prosecutors informed Alpert that under the statute he could be charged with 140 counts of transmitting child pornography and consequently could spend the rest of his life in prison, Alpert accepted a plea deal resulting in the following: a suspended sentence; five years probation; and a requirement to register as a sex offender.<sup>155</sup>

Texas also takes the child pornography approach. There, a thirteen-year-old boy was arrested for child pornography when a school coach found a nude image of a minor on his cell phone.<sup>156</sup> If convicted, he may be required to register as a sex offender for ten years after a hearing that determines if the "interests of the public" require

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150. See Bianca Prieto, 'Sexting' Teenagers Face Child-Porn Charges, ORLANDO SENTINEL, Mar. 8, 2009, available at [http://articles.orlandosentinel.com/2009-03-08/news/orl-asec-sexting-030809\\_1\\_sexting-face-child-porn-charges-nude-photos](http://articles.orlandosentinel.com/2009-03-08/news/orl-asec-sexting-030809_1_sexting-face-child-porn-charges-nude-photos).

151. *Id.*

152. *Id.*

153. *Id.* It may be that Romeo and Juliet (and other teenage lovers) simply cannot help but make "stupid" decisions. See generally discussion *infra* Part IV (providing an overview of the psychological proclivities of teenagers which make them particularly prone to these demonstrations of poor judgment).

154. See Corbett, *supra* note 15, at 3. Florida also applies severe penalties pursuant to child pornography legislation to teenagers who possess pictures of themselves in sexual situations, but do not distribute them to anyone but themselves. See generally FLA. STAT. § 943.0435 (2009) (detailing the third-degree felony child pornography statute).

155. Robert D. Richards & Clay Calvert, *When Sex and Cell Phones Collide: Inside the Prosecution of a Teen Sexting Case*, 32 HASTINGS COMM. & ENT. L.J. 1, 9 (2009).

156. See Bryn Ostrager, Note, *SMS. OMG! LOL! TTYL: Translating the Law to Accommodate Today's Teens and the Evolution from Texting to Sexting*, 48 FAM. CT. REV. 712, 716 (2010).

registration.<sup>157</sup> Similarly, in Massachusetts, boys ranging from twelve to fourteen-years-old have been charged with “possessing and distributing material of a child in a sexual act” under child pornography legislation for sending nude pictures of a thirteen-year-old girl via text message.<sup>158</sup> They face up to twenty years as registered sex offenders.<sup>159</sup> Though these states and others<sup>160</sup> have taken the approach of penalizing teenage sexters under child pornography legislation, it has proven controversial.<sup>161</sup> As a result, many jurisdictions have enacted or proposed legislation that is specifically tailored to target the teenage mass-sexting dilemma.

### C. Jurisdictions Penalizing Sexting Under Sexting-Specific Legislation

Vermont was a pioneer in the sexting-specific legislation approach. Vermont passed legislation that was specifically designed to address sexting thereby taking sexting out of the realm of child pornography.<sup>162</sup> Consequently, the penalties of possessing or distributing child pornography, such as a sex offender registration, are not applicable to teenage sexting.<sup>163</sup> This helps remove the controversy of penalizing teenage sexters because a primary concern of punishing teenage sexters under existing child pornography legislation is that the penalties for committing the crime were never intended to reach that type of behavior.<sup>164</sup>

Utah also established sexting-specific legislation that offers more leniency to minor teenage sexters than child pornography legislation

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157. *See id.*; *see also* TEX. CODE CRIM. PROC. ANN. art. 62.352 (West 2010); TEX. CODE CRIM. PROC. ANN. art. 62.101(c)(1) (West 2010).

158. *See* Ostrager, *supra* note 156, at 716.

159. *See id.*; *see also* MASS. GEN. LAWS. ANN. ch. 6, § 178G (West 2010); MASS. GEN. LAWS. ANN. ch. 6, § 178C (West 2010).

160. *See generally* Shafron-Perez, *supra* note 103, at 441-43 (outlining New Jersey and Ohio’s child pornography approach to the teenage mass-sexting dilemma).

161. *See* Levick & Moon, *supra* note 18, at 1035-36.

162. Catherine Arcabascio, *Sexting and Teenagers: OMG R U GOING 2 JAIL???*, 16 RICH. J.L. & TECH. 10, 32-35 (2010).

163. *See id.* at 34; *see also* VT. STAT. ANN. tit. 13, § 2802b (West 2010); Shafron-Perez, *supra* note 103, at 445.

164. The key distinction between traditional child pornography and childish teenage sexting is the motivation of the offender: a pedophile who likes to look at nude images of a child is a long-term danger to the community because he is likely to offend again (thus, sex registration is a necessary service for the community); conversely, a teenager who mass distributes a nude image of a peer, even if acting in malice, is not likely to commit that type of behavior once he reaches majority and maturity (thus, sex registration is an inappropriate penalty as it adds no security to the community).

would; however, it did not remove the sex registration requirements.<sup>165</sup> Specifically, teenagers under the age of sixteen found guilty of sexting will only be convicted of a Class C misdemeanor, while sixteen and seventeen-year-old teenage sexters will be convicted of a more severe Class A misdemeanor.<sup>166</sup> “According to the drafters of the legislation, the bill reflects an effort to give prosecutors more options, beyond felony charges, when youth of certain ages sext, taking ‘into account an individual’s age, maturity, and level of sophistication.’”<sup>167</sup>

Illinois and New Jersey have chosen to address the teenage mass-sexting dilemma with lenient penalties such as counseling, community service, and diversionary programs.<sup>168</sup> Several other jurisdictions have followed suit by enacting or proposing sexting-specific legislation with many variations regarding: the age of the teenage sexting victim as well as the teenage sexting victimizer; the level of intent of the teenage sexting victimizer; and whether the teenage sexting victim gave the picture voluntarily or consented to its distribution.<sup>169</sup> Generally, these legislative measures are promising in that they, unlike child pornography legislation, are tailored to the unique attributes of the teenage mass-sexting dilemma, which are not similar enough to traditional child exploitation to be penalized in the same way.<sup>170</sup> The prob-

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165. See UTAH CODE ANN. § 76-10-1206 (West 2011); Elizabeth C. Eraker, Note, *Stemming Sexting: Sensible Legal Approaches to Teenagers’ Exchange of Self-Produced Pornography*, 25 BERKELEY TECH. L.J. 555, 576-77 (2010).

166. See UTAH CODE ANN. § 76-10-1206 (West 2011); Eraker, *supra* note 165, at 577.

167. Eraker, *supra* note 165, at 577; see H.B. 14, Utah Leg., 2009 Gen. Sess. (Utah 2009). Ohio has taken similar steps. See Davis, *supra* note 11, at 20 (“In Ohio, Republican Rep. Ron Maag introduced a measure that would make it a misdemeanor for minors to recklessly create, possess or send nude photos of other minors.”).

168. See Davis, *supra* note 11, at 20 (“In Illinois . . . teens who forward or post online racy pictures of their underage classmates would get juvenile court supervision that could result in mandatory counseling or community service . . . [I]n New Jersey, the state assembly unanimously passed a bill . . . that would allow first-time offenders to undergo a diversionary program.”).

169. See, e.g., Arcabascio, *supra* note 162, at 39-40; Robert H. Wood, *The Failure of Sexting Criminalization: A Plea for the Exercise of Prosecutorial Restraint*, 16 MICH. TELECOMM. & TECH. L. REV. 151, 162-64 (2009); Eraker, *supra* note 165, at 573-76; Jordan J. Szymialis, Note, *Sexting: A Response to Prosecuting Those Growing Up with a Growing Trend*, 44 IND. L. REV. 301, 319-20 (2010); see also Davis, *supra* note 11, at 20 (“[S]tates are enacting their own statutes, trying to carve a middle path between completely decriminalizing sexting on one hand and prosecuting teens as sex offenders on the other.”).

170. See Davis, *supra* note 11, at 20 (“Bills or resolutions have been introduced in at least 20 states, according to the National Conference of State Legislatures, and new legislation has been enacted in at least 10 states. Most of those bills aim to lessen the penalties for sexting by treating it as a misdemeanor or other low-level infraction instead of a felony sex offense.”).

lem is that this targeted legislation is too lenient to sufficiently punish the behavior.

Of course, there remain states that have yet to take decisive action to address the teenage mass-sexting dilemma.<sup>171</sup> Further, as evidenced in the preceding pages, the legislative approaches throughout the country are varied and, judging by the ever-increasing incidents of teenage sexting, the measures have not been effective enough. To implement a legislative remedy to the teenage mass-sexting dilemma, it is first necessary to understand the unique psychological vulnerabilities of both the teenage sexting victims and their teenage victimizers.

### III. THE TEENAGE BRAIN'S ROLE IN CREATING TEENAGE SEXTING VICTIMS AND VICTIMIZERS

Juliet (Sat 12:16 AM): i cant eat. i cant sleep. i cant go to skool. u ruined my life!

Mercutio (Sat 12:18 AM): u should have never sent ur pic to Romeo

Mercutio (Mon 12:18 AM): slut

Recent research indicates that teenagers' brains do not reach maturity nearly as quickly as the rest of their bodies do.<sup>172</sup> The lack of development in key areas of the teenage brain makes teenagers vulnerable to: (1) the extreme depression resulting from being a victim of sexting; and (2) the lack of judgment that results in teenagers' mass-sexting in the first place.<sup>173</sup>

#### A. The Teenage Brain and Emotional Vulnerability

Recent studies have confirmed what direct observance and personal experience has shown many of us: teenagers are generally more emotional than adults.<sup>174</sup> Specifically, the part of teenage brains that

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171. See Eraker, *supra* note 165, at 581. For example, Virginia and Indiana have only initiated studies on teenage sexting to best remedy the situation in their respective states. *Id.* Also, though the New Hampshire legislature has noted that sexting is an existing problem, they have hesitated to make any legislation in response to it because there have not yet been any sexting prosecutions in this state. See Megan Sherman, Note, *Sixteen, Sexting, and a Sex Offender: How Advances in Cell Phone Technology Have Led to Teenage Sex Offenders*, 17 B.U. J. Sci. & Tech. L. 138, 148 (2011).

172. See generally *Research Facts & Findings: Adolescent Brain Development*, ACT FOR YOUTH UPSTATE CENTER OF EXCELLENCE RES. FACTS & FINDINGS 1 (May 2002), [http://www.actforyouth.net/resources/rf/rf\\_brain\\_0502.pdf](http://www.actforyouth.net/resources/rf/rf_brain_0502.pdf) (outlining recent developments in the understanding of the physiological differences between teenage and adult brains).

173. See discussion *infra* Part IV.A-B.

174. See *Frontline: Inside the Teenage Brain* (PBS television broadcast 2002), available at <http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/interviews/todd.html> (“[T]he more emotional region [of the teenage brain] . . . has more activation compared to the adult [brain].”).

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activates emotion is more active in teenagers than in adults.<sup>175</sup> This difference between the teenage and adult brain accounts for the fact that teenagers have a more difficult time than adults controlling how they react to their emotions.<sup>176</sup> Also, chemical differences between a teenage brain and an adult brain make teenagers more vulnerable to anxiety: “[a] brain chemical that reduces anxiety in adults has the opposite effect on adolescents . . . perhaps explaining why many teenagers are so touchy.”<sup>177</sup> For example, research has shown that social isolation (like that felt by a sexting victim who is ostracized by his peers) may cause depression.<sup>178</sup> Additionally, sexting victims may also suffer from guilt and shame that also result in depression.<sup>179</sup> For teenagers especially, untreated depression can lead to suicidal ideation.<sup>180</sup> Female teenagers, who are more often victims of sexting than their male counterparts,<sup>181</sup> are even more susceptible to depression.<sup>182</sup>

Thus, research and reality show us that teenagers who face the ramifications of having their sexually-explicit images sent to their peers or posted on the internet—guilt, shame, and ridicule—are very vulnerable to depression.<sup>183</sup> Because of teenagers’ brain anatomy and

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175. *See id.*

176. *See id.* (“[T]he frontal region [of the brain], or this executive region, is activating differentially in the teenagers compared to adults. And I think that has important implications in terms of modulating their own responses, or trying to inhibit their own gut responses.”).

177. *See* Sena Desai Gopal, *Teen Brains React Differently to Stress than Adult Ones*, BOSTON GLOBE (Mar. 12, 2007), [http://www.boston.com/news/science/articles/2007/03/12/teen\\_brains\\_react\\_differently\\_to\\_stress\\_than\\_adult\\_ones/](http://www.boston.com/news/science/articles/2007/03/12/teen_brains_react_differently_to_stress_than_adult_ones/). Researcher, Sheryl S. Smith, explains that “[w]e now have a biological basis for why teenagers are more irritable, angry, and rebellious in response to stress” than adults. *Id.*; *see also* Child and Teen Brains Very Sensitive to Stress, *Likely a Key Factor in Mental Illness*, SCHIZOPHRENIA DAILY NEWS BLOG (Aug. 21, 2007), <http://www.schizophrenia.com/sznews/archives/005410.html> (“New research is showing that the brains of children and adolescent (teens) are much more sensitive to stress than brains of adults. Chronic stress (or frequent periods of moderate stress) seems to be particularly damaging to these young brains . . . . Other research is suggesting that it is *psychological or social stress* that for children these days, is perhaps the most common type of stress.”).

178. *See* JJ Hensley, *More Teenagers Engaging in Risky Behaviors but Parents Can Talk to Them, Set Boundaries*, ARIZ. REPUBLIC, Mar. 12, 2006, at B3, available at 2006 WLNR 25134212.

179. *See* *Sexting Poses Risk to Teens’ Health, Warns Experts*, ASIAN NEWS INT’L, May 10, 2009, available at 2009 WLNR 8880883 (“[G]uilt and shame [from a teenager having his nude picture exposed to his peers] can result in emotional issues like depression and suicidal ideation . . . .”). Decker School of Nursing Associate Professor, Mary Muscari, warns that “sexting can result in young lives being lost to suicide.” *Id.*

180. *See* Hensley, *supra* note 178. Further, suicide is the third-leading cause of death for people between fifteen and twenty-four years old; and approximately twenty-five percent of U.S. high school students have thought about killing themselves in the past year. *Id.*

181. *See generally supra* Part II.C (providing examples of the many publicized female victims of sexting).

182. *See* Hensley, *supra* note 178 (“Teenage girls are twice as likely as boys to suffer from depression.”).

183. *See* discussion *supra* Part II.C (showing examples of this sad reality).

chemistry, their depression is more likely to have grave psychological impact, including suicidal ideation.<sup>184</sup> This consequence makes teenage mass-sexting a very serious societal problem that requires effective legislative action to be remedied.

## B. The Teenage Brain and Poor Judgment

As explored in the previous section, the contrast between teenage brains and adult brains leads to teenagers behaving differently than adults. These different behaviors are not limited to emotions, however.<sup>185</sup> These differences also include limitations on a teenager's ability to reason.<sup>186</sup> This explains why teenagers, may look like adults, be capable of making excellent grades in school, show civic responsibility, and possess excellent leadership skills, yet are still more susceptible than adults to poor judgment calls—like texting while driving.<sup>187</sup> Consequently, teenagers are more prone to engage in mass-sexting without fully grasping the potential harm to victims or themselves.<sup>188</sup> What these teenagers think of as a harmless prank or, more egregiously, retaliation for unrequited feelings or infidelity, may render dire psychological and legal consequences that their immature brains cannot fully anticipate.<sup>189</sup>

Despite the recent developments in the scientific community, the legal system has long since recognized the limitations of teenagers, which is why they have limited rights.<sup>190</sup> Thus, just as it will be neces-

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184. *Id.*

185. See Debra Bradley Ruder, *A Work in Progress: The Teen Brain*, HARV. MAG., Sept.-Oct. 2011, at 8, available at <http://harvardmagazine.com/2008/09/the-teen-brain.html> (“The last section [of the brain] to connect is the frontal lobe, responsible for cognitive processes such as reasoning, planning, and judgment. Normally this mental merger is not completed until somewhere between ages 25 and 30 . . .”).

186. *See id.*

187. *See id.* (“Your teenage daughter gets top marks in school, captains the debate team, and volunteers at a shelter for homeless people. But while driving the family car, she text-messages her best friend and rear-ends another vehicle.”).

188. *See NBC Today Show: Dr. Ruth Peters Interview* (NBC television broadcast July 16, 2009), available at <http://www.clicker.com/tv/the-today-show/keeping-your-teen-safe-from-sexting-282813/>.

189. *See id.*; see also Prieto, *supra* note 150.

190. *See, e.g., Cruel and Unusual Punishment: The Juvenile Death Penalty: Adolescence, Brain Development and Legal Culpability*, A.B.A. JUV. JUST. CENTER, Jan. 2004, at 1, available at [http://www.americanbar.org/content/dam/aba/publishing/criminal\\_justice\\_section\\_newsletter/crimjust\\_juvjus\\_Adolescence.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_juvjus_Adolescence.authcheckdam.pdf) [hereinafter *Adolescence, Brain Development and Legal Culpability*] (“As a society, we recognize the limitations of adolescents and, therefore, restrict their privileges to vote, serve on a jury, consume alcohol, marry, enter into contracts, and even watch movies with mature content. Each year, the United States spends billions of dollars to promote drug use prevention and sex education to protect youth at this vulnerable stage of life.”).

sary to consider the resulting psychological damage to the mass-sexting victims when formulating a penalty for it, it will also be necessary to consider the physiological limitations of the perpetrators because it affects their culpability.

IV. A PENALTY STRUCTURE THAT PUNISHES THE BEHAVIOR THAT CAUSES PSYCHOLOGICAL DAMAGE TO THE VICTIM WHILE ACCOUNTING FOR TEENAGERS' PHYSIOLOGICAL IMMATURITY

Romeo (Thu 4:26 PM): my sentencing is 2morrow. i think we should see other ppl

Juliet (Thu 4:26 PM): parting is such sweet sorrow<sup>191</sup>

Romeo (Thu 4:29 PM): wat?

Juliet (Thu 4:30 PM): never mind

The immaturity of the teenage brain adds complexity to the teenage mass-sexting dilemma. On one hand, the fact that teenagers are particularly susceptible to depression when faced with the ridicule of their peers means that victims of sexting have to be protected, and thus those who victimize them should be severely penalized to punish the offending behavior. On the other hand, teenagers who victimize their emotionally susceptible peers may not have the decision making skills necessary to make them fully culpable for their ill-advised, and potentially even ill-intentioned, offending behavior.<sup>192</sup> This dilemma is best addressed by implementing a penalty structure that is sufficiently severe, so as to appropriately punish the offending behavior and deter the particular offender without the long-term stigma associated with felony or sex-based crimes.

First, the United States Supreme Court has said that the rationale behind prohibiting and severely penalizing child pornography is, among other things, to prevent the psychological damage that results from exploiting children by destroying the market for the exploitative images.<sup>193</sup> Thus, particularly as it relates to the sexual exploitation of teenagers, it is necessary to take into consideration the resulting psychological damage when determining how to penalize the behavior. Teenage mass-sexting without the victim's consent or knowledge is exploitation in that others are benefiting from the teen's sexuality to his

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191. WILLIAM SHAKESPEARE, *ROMEO & JULIET*, act 2, sc. 2.

192. See discussion *supra* Part IV.B.

193. See *Osborne v. Ohio*, 495 U.S. 103, 109-10 (1990).

or her detriment.<sup>194</sup> Following the Court's sound reasoning, if sexual exploitation of children must be severely penalized in an effort to deter the psychological damage that it causes, those who sexually exploit teenagers by mass-distributing their sexually explicit pictures must be severely penalized to punish the victimizer for the psychological damage that he caused while simultaneously deterring him from committing the offense again.<sup>195</sup>

As teenagers have limited rights already,<sup>196</sup> merely abridging these limited rights will not be a sufficient penalty (thus, remedies like diversion programs and probation are inadequate).<sup>197</sup> Instead, a mandatory prison term in either a juvenile or adult facility, depending on the age of the teenage offender, is a more appropriate response. Because a teenager's ability to understand the consequences of his actions increases as he approaches twenty-one-years-old, the prison term should correspondingly increase with the offender's age and level of culpability: twelve and fourteen-year-olds would serve between six and eighteen months; fifteen to seventeen-year-olds would serve between eighteen months and two years; and seventeen to twenty-one-year-olds (who are almost, but not completely, capable of reasoning like adults with fully-developed brains) would serve a minimum of three years, not to exceed five years.

This mandatory prison term structure not only provides individual deterrence by limiting the offender's opportunity to commit the crime again (because his freedom is limited), but it will also provide a sense of justice to the victim for the wrongdoing committed by providing an appropriately severe penalty.<sup>198</sup>

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194. See generally WEBSTER'S II NEW COLLEGE DICTIONARY 395 (3d ed. 1995) (defining exploitation as "utilization of another person for selfish purposes")

195. See *Osborne*, 495 U.S. at 109-10. The goal is not deterrence for the general public per se, but for the offender himself. By punishing the teenager in such a way as to limit his access to commit the offense, there is inherent deterrence. See *id.*

196. See, e.g., *Adolescence, Brain Development and Legal Culpability*, *supra* note 190 (stating that in most U.S. jurisdictions, you have to be sixteen to drive, eighteen to vote, and twenty-one to drink).

197. See Elizabeth M. Ryan, Note, *Sexting: How the State Can Prevent a Moment of Indiscretion from Leading to a Lifetime of Unintended Consequences for Minors and Young Adults*, 96 IOWA L. REV. 357, 379-80 (arguing that diversion programs are an effective remedy for the teenage mass-sexting dilemma).

198. Because there is a question as to whether teenagers are able to be deterred by the promise of severe punishment, this analysis does not focus on that questionable possibility. See generally CHRISTOPHER SLOBOGIN & MARK R. FONDACARO, *JUVENILES AT RISK: A PLEA FOR PREVENTIVE JUSTICE* (2011) (discussing why attempts to deter teenagers' behavior may not be effective); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 ILL. L. REV. 363 (1999) (discussing why attempts to deter anyone's behavior may not be effective). Instead, it focuses on individualized deterrence and meeting the utilitarian objective of retribu-

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However, if teenagers who engage in mass-sexting are sentenced to prison and then released to face the traditional collateral consequences that convicts face,<sup>199</sup> then this is tantamount to completely ignoring the fact that teenagers truly do not have the physiological capabilities to make judgments that adults have. This problem involves balancing this consideration with the equally important need to ensure that the penalty is severe enough to adequately punish the offense.<sup>200</sup>

These interests can be balanced by holding firm to the mandatory prison terms, but ensuring that they are not succeeded by either a felony status or a sex-registration requirement. The policy behind this is as follows: since punishment is in part meant to deter the perpetrator from repeating the offense, then teenagers, whose brain anatomy limits their reasoning skills, should not be punished beyond a point where they would likely commit the same offense any way. This is particularly relevant for the older teenagers who may or may not have reached majority and would likely be tried as adults. A seventeen-year-old who sends an email to his football buddies would not likely do this again when, after a minimum of three years in prison he re-enters society, because his brain is better able to make sound judgments. Why then should he spend the rest of his life registering as a sex offender and searching for an employer willing to give him a chance? The easy answer is the retributive aspect of the utilitarian form of punishment. However, with a legal system already bogged down with ancillary costs, retribution may not be a worthy enough goal to justify having to ensure that (1) a no-risk “sex-offender” stays away from schools or (2) that society supports an able-bodied man whose felony status precludes him from gainful employment. The proposed penalty structure, which grants severity on the front-end and

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tion through severe punishment. When you consider the result of mass-sexting—suicide in some cases—it is in the interest of justice to punish those who caused such tragic results even if the punishment does not guarantee widespread deterrence.

199. See generally Andrew E. Taslitz, *Destroying the Village to Save It: The Warfare Analogy (or Dis-Analogy?) and the Moral Imperative to Address Collateral Consequences*, 54 How. L.J. 501 (2011) (outlining the devastating effects of collateral consequences).

200. At first glance, this may appear to be the necessary balance in any juvenile criminal case. However, teenage mass-sexting is different than crimes like murder, rape, or robbery in that the brutality and resulting damage of those crimes are immediately apparent even to an immature brain because society makes it clear that this behavior is unacceptable. See SLOBOGIN & FONDACARO, *supra* note 198, at 21 (“Most of the research on juvenile’s cognitive functioning suggests that by the end of the first decade of life people are able to understand society’s rules.”). The consequences of mass texting are not readily apparent to a teenager particularly when, like Romeo, there was no malicious intent. See *id.* at 22-23.

leniency on the back-end, reaches two important goals: punishing reprehensible crime while issuing age-appropriate penalties.

However, this penalty structure must be limited to the situation of one teenager mass-distributing a nude or sexually-explicit picture of another teenager because of the unique psychological and physiological considerations these situations pose.<sup>201</sup> Even in other types of sexting cases, this penalty structure would be inadequate and inappropriate. For example, when a sixteen-year-old teenager sends a sexually-explicit picture of himself to his sixteen-year-old sexual partner and no one else sees it, there is no exploitation or psychological damage; thus, the mandatory prison term would be needlessly harsh.<sup>202</sup> Also, in a situation in which a thirty-five-year-old, who ostensibly possesses a fully developed brain capable of making rational judgments, mass-distributes a picture of a teenager (or even merely possesses it), it would be inappropriate to forgo the imposition of a felony status or a sex registration requirement because his brain does not shield him from full culpability.

Thus, the proposed penalty structure must be drafted in such a way as to ensure that it only reaches the cases where at least one teenager mass-distributes sexually-explicit pictures of at least one other teenager without his consent. This is the only situation in which the front-end severity and back-end leniency is justified or makes any sense at all.

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201. See generally Shuka Rassouli, Note, *Cruel and Unusual Punishment: Juvenile Offenders Sentenced to Adult Prisons*, 8 WHITTIER J. CHILD & FAM. ADVOC. 261, 272-76 (asserting that incarcerating minors in adult prisons is cruel and unusual punishment because it has devastating effects, including psychological damage). Though this is ultimately beyond the scope of this Note, there should be a movement towards therapeutic rather than punitive detention centers to limit this psychological impact to teenagers serving prison sentences.

202. Some jurists believe that prohibiting this behavior is a violation of teenagers' privacy rights. See *A.H. v. State*, 949 So. 2d 234, 239 (Fla. Dist. Ct. App. 2007) (Padovano, J., dissenting). In this case, a teenage girl was prosecuted for storing nude pictures of herself on her computer:

I think her expectation of privacy in the photographs was reasonable. Certainly, an argument could be made that she was foolish to expect that, but the expectation of a sixteen year old cannot be measured by the collective wisdom of appellate judges who have no emotional connection to the event. Perhaps if the child had as much time to reflect on these events, she would have eventually concluded, as the majority did, that there were ways in which these photos might have been unintentionally disclosed. That does not make her expectation of privacy unreasonable.

*Id.* at 241.

## CONCLUSION

Sexting is only one example of how technology has significantly complicated the lives of American teenagers, but it is a significant example! This behavior has realized its potential to negatively impact teenagers. First, when teenagers, who are particularly vulnerable to peer ridicule, are the victims of sexting, their social lives can spiral out of control, resulting in depression and suicidal ideation. Further, when teenagers victimize other teenagers by engaging in mass sexting, they set themselves up for consequences that their immature brains are not fully capable of anticipating. Thus, the limitations of the teenage brain really complicate the teenage mass-sexting dilemma. On one hand, they cannot handle the stress of being victimized, and on the other hand, they are not fully culpable for the victimization.

To balance these competing interests, the proposed penalty structure targets these unique circumstances and provides severe penalties to deter the behavior that causes the psychological damage while eliminating the collateral consequences that exceed the goal of appropriate punishment and individual deterrence. Since neither teenage sexual exploration nor advances in technology (which ostensibly will be used to facilitate the exploration) seem to be slowing down any time soon, it is important for United States jurisdictions to implement the proposed penalty structure in order to quickly remedy the teenage mass-sexting dilemma.

If the legal reaction to the teenage mass-sexting dilemma continues its current course, teenagers guilty of mass-sexting will either be inappropriately penalized under child pornography legislation that is not intended to reach that behavior and poses far too many collateral consequences, or be too leniently penalized by sexting-specific legislation that provides penalties that have some benefits, (for example, educational programs) but do not sufficiently deter the individual's behavior. Implementation of the front-end severity and back-end leniency approach is the answer to this dilemma.



## NOTE

# Keep the Court Room Doors Closed So the Doors of Opportunity Can Remain Open: An Argument for Maintaining Privacy in the Juvenile Justice System

LEILA R. SIDDIKY\*

“They are not youngsters. They are not kids. They are hardened criminals. It’s a tragedy and I’ve wept about what happened to them, their broken hearts that have gotten them on this path, what got them there. But they are evil.”<sup>1</sup>

## INTRODUCTION

Kids killing kids is a far too common headline in Washington, D.C. That headline could have preceded the stories detailing the deaths of David Weston, Jamal Bell, Joseph Alonzo Sharps Jr., and many others—all teenage victims of teenage killers.<sup>2</sup> The story of two

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\* J.D. Candidate, Howard University School of Law, class of 2012; Executive Notes & Comments Editor, *Howard Law Journal*, 2011-2012; M.S.T., Pace University, 2007; B.A., The George Washington University, 2005. I would like to thank my faculty advisor, Professor Andrew Taslitz; the editors of the *Howard Law Journal*; Sonny, Amaya, and the rest of my loving family.

1. Patricia Soung, *Social and Biological Constructions of Youth: Implications for Juvenile Justice and Racial Equity*, 6 NW. J.L. & SOC. POL’Y 428, 428 (2011) (quoting *Fair Sentencing for Youth Act: Hearing on S.B. 399 Before the Appropriations Comm.*, 2009 Leg. (Cal. 2009-2010) (statement of Jim Nielsen)). The article quotes California Republican Assembly Member Jim Nielsen’s speech during a debate on a California bill to allow state “judges to review and reduce some sentences of life without the possibility of parole given to youth.” *Id.*

2. See Major Cases/Unsolved Homicides-2010, METROPOLITAN POLICE DEPARTMENT, [http://mpdc.dc.gov/mpdc/cwp/view,a,1243,q,567871,mpdcNav\\_GID,1533,mpdcNav,%7C.asp](http://mpdc.dc.gov/mpdc/cwp/view,a,1243,q,567871,mpdcNav_GID,1533,mpdcNav,%7C.asp) (last visited Nov. 12, 2011); see also HOMICIDE WATCH D.C., <http://www.homicidewatch.org> (last vis-

friends, Jamal Bell and Prince Okorie, is particularly disturbing and is representative of the larger problem in D.C. and communities throughout the U.S.<sup>3</sup> Jamal and Prince were two of D.C.'s 131 homicide victims in 2010.<sup>4</sup> Both Jamal and Prince attended Roosevelt Senior High School, and both boys were shot in the head.<sup>5</sup> Jamal was killed on June 19. Prince was killed November 30, and Raymond Roseboro, a 20-year-old ward of D.C.'s Department of Youth Rehabilitation Services ("DYRS"), is awaiting trial for the murder.<sup>6</sup> Both Prince and Raymond were under the supervision of DYRS on that November day.<sup>7</sup> Raymond was supposed to be in city custody when he killed Prince, who three weeks before his death had been placed at a DYRS-licensed shelter.<sup>8</sup>

These are children despite the rhetoric of some, and these children are not evil. The stories of Jamal, Prince, and Raymond lend credence to the belief that there is a serious problem with juvenile crime in Washington, D.C. The system does not serve the children for which it is responsible, and it does not make the D.C. community safer—its wards are both the victims and perpetrators of violent crime. This problem with juvenile crime is not isolated to D.C.; it is a problem throughout the United States.<sup>9</sup> As a result, many juvenile justice systems are under pressure to reform the system, to reduce juvenile crime, and to make communities safer.<sup>10</sup> The public wants children to be safe, but they also want to be safe from "these children."

Eliminating juvenile crime should mean supporting juvenile offenders by rehabilitating them such that they do not recidivate and

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ited Nov. 12, 2011) ("cover[ing] every homicide from crime to conviction" occurring in the District of Columbia).

3. Jiria Pender, *Roosevelt's Fallen Riders*, RIDER TIMES (Mar. 10, 2011, 12:42 PM), [http://my.hsj.org/Schools/Newspaper/tabid/100/view/frontpage/schoolid/3928/articleid/421883/newspaperid/4109/Roosevelts\\_Fallen\\_Riders.aspx](http://my.hsj.org/Schools/Newspaper/tabid/100/view/frontpage/schoolid/3928/articleid/421883/newspaperid/4109/Roosevelts_Fallen_Riders.aspx).

4. Matthew Cella, *D.C. Homicides Fall 9% in 2010 to 131, Lowest Toll Since '63*, WASH. TIMES, Jan. 1, 2011, at A05.

5. See Pender, *supra* note 3.

6. See Jeffrey Anderson & Matthew Cella, *Homicide Suspect was Ward of DYRS*, WASH. TIMES, Dec. 13, 2010, at A05.

7. See *id.*

8. *Id.*

9. Juveniles were involved in one-quarter of serious violent victimizations annually from 1973 to 1997. U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, STATISTICAL BRIEFING BOOK, <http://www.ojjdp.gov/ojstatbb/offenders/qa03202.asp?qaDate=19990930> (last visited Nov. 12, 2011).

10. See, e.g., Arthur R. Blum, Comment, *Disclosing the Identities of Juvenile Felons: Introducing Accountability to Juvenile Justice*, 27 LOY. U. CHI. L.J. 349, 350 (1996); Danielle R. Oddo, Note, *Removing Confidentiality Protections and the "Get Tough" Rhetoric: What has Gone Wrong with the Juvenile Justice System?*, 18 B.C. THIRD WORLD L.J. 105, 109 (1998).

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appear back in juvenile court or find themselves before the adult criminal courts.<sup>11</sup> For others, it means taking a much harsher approach so that juvenile offenders are treated more like adults. To respond to clamors for reform, many juvenile courts have embraced the latter by abandoning or limiting the privacy and confidentiality that was traditionally a hallmark of the juvenile courts.<sup>12</sup> Many juvenile courts are now open to the public,<sup>13</sup> and the court documents and identities of juvenile offenders are matters of public record.<sup>14</sup>

The juvenile justice system was formed with the unique purpose of rehabilitating children who engage in criminal behavior.<sup>15</sup> The system was designed to protect and nurture children so that they could learn from their mistakes and become contributing members of society.<sup>16</sup> Changing the juvenile justice system to increase public access and eliminate privacy and confidentiality undermines the juvenile justice system's goals of rehabilitation. Therefore, such reforms must be abandoned or reversed. Additionally, increased public access worsens the existing collateral consequences that confront juvenile offenders.<sup>17</sup>

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11. See Blum, *supra* note 10, at 367-68.

12. However, many jurisdictions still have a baseline expectation that juvenile proceedings are closed to the public. See ALA. STAT. § 12-15-65(a) (2000); ALASKA STAT. § 47.10.070(a) (2000); CONN. GEN. STAT. ANN. § 54-76h (West 1994) (mandatory closure); D.C. CODE § 16-2316(e)(2) (LexisNexis 1997 & Supp. 2000); IDAHO CODE ANN. § 16-1608(b) (1979 & Supp. 2000); KY. REV. STAT. ANN. § 610.070(3) (West 1999); MASS. GEN. LAWS ANN. ch. 119, § 65 (West 1993 & Supp. 2000); MISS. CODE ANN. § 43-21-203(6) (2000); N.H. REV. STAT. ANN. § 169-B:34(I)(a) (LexisNexis 1994 & Supp. 2000) (mandatory closure); N.J. STAT. ANN. § 2A:4A-60(i) (West 1987 & Supp. 2000); N.Y. JUD. CT. ACTS LAW § 341.1 (McKinney 1999); OHIO REV. CODE ANN. § 2151.35(A) (West Supp. 2000); R.I. GEN. LAWS § 14-1-30 (1994); S.C. CODE ANN. § 20-7-755 (1985 & Supp. 2000); TENN. CODE ANN. § 37-1-124(d) (1996); VT. STAT. ANN. tit. 33, § 5523(c) (1991 & Supp. 1999); W. VA. CODE ANN. § 49-5-2(i) (LexisNexis 1999 & Supp. 2000); WIS. STAT. ANN. § 48.299(1)(a) (West 1997 & Supp. 2000); WYO. STAT. ANN. § 14-6-224(b) (1999).

13. Many jurisdictions have adopted statutes containing no public exclusion language. See IDAHO CODE ANN. § 20-525(1) (1998); IND. CODE ANN. § 31-32-6-3 (West 1998); IOWA CODE ANN. § 232.150(1)(b) (West 1997); ME. REV. STAT. ANN. tit. 15, § 3307(2)(A) (1997); MD. CODE ANN., CTS. & JUD. PROC. § 3-818 (LexisNexis 1998); MINN. STAT. ANN. § 260.155(1)(c) (West 1998); MO. ANN. STAT. § 211.171(6) (West 1998); UTAH CODE ANN. § 78-3a-115(1)(b)-(c) (LexisNexis 1998); VA. CODE ANN. § 16.1-302(C) (1998). *But see* FLA. STAT. ANN. § 985.04(4)(a) (West 1998).

14. See ARK. CODE ANN. § 9-27-309(2)(c)-(d) (1997); CAL. WELF. & INST. CODE § 389(a) (West 1999); COLO. REV. STAT. ANN. § 19-1-302 (West 1998); GA. CODE ANN. § 15-11-58(b) (1998); IND. CODE ANN. § 31-39-2-8(a) (LexisNexis 1998); MINN. STAT. ANN. § 260.161(2) (West 1998); MO. ANN. STAT. § 211.321(2) (West 1997); OKLA. STAT. ANN. tit. 10, § 7307-1.2(B)-(E) (West 1999); VT. STAT. ANN. tit. 33, § 5538(a) (1998); WASH. REV. CODE ANN. § 13.50.050(2) (West 1999).

15. See, e.g., DEAN JOHN CHAMPION, *THE JUVENILE JUSTICE SYSTEM: DELINQUENCY, PROCESSING, AND THE LAW* (6th ed. 2004) (detailing the history and current status of the United States' juvenile justice system).

16. *Id.* at 8.

17. See, e.g., Oddo, *supra* note 10, at 108-09.

If greater public access is granted and privacy and confidentiality are denied, the youth involved in the juvenile justice system will see more closed doors, and society will see greater recidivism among juveniles.<sup>18</sup> Those before the juvenile justice system are children—they are not criminals—and should be treated as such.<sup>19</sup> Such efforts to reform in hopes of greater efficacy and accountability in the system are ill advised and must be abandoned in favor of more creative solutions that balance the best interests of the children with the interests of the community. Our juvenile justice system certainly needs reform, and our children certainly need to stop hurting each other and our communities, but we cannot accomplish these goals through near-sighted and fear-driven reforms.

This Note explores and argues against reform efforts in the juvenile justice system that focus on reducing or eliminating privacy and confidentiality for youth being adjudicated. Part I includes a brief history of the juvenile justice system in the United States, an explanation of its current state, an overview of Washington D.C.'s juvenile courts, and a potential change in D.C.'s juvenile justice system that will reduce privacy and confidentiality for juveniles in the system. Part II focuses on the legal roots of privacy, how privacy functions in the juvenile justice system, and the benefits of privacy and confidentiality. Part III discusses the collateral consequences associated with being adjudicated in the juvenile justice system and how the loss of privacy worsens collateral consequences for juveniles. Part IV discredits arguments for eliminating privacy and confidentiality in juvenile court and argues for some alternative reforms that serve to increase accountability and efficacy in the juvenile justice system while still promoting the rehabilitation and best interests of the children involved in the system.

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18. Throughout this Note, the term “juvenile” and “children” will be used interchangeably. The use of “children” is very purposeful and reflects a conscious awareness that those in the juvenile justice system are in fact children despite the fact that they may be treated and act differently than that. Also, this Note will consciously avoid the use of “these children” because it makes the children who are being discussed seem inferior and marginalized. They are “our children.”

19. Those before the juvenile courts are not being tried as adults despite the fact that being tried as an adult when you are still a minor is possible. Nearly every jurisdiction has a statute that allows waiver into adult court for those children whose crimes are deserving of such treatment where the statutory elements have been satisfied. BENJAMIN ADAMS & SEAN ADDIE, U.S. DEP'T OF JUSTICE OFFICE OF JUSTICE PROGRAMS, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION FACT SHEET: DELINQUENCY CASES WAIVED TO CRIMINAL COURT, 2005 (2009), <https://www.ncjrs.gov/pdffiles1/ojjdp/224539.pdf> [hereinafter OJJDP FACT SHEET]. Therefore, if a child is before a juvenile court, our laws indicate that he or she is not considered a criminal.

I. THE HISTORY OF JUVENILE JUSTICE AND ITS  
CURRENT STATE

A. Unique Goals of the Juvenile Justice System

The criminal justice system was created to protect society and to punish offenders. The juvenile justice system, however, was created with a distinctly different purpose.<sup>20</sup> The juvenile justice system was created with the belief that juveniles are not accountable for their wrongdoing.<sup>21</sup> Children have diminished capacity and are less culpable.<sup>22</sup> These beliefs led to juvenile offenders being dealt with differently than adults.<sup>23</sup>

The juvenile justice system is a product of these sincerely-held beliefs.<sup>24</sup> These beliefs inform both how the system functions and how children are treated within the system.<sup>25</sup> These beliefs include a belief that science can be used to identify and address the causes of juvenile crime, that every child can be rehabilitated, and that the state holds power to help juveniles, *parens patriae*.<sup>26</sup>

*Parens patriae*, a timeworn concept that is still very present in political discourse, is the idea that the government is the father of the country, and it bears the responsibility to make all decisions.<sup>27</sup> The underlying idea behind “*parens patriae*” was that the parents are merely the agents of society in the area of childrearing and that the state has the primary and legitimate interest in the upbringing of its children.”<sup>28</sup> This notion pushed the juvenile courts to behave in a manner that protected children and emphasized proper development

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20. Oddo, *supra* note 10, at 106.

21. *See id.*

22. *See* Russell K. Van Vleet, *Will the Juvenile Court System Survive?: The Attack on Juvenile Justice*, 564 ANNALS AM. ACAD. POL. & SOC. SCI. 203, 208 (1999).

23. *See id.* (“The entire premise for the development of a separate juvenile court was a general acceptance that youths are not simply little adults.”).

24. *See id.* (“The entire premise for the development of a separate juvenile court was a general acceptance that youths are not simply little adults.”) (emphasis added).

25. *Cf. id.* (“[The notion that] lack of maturation requires a separate and presumably less punitive response . . . has . . . been reinforced through the adoption by the juvenile court of legal processes that differed substantially from those of the criminal court.”).

26. *See* Blum, *supra* note 10, at 361.

27. CHAMPION, *supra* note 15, at 26.

28. *Id.*

of children involved in the system.<sup>29</sup> The focus was not on retribution, punishment, or deterrence.<sup>30</sup>

The notion of *parens patriae* lives in the rehabilitative orientation of the juvenile justice system. The rehabilitative view is described as one where “[t]he child was brought before the judge with no one to prosecute him and with no one to defend him—the judge and all concerned were merely trying to find out what could be done on his behalf.”<sup>31</sup> Under this approach, the juvenile’s “behavior does not need to amount to crime, because the primary goal is not to prevent future criminal behavior but to improve the psychological well-being and socialization of the child.”<sup>32</sup> Rehabilitation does work to prevent recidivism, but its primary goal is improving the life of the child.

Today, the notion of a juvenile court system parenting the juvenile offender and seeking to reform his behavior has been overcome by greater constitutional rights for juveniles.<sup>33</sup> As juveniles are granted more protections from the state, the state is less able to, and it is less appropriate for the state to act as a parent. For example, in *In re Gault*,<sup>34</sup> the state of Arizona attempted to defend its procedures against claims that the procedures lacked constitutional protections with the notion of *parens patriae*.<sup>35</sup> In that case, Arizona argued that because juvenile courts were concerned with the welfare of the child, the fundamental fairness requirement of due process was satisfied through the embracing of *parens patriae*.<sup>36</sup> The U.S. Supreme Court rejected the state’s argument, holding that juveniles were to be afforded due process rights consistent with the Fourteenth Amend-

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29. See *Juvenile vs. Adult Justice*, FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/juvenile/stats/juvvsadult.html> (last visited Nov. 12, 2011).

30. See generally *id.* (juxtaposing and contrasting features of the criminal justice system and the juvenile justice system).

31. Christopher Slobogin & Mark R. Fondacaro, *Juvenile Justice: The Fourth Option*, 95 IOWA L. REV. 1, 8 (2009) (quoting JANE ADDAMS, MY FRIEND, JULIA LATHROP 96 (Univ. of Ill. Press 2004) (1935)).

32. *Id.* at 10.

33. See CHAMPION, *supra* note 15, at 27.

34. *In re Gault*, 387 U.S. 1 (1967).

35. See CHRISTOPHER P. MANFREDI, THE SUPREME COURT AND JUVENILE JUSTICE 115 (1998). See generally *In re Gault*, 387 U.S. at 1 (invalidating several juvenile court procedures in Arizona).

36. See MANFREDI, *supra* note 35, at 115.

ment;<sup>37</sup> the state acting as parent was not a substitute for due process.<sup>38</sup>

Along with *parens patriae*, the concept of determinism was incredibly influential in the creation of a separate juvenile justice system.<sup>39</sup> Determinism contended that human action was a result of environmental, biological, or social circumstances more so than free will.<sup>40</sup> Those who followed determinism also believed juveniles were not responsible for their actions and should not be punished.<sup>41</sup> Rather, these children should be rehabilitated and protected against the punishment of society.<sup>42</sup> Determinists also subscribed to the notion of *parens patriae* believing that the state could be the parent of juvenile delinquents, “lead[ing] their wayward young back to the road of righteous living.”<sup>43</sup>

In more modern times, use of the adult retribution model by the juvenile justice system (a departure from the rehabilitation approach) has gained greater attention.<sup>44</sup> This model imposes adult-like sentences upon juveniles based on the belief that they are deserving of punishment and in need of it.<sup>45</sup> Most jurisdictions have some combination of these philosophies and models, and much of the debate about the juvenile justice systems stems from the tension between these varying approaches. When the juvenile justice system was formed, the primary goal was invariably rehabilitation—not punishment or retribution.<sup>46</sup> Thus, today’s juvenile courts remain more informal, individualized, and non-adversarial in nature.<sup>47</sup>

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37. See generally *In re Gault*, 387 U.S. at 1 (striking down various aspects of Arizona juvenile court procedure as violations of due process).

38. See generally *id.* (rejecting Arizona’s arguments in support of its juvenile justice system’s practices).

39. See Blum, *supra* note 10, at 351.

40. *Id.*

41. *Id.*; see also Michele Cotton, *A Foolish Consistency: Keeping Determinism Out of the Criminal Law*, 15 B.U. PUB. INT. L.J. 1, 27 (2005) (stating that courts accepted deterministic explanations of juvenile behavior and accordingly treated juvenile offenders differently).

42. Blum, *supra* note 10, at 351-52.

43. *Id.* at 352.

44. See Cotton, *supra* note 41, at 38.

45. See *id.*

46. See Jan L. Trasen, Note, *Privacy v. Public Access to Juvenile Court Proceedings: Do Closed Hearings Protect the Child or the System?*, 15 B.C. THIRD WORLD L.J. 359, 369 (1995).

47. See *id.* at 370.

B. History of Juvenile Justice

The juvenile justice system, as an entity separate from the adult system, is a modern creation.<sup>48</sup> In England and early America, there was no distinction regarding age when administering justice and punishment.<sup>49</sup> While children were understandably treated quite differently than adults, it took time for the courts to recognize that children did in fact have rights, and they should be afforded the same rights as adults.<sup>50</sup>

An Illinois case was seminal in changing the rights held by juveniles and limiting the state's power over a juvenile.<sup>51</sup> In *People ex rel. O'Connell v. Turner*, an Illinois youth was committed to the Chicago Reform School for supervision for an unspecified period.<sup>52</sup> The presiding judge held that the youth's "moral welfare and the good of society require that he should be sent to said school for instruction, employment and reformation."<sup>53</sup> The parents challenged the Illinois statute that gave the state the power to commit any juvenile who is deemed to be "a vagrant, or is destitute of proper parental care, or is growing up in mendicancy, ignorance, idleness or vice" to a state reform school.<sup>54</sup> The court held that the statute could not confer to the state power that exceeded the power of a natural parent.<sup>55</sup> Juvenile crime would still be dealt with in a different manner than adult crime, but the state would no longer enjoy limitless power and discretion over the lives of children.

The Supreme Court changed the independence and lack of accountability of the juvenile courts with a 1967 decision, *In re Gault*.<sup>56</sup> A fifteen-year-old juvenile was arrested and detained for making lewd phone calls to his neighbor.<sup>57</sup> At the delinquency hearing, the judge committed the juvenile to the State Industrial School until he was

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48. See CHAMPION, *supra* note 15, at 8.

49. *Id.*

50. *Id.*

51. See generally *People ex rel. O'Connell v. Turner*, 55 Ill. 280 (1870) (holding that the laws governing juvenile detention are in conflict with the declaration of rights in the Constitution).

52. *Id.*

53. *Id.* at 280.

54. *Id.* at 282 (quoting 1867 ILL. LAWS § 16).

55. *Id.* at 286 ("If, without crime, without the conviction of any offense, the children of the State are to be thus confined for the 'good of society,' then society had better be reduced to its original elements, and free government acknowledged a failure.").

56. See generally *In re Gault*, 387 U.S. 1 (1967) (holding that juveniles accused of crimes are provided similar due process rights under the Fourteenth Amendment).

57. *Id.* at 4.

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twenty-one.<sup>58</sup> The juvenile was afforded no right to appeal.<sup>59</sup> In reviewing the Supreme Court of Arizona's decision to affirm the lower court's dismissal of the writ, the Court weighed whether the current procedure in juvenile courts comported with the due process protections of the Fourteenth Amendment.<sup>60</sup> The Court acknowledged the uniqueness of the juvenile justice system, citing its birth in "the highest motives and most enlightened impulses,"<sup>61</sup> but was still not satisfied with the protections (or lack of protections) afforded to juveniles.<sup>62</sup> The Court noted,

The absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment. The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness.<sup>63</sup>

In Justice Black's concurring opinion, he concluded that to deny those facing criminal convictions rights afforded by the Constitution simply because they are children would be invidious discrimination.<sup>64</sup> The *In re Gault* decision led to substantial juvenile reforms throughout the United States such that juveniles now enjoy the protections of the Fourteenth Amendment in all criminal proceedings regardless of their venue.<sup>65</sup>

Today there are fifty-one different juvenile justice systems that vary tremendously in how juveniles accused of crimes are adjudicated.<sup>66</sup> One difference among systems has to do with what arm of government has control over the juvenile courts—local or state agency, executive or judiciary.<sup>67</sup> Some jurisdictions have organized their juvenile justice systems centrally while others have a more decentralized

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58. *Id.* at 7-8.

59. *Id.* at 8.

60. *Id.* at 10 (showing that the plaintiffs asserted that due process required that juveniles receive notice of the charges, right to counsel, right to confrontation and cross examination, privilege against self-discrimination, right to a transcript of the proceedings and right to appellate review).

61. *Id.* at 17.

62. *Id.* at 18-19.

63. *Id.*

64. *Id.* at 61 (Black, J., concurring).

65. See CHAMPION, *supra* note 15, at 21.

66. MELANIE KING, NAT'L CTR. FOR JUVENILE JUSTICE, GUIDE TO THE STATE JUVENILE JUSTICE PROFILES 1 (2006).

67. *Id.* at 2.

structure.<sup>68</sup> Jurisdictions also vary in the confidentiality and privacy protections provided to juveniles. In addition, the punishment or orders that a juvenile court can issue vary in severity.<sup>69</sup> One commonality that exists within all juvenile justice systems is that a juvenile can be charged as an adult for a crime if the statutory requirements for that jurisdiction are met.<sup>70</sup> This feature of dealing with juvenile crime is used increasingly and is representative of the increased focus on punishing juveniles.

### C. Calls for Reform and the Efforts to Reform

Given the tremendous amount of pressure on juvenile justice systems to reform, there are serious threats to the traditional nature of these systems and the systems' goals of rehabilitation rather than punishment.<sup>71</sup>

Today, many legal analysts question this goal of the court, renewing the debate on whether to punish or to rehabilitate juvenile criminals. Whether juvenile courts actually treat children more benevolently than the adult court system is irrelevant because the public perception is that juveniles are treated differently. Regardless of the reality of the courts' treatment of juveniles, this perception of leniency drives many of the current changes in juvenile law.<sup>72</sup>

In light of perceived increases in crime, beliefs that juveniles are engaged in more serious violent crime, and notions of leniency, jurisdictions have increased adult prosecutions of juveniles, imposed harsher juvenile sentences, and reduced the protections within the juvenile justice system.<sup>73</sup> The tools of the juvenile court are viewed by some as weak, incapable of deterring youth from committing future offenses, and inept at protecting the greater community.<sup>74</sup>

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68. *Id.* at 5 (outlining states with centralized juvenile justice systems: Alaska, Delaware, Florida, Maine, Maryland, New Hampshire, North Carolina, Rhode Island, South Carolina, and Vermont; and states with decentralized juvenile justice systems: California, Michigan, New York, Pennsylvania, and Texas).

69. See MINN. STAT. § 260.125 (codified as amended at 1999 Minn. Laws, ch. 139, art.4, § 3) (explaining that juvenile courts have broad discretion in applying sentences to juveniles who are adjudicated involved; one such practice is blended sentences such that part of a juvenile's sentence is a typical form of juvenile court punishment like probation or a suspended adult sanction that will be imposed if the juvenile fails to comply with the traditional juvenile punishment).

70. See generally KING, *supra* note 66 (describing the different juvenile justice systems).

71. Maureen Pacheco, *The Defense of Children – A Call to Arms*, 34 CHAMPION 49, 49 (2010).

72. Candace Zierdt, *The Little Engine That Arrived at the Wrong Station: How to Get Juvenile Justice Back on the Right Track*, 33 U.S.F. L. REV. 401, 407 (1999).

73. See Oddo, *supra* note 10, at 113-14.

74. See Van Vleet, *supra* note 22, at 209.

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To address the calls for reform, many jurisdictions have implemented a host of “get tough” measures.<sup>75</sup> These reforms include waiver to adult court, boot camps, and the removal of confidentiality and anonymity.<sup>76</sup> The transfer of juveniles to adult court is statutory.<sup>77</sup> Each jurisdiction’s statute sets out the minimum age for transfer and the nature of the criminal charges that can lead to a transfer. In Virginia, for example, any juvenile age fourteen or older who is charged with murder is automatically tried in adult criminal court.<sup>78</sup> In order to deal with the youth who remain in juvenile courts more adequately, many jurisdictions have implemented stronger punishments for those youth that were adjudicated as delinquent.<sup>79</sup> In many jurisdictions, both minimum and maximum sentences have been increased.<sup>80</sup>

Another growing trend in juvenile courts is the elimination of privacy and confidentiality as an effort to stop the perceived coddling of juvenile offenders.<sup>81</sup> This loss of privacy and confidentiality can mean that the juvenile courts are open to the public and the press.<sup>82</sup> It can also mean that the name and photograph of a juvenile accused of a crime are disclosed to the public.<sup>83</sup> Additionally, it may mean that a juvenile’s arrest record or court documents are public.<sup>84</sup> Or, it may mean that the court system shares such information with third parties such as the school system or social services.<sup>85</sup> This form of information and disclosure sharing is a direct invasion on the privacy and confidentiality that were hallmarks of the juvenile justice system when it was formed.<sup>86</sup>

Specific instances of eliminating privacy and confidentiality vary from jurisdiction to jurisdiction.<sup>87</sup> Federal law allows fingerprinting

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75. *Id.* at 204.

76. *See id.* (describing the use of boot camps by juvenile courts).

77. *See* Zierdt, *supra* note 72, at 415-419.

78. Oddo, *supra* note 10, at 114.

79. Paul J. McNulty, *Natural Born Killers? Preventing the Coming Explosion of Teenage Crime*, 71 POL’Y REV. 84, 86 (1995).

80. Oddo, *supra* note 10, at 114-15.

81. *See* U.S. DEP’T OF JUSTICE OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, OFFICE OF JUSTICE PROGRAMS, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME 45 (1996).

82. Zierdt, *supra* note 72, at 420-21.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. Zierdt, *supra* note 72, at 420-21.

and photographing of juveniles who commit “adult felonies.”<sup>88</sup> California allows public disclosure of a juvenile’s name when the juvenile is at least fourteen-years-old and has committed certain offenses.<sup>89</sup> In North Dakota, juvenile courts are required to turn over certain information to schools upon request in cases where the adjudication of a delinquency would have been a felony in adult court.<sup>90</sup> In Florida, a law enforcement agency may release the name, picture, and address of a child charged with an offense, which would constitute a felony.<sup>91</sup> Again, these efforts at reform aim to restore faith in the juvenile justice system’s effectiveness at dealing with juvenile crime and protecting the community.

#### D. Why the System Needs Reform

Various groups call for the reform of the juvenile justice system to address the needs of the children involved and to protect the community from juvenile crime.<sup>92</sup> Some urge reform because the systems have failed to provide meaningful opportunities for the rehabilitation of youth. Statistics such as the fact that “New York State’s abusive youth prisons have an eighty-nine percent recidivism rate for boys and cost \$210,000 per youth—a one-year equivalent of four years at Harvard—to produce an adult criminal” give credence to these critics.<sup>93</sup> Critics also point out issues of abuse and constitutional failure within the system.<sup>94</sup> Others urge reform because they feel the juvenile justice system lacks accountability, and youth need harsher consequences and punishment rather than a mere slap on the wrist and coddling.<sup>95</sup> Even if the reformers/critics have different views on why reform is needed, most claim to be concerned for the development of

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88. *Id.*

89. See CAL. WELF. & INST. CODE § 204.5 (West 1998).

90. See N.D. CENT. CODE § 27-20-51 (Supp. 1997).

91. See FLA. STAT. ANN. § 985.04 (West 1998).

92. These groups include, but are not limited to, both national and local groups such as the Center for Juvenile Justice Reform, the National Center for Juvenile Justice, the Coalition for Juvenile Justice, and the Center for Juvenile and Criminal Justice.

93. Marian Wright Edelman, *Juvenile Justice Reform: Making the “Missouri Model” an American Model*, HUFFINGTON POST (Mar. 15, 2010, 9:50 AM), [http://www.huffingtonpost.com/marian-wright-edelman/juvenile-justice-reform-m\\_b\\_498976.html](http://www.huffingtonpost.com/marian-wright-edelman/juvenile-justice-reform-m_b_498976.html).

94. Ken Steir, *Why Reforming the Juvenile-Justice System is So Hard*, TIME (Sept. 16, 2009), <http://www.time.com/time/nation/article/0,8599,1924255,00.html>.

95. See Blum, *supra* note 10, at 380-93; see also Gordon A. Martin Jr., *Open the Doors: A Judicial Call to End Confidentiality in Delinquency Proceedings*, 21 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 393, 401-02 (1995).

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the children and their transformation into productive members of society as well as the protection of the greater community.<sup>96</sup>

Public access is commonly presented as a way to reform the juvenile justice system. As the traditional level of privacy and confidentiality in juvenile courts is unique, many critics believe that the failings of the system can be attributed at least partially to the lack of public access.<sup>97</sup> A strong argument for greater public access to juvenile proceedings is an effort to stop corruption and incompetence in the juvenile justice system.<sup>98</sup> Some argue that the closed doors of the juvenile justice system have served to insulate the adults in the system allowing children to be subject to abuse, inefficiency, and unprofessional conduct.<sup>99</sup> One such incident occurred recently in Luzerne County, Pennsylvania.<sup>100</sup> A former Luzerne County judge allegedly received kickbacks for sending children to a for-profit detention center.<sup>101</sup> The alleged corruption occurred between 2003 and 2008, resulting in large numbers of children being sent to the detention center for low-level misdemeanors.<sup>102</sup>

Such scandals illuminate the potential for inconsistency, exploitation, impropriety, and abuse in the juvenile courts.<sup>103</sup> Thus, some proponents of greater public access and diminished confidentiality in juvenile courts argue that greater public scrutiny will serve to protect

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96. Edelman, *supra* note 93. (“We need a system that returns young people to the community prepared to succeed and become productive adults, to serve as a model for the entire nation. We don’t need systems that do further harm and return youths, most of them nonviolent offenders, back to their communities hopeless, angry and unprepared to succeed in life.”).

97. *See, e.g.*, Blum, *supra* note 10, at 387-88; Martin, *supra* note 95, at 401-02.

98. *See* Trasen, *supra* note 46, at 378 (“[C]ritics believe that public access to dependency proceedings could promote a higher degree of fairness and effectiveness to the children involved in these cases.”).

99. *Id.*

100. Dave Janoski, *Luzerne County ‘Zero Tolerance’ Policy Accepted in Scandal*, TIMES TRIB. (Nov. 10, 2009) <http://thetimes-tribune.com/luzerne-county-zero-tolerance-policy-accepted-in-scandal-1.406650>.

101. *Id.* The former judges were indicted by a federal grand jury on forty-eight counts including extortion, money laundering, bribery, wire fraud and other offenses. *See also* Terrie Morgan-Besecker, *Ex-judges’ Motions Get Rejected*, TIMES LEADER (July 19, 2010) [http://www.timesleader.com/news/hottopics/judges/Ex-judges\\_rsquo\\_\\_motions\\_get\\_rejected\\_07-07-2010.html](http://www.timesleader.com/news/hottopics/judges/Ex-judges_rsquo__motions_get_rejected_07-07-2010.html).

102. *Luzerne County “Kids for Cash” Juvenile Court Scandal*, JUV. L. CENTER, <http://www.jlc.org/luzerne/> (last visited Oct. 17, 2011).

103. Since the scandal in Luzerne County, Pennsylvania has enacted many reforms to the system to protect the children involved and restore public faith, but surprisingly none of these reforms involve confidentiality and privacy. *See* Press Release, Amy Kelchner, Comm’n Coordinator, Admin. Office of Pa. Courts, Chief Justice Castille Provides Update on Reforms Resulting from Juvenile Justice Scandal (Mar. 1, 2011).

children from a potentially abusive and exploitive system.<sup>104</sup> By granting greater public access, they argue, courts would be forced to use more consistent standards in the adjudication of juveniles.<sup>105</sup> Also, it would ensure that judges behave in an ethical and professional manner and promote greater public confidence in the system.<sup>106</sup> There is some strength to the argument for public access in light of the potential abuse and exploitation of children; however, in light of the negative consequences of public access, other reforms that equally protect children must also be explored.

#### E. The Reality of Race and Class in the Juvenile Justice System

A discussion of the juvenile justice system cannot ignore the role that race and class play within the administration of justice for juveniles. Many describe the criminal justice system as disproportionately harsh toward people of color. Paul Butler summarizes these critiques of the criminal justice system, stating that the system is “unjust because there are too many people of color—especially black people—in prison . . . [and] because the war on drugs has been selectively prosecuted in the black community, thereby resulting in a disproportionate number of arrests and incarcerations for crimes that blacks do not commit disproportionately.”<sup>107</sup>

This inequity is present in the juvenile justice system as well. The Sentencing Project reports that African American youth represent only seventeen percent of their age group within the general population, but they represent forty-six percent of juvenile arrests, thirty-one percent of referrals to juvenile court, and forty-one percent of waivers to adult court.<sup>108</sup> Furthermore, the National Council on Crime and Delinquency has found that black youth are detained at higher rates than white and Latino youth, and Latino youth are detained at higher rates than white youth.<sup>109</sup> The Sentencing Project has concluded that

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104. See Trasen, *supra* note 46 and accompanying text.

105. *Id.*

106. *Id.* at 379.

107. Paul Butler, *Starr is to Clinton as Regular Prosecutors are to Blacks*, 40 B.C. L. REV. 705, 707 (1999).

108. The Sentencing Project, *Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers* 9 (2008), available at [http://www.sentencingproject.org/doc/publications/rd\\_reducingracialdisparity.pdf](http://www.sentencingproject.org/doc/publications/rd_reducingracialdisparity.pdf).

109. See Will Drakeford & Lili Frank Garfinkel, *Differential Treatment of African American Youth*, The Nat'l Center on Education, Disability, and Juv. Just., [http://www.edjj.org/Publications/pub\\_06\\_13\\_00\\_2.html](http://www.edjj.org/Publications/pub_06_13_00_2.html) (last visited Nov. 12, 2011), reprinted in *Healing Racism*, 9 *Reclaiming Children & Youth J.*, no. 1 (2000).

black juveniles are incarcerated at six times the rate of white juveniles, and Latino juveniles are incarcerated at double the rate of white juveniles.<sup>110</sup> It is clear from these statistics that the juvenile justice system suffers from the same flawed inequality as the general criminal justice system.<sup>111</sup> Any discussion of reforming the juvenile justice system must acknowledge and account for racial inequalities in the system.

#### F. Washington, D.C.: A Failing System

Washington, D.C.'s juvenile justice system has fallen under great scrutiny and is in serious need of reform. However, it remains unclear how this broken system will be changed and if it will lead to better results for the youth involved. In Washington, D.C., juvenile adjudications fall within the province of the Juvenile and Neglect Branch of the Family Court.<sup>112</sup> The Family Court states that child safety and prompt permanency are the primary considerations in decisions involving children.<sup>113</sup> It also states another goal of providing "early intervention and diversion opportunities for juveniles charged with offenses—to enhance rehabilitation and promote public safety."<sup>114</sup>

In 2009, the Family Court resolved 3,877 juvenile cases.<sup>115</sup> Of the cases before Family Court in 2009, the youth involved were detained in forty-three percent of the cases.<sup>116</sup> Of those 3,877 juvenile cases, 1,095 juvenile offenders were eventually placed on probation.<sup>117</sup> D.C.'s Department of Youth Rehabilitation Services ("DYRS"), a cabinet level administrative agency, oversees "detention, commitment

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110. *Id.*

111. *Id.*

112. *Family Court Operations Division Components*, Superior Court of DC, <http://www.dccourts.gov/dccourts/superior/family/components.jsp> (last visited Nov. 12, 2011) (alteration in original). The Family Court is located on the JM level of D.C. Superior Court and is set apart from the rest of the courthouse. It has a separate entrance. It has many seating areas as the proceedings in Family Court are closed and those waiting for their case must wait outside the courtroom for their case to be called. Usually, the JM level is filled with activity and families.

113. SUPERIOR COURT OF DC, FAMILY COURT 2009 ANN. REPORT 2 (2010), available at <http://www.dccourts.gov/dccourts/docs/family/2009FamilyCourtAnnualReport.pdf>.

114. *Id.* In June 2010, the New Beginnings Youth Development Center opened. *Id.* This \$46 million facility is modeled after Missouri's success in dealing with juvenile offenders. *Id.* New Beginnings holds many of D.C.'s juvenile offenders, but it is less like a prison and more like a school. Martha T. Moore, *For D.C., Hope in Treating Young Offenders*, USA TODAY, May 28, 2010, at 1A, available at [http://www.usatoday.com/news/nation/2010-05-18-offenders\\_N.htm](http://www.usatoday.com/news/nation/2010-05-18-offenders_N.htm).

115. SUPERIOR COURT OF DC, FAMILY COURT 2009 ANN. REPORT 32 (2010), available at <http://www.dccourts.gov/dccourts/docs/family/2009FamilyCourtAnnualReport.pdf>.

116. *Id.* at 76.

117. *Id.* at 37.

and aftercare services for youth held under its care in its facilities or residing in the DC community.”<sup>118</sup>

It is fair to describe D.C. as having a fairly harsh, but unsuccessful approach to juvenile crime. During 2010, D.C. experienced a rash of homicides involving youth.<sup>119</sup> At least a dozen juveniles under the supervision of DYRS were arrested and charged for a number of these homicides.<sup>120</sup> One particularly high-profile murder was that of Brian Betts, a D.C. middle school principal, killed in April.<sup>121</sup> Three young men who were under the supervision of DYRS have been arrested and charged for Betts’ murder.<sup>122</sup> All three youths had juvenile arrests records.<sup>123</sup> One of the youths had allegedly absconded from a group home while the other two had failed to appear at court hearings or meetings with juvenile officials and were being sought out by DYRS.<sup>124</sup> Many other murders in both 2010 and 2011 have been connected with D.C.’s juveniles and DYRS.<sup>125</sup>

D.C.’s juvenile courts are currently closed to the public with youth enjoying near absolute privacy and anonymity. Their juvenile records are sealed, and their names and other personal information are not released to the public.<sup>126</sup> A public outcry for greater accountability for youth and greater supervision of youth in the juvenile justice system has been growing as these incidents of violence make the news.<sup>127</sup> Former Attorney General for the District of Columbia, Peter Nickles, attempted to respond to these demands for change stating, “I am very disturbed by the confidentiality requirements . . . [t]hey put a

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118. THE DISTRICT OF COLUMBIA: DEPARTMENT OF YOUTH REHABILITATION SERVICES, <http://dyrs.dc.gov/DC/DYRS/> (last visited Nov. 12, 2011).

119. See Emily Babay & Freeman Klopott, *Youth Caught in Slain Professor’s Jeep was City Ward*, WASH. EXAMINER, Oct. 26, 2010, available at <http://washingtonexaminer.com/news/2010/10/youth-caught-slain-professors-jeep-was-city-ward>.

120. *Id.*

121. Dan Morse et al., *Police: Principal Brian Betts Met Alleged Killers on Sex Chat Line*, WASH. POST, May 3, 2010, at A01.

122. Editorial, *A shrouded justice system; Betts Murder Raises Questions About How D.C., Courts Handle Young Offenders*, WASH. POST, May 7, 2010, at A26.

123. *Id.*

124. *Id.*

125. See Jeffrey Anderson & Matthew Cella, *Violent Crime of DYRS Wards Knows No Bounds*, WASH. TIMES, Nov. 28, 2010, at A01. A thirty-one year old Catholic University student was murdered on August 22, 2010 when he was biking home from work; Eric Foreman, a 16 year old, was arrested and charged for the murder. Roz Plater, *Teen Arrested in Murder of Catholic University Student*, MYFOXDC (Sept. 23, 2010), <http://www.myfoxdc.com/dpp/news/dc/teen-arrested-in-murder-of-catholic-university-student-092310>.

126. D.C. CODE ANN. §§ 16-2331-16-2332, 16-2363 (1998); Tim Craig, *D.C. Council Passes Bill to Identify Violent Juvenile Offenders*, WASH. POST, Oct. 19, 2010, at B04.

127. See Craig, *supra* note 126.

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cloak of mystery in these cases of juveniles who are in the criminal justice system. How do you hold people accountable?”<sup>128</sup> His comments indicate a clear desire to “get tough” on juvenile crime.

After recommendations by Nickles to reform the juvenile justice system in a way that promoted greater accountability, the D.C. City Council passed a bill<sup>129</sup> to identify violent juvenile offenders.<sup>130</sup> In support of this bill, one Councilmember stated, “[y]oung people think they can act with impunity. They think there are no consequences.”<sup>131</sup> The bill was not signed by Mayor Adrian Fenty during the last days of his term in 2010, but it did pass unanimously.<sup>132</sup> The legislation provides that complete juvenile records would remain sealed; however, a juvenile’s name and offense could be publicly released once that juvenile has been convicted of a violent crime or a major property crime.<sup>133</sup> Once a juvenile has been convicted, his or her personal information can be released for all subsequent arrests, even if there is no conviction for subsequent crimes.<sup>134</sup>

Mayor Fenty lost the 2010 mayoral election to Vincent Gray.<sup>135</sup> It is still unclear how Gray will lead the city on the issue of juvenile justice. On Gray’s campaign website, he pledged a commitment to ending youth violence and reducing juvenile crimes.<sup>136</sup> The website stated, “[i]t’s time we overhaul our hugely dysfunctional juvenile jus-

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128. Harry Jaffe, *Time to Shed Light on Juvenile Killers*, EXAMINER (May 7, 2010) <http://washingtonexaminer.com/local/dc/harry-jaffe-time-shed-light-juvenile-killers>.

129. Craig, *supra* note 126. D.C.’s lawmaking power is quite different than that of other jurisdictions. D.C. has a thirteen member City Council that serves as the legislative body for the District. *District of Columbia Research Guide*, GEORGETOWN U. L. CENTER, <http://www.ll.georgetown.edu/states/dc-in-depth.cfm> (last visited Nov. 12, 2011). The City Council has the authority to enact laws, but D.C. legislation and budgets need approval from the Federal Government. *Id.* If approved by a majority in the City Council, legislation is then sent to the Mayor. *Id.* If the bill becomes an act, the Council chair sends the act to the U.S. Congress to review for thirty legislative days. *Id.* If the act is a criminal act, Congress has sixty legislative days. *Id.* If Congress takes no action, the act becomes a law. *Id.* Congress can pass a joint resolution disapproving the act. *Id.* The joint resolution has to be approved by the President. *Id.*

130. Craig, *supra* note 126; PHIL MENDELSON, CHAIRMAN, COMM. ON PUB. SAFETY AND THE JUDICIARY, COUNCIL OF D.C., EXPANDING ACCESS TO JUVENILE RECORDS AMENDMENT ACT OF 2010, REP. ON B. 18-344 (D.C. 2010), *available at* <http://www.dccouncil.us/image/00001/20100818164637.pdf> [hereinafter EXPANDING ACCESS TO JUVENILE RECORDS].

131. Craig, *supra* note 126.

132. *Id.*

133. *Id.*; EXPANDING ACCESS TO JUVENILE RECORDS, *supra* note 130.

134. Craig, *supra* note 126.

135. Michael Ruane et al., *Vincent Gray Wins D.C.’s Mayor’s Race over Adrian Fenty*, WASH. POST (Sept. 15, 2010) <http://www.washingtonpost.com/wpdyn/content/article/2010/09/14/AR2010091402473.html>.

136. Vince Gray for Mayor, <http://www.vincegrayformayor.com/publicsafety/> (last visited Nov. 16, 2010) (removed after Gray won the election).

tice and rehabilitation system so that the city's youths are less likely to engage in criminal activity and more likely to receive the treatment and wrap-around services they need if they do come in contact with the juvenile justice system."<sup>137</sup> Gray seems to indicate a commitment and desire to reform the juvenile justice system, but it is unclear if he will choose to continue the efforts made by his predecessor. It remains to be seen whether he will decrease privacy and confidentiality or pursue other types of reforms aimed at fixing the system and rehabilitating juveniles. If DYRS and juveniles under its supervision continue to be linked to violent crime in D.C., it is likely that Gray will have to take some action and that that action will likely change the nature of the current juvenile justice system with the adoption of more "get tough" measures.

If the legislation that removes confidentiality for some D.C. juveniles takes effect, the juvenile justice system in D.C. will change dramatically. As this Note will argue, the Family Court of D.C. Superior will no longer protect the children involved. It will treat them with the same indignity that is thrust upon adults in criminal court. It is also unlikely that crimes committed by juveniles already involved in the juvenile justice system will see any decrease. The loss of anonymity and public access to juvenile records will not serve to curb juvenile crime nor will it serve to deter the juveniles under court supervision. Only real efforts at making strides towards rehabilitation offer any hope of decreasing juvenile crime.<sup>138</sup>

## II. PRIVACY AND ITS IMPORTANCE IN JUVENILE COURT

### A. Privacy and its Sociological Benefits and Importance to Child Development

Privacy is more than a legal principle and plays an important role in society and the development of a child. Definitions of privacy vary immensely. Daniel Solove has presented six headings to help understand what privacy is.<sup>139</sup> These headings include the right to be let alone, limited access to the self, secrecy, control of personal information, personhood, and intimacy.<sup>140</sup> Under the heading of secrecy is the control of personal information.<sup>141</sup> This classification of privacy is

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137. *Id.*

138. See discussion *infra* Part IV.

139. Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1092 (2002).

140. *Id.* at 1094.

141. See *id.*

the most relevant in the context of the juvenile justice system. Under this notion of privacy, “privacy is violated by the public disclosure of previously concealed information.”<sup>142</sup> Judge Richard Posner describes this type of privacy interest as “want[ing] more power to conceal information about themselves that others might use to their disadvantage.”<sup>143</sup> Another relevant heading to this context is the notion of personhood. Privacy also allows a person to be who they choose to be.<sup>144</sup>

Privacy plays a critical and varying role in the development of a child. For children and adolescents, control of personal information and the notion of personhood are critical to their development into adults.<sup>145</sup> Keeping juvenile courts closed is partially an effort to recognize the juvenile’s unique need for privacy. “[T]eenagers have a heightened need for personal privacy . . . . For an adolescent, privacy is a ‘marker of independence and self-differentiation.’ If the child’s privacy is threatened, the resulting stress can seriously undermine the child’s self-esteem.”<sup>146</sup> Privacy and confidentiality in juvenile courts is thus connected to the goals of rehabilitation through its link to the child’s sense of self and the child’s self-esteem.

Juvenile courts and proceedings are different from adult proceedings in criminal court.<sup>147</sup> Most notably, juvenile court proceedings were traditionally closed to the public to protect the identity of the juveniles.<sup>148</sup> However, every juvenile justice system allows some measure of public access to juvenile courts.<sup>149</sup> Usually, this access is such that criminal courts can access juvenile records.<sup>150</sup> Other jurisdictions allow much greater access.<sup>151</sup>

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142. *Id.* at 1105.

143. RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 271 (1981).

144. Solove, *supra* note 139, at 1116-17 (discussing the philosophical work of Stanley Benn and Jeffrey Reiman).

145. See Jessica R. Feierman & Riya S. Shah, *Protecting Personhood: Legal Strategies to Combat the Use of Strip Searches on Youth in Detention*, 60 *RUTGERS L. REV.* 67, 93 (2007).

146. *Id.* at 93.

147. CHAMPION, *supra* note 15, at 19.

148. *Id.*

149. U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ-161255, *PRIVACY AND JUVENILE JUSTICE RECORDS: A MID-DECADE STATUS REPORT (1997)*, available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/PJJR.PDF>.

150. *Id.*

151. *See id.*

## B. The Right to Privacy

### 1. The Constitutional Right to Privacy

Privacy has been held to be a constitutionally protected fundamental right.<sup>152</sup> Supreme Court justices have often disagreed on the source of this constitutional right.<sup>153</sup> A number of justices believe this right is rooted in the liberty clause of the Fifth and Fourteenth Amendments<sup>154</sup> while others believe it is found in the penumbras created by emanations from the protections set out in the Bill of Rights.<sup>155</sup> Regardless of its source, the Supreme Court and its decisions recognize a constitutional right to privacy that includes the right to family autonomy,<sup>156</sup> a woman's right to choose regarding abortion,<sup>157</sup> a right to make decisions regarding contraception,<sup>158</sup> and a right to a measure of sexual freedom.<sup>159</sup> This right is not absolute and does not extend to all contexts.<sup>160</sup>

### 2. A Juvenile's Constitutional Right to Privacy

There is a constitutionally protected right to privacy, but for juveniles, it has been recognized and protected only in limited circumstances.<sup>161</sup> The Supreme Court has not addressed whether minors possess rights to informational privacy, but it has found that children

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152. *See* *Griswold v. Connecticut*, 381 U.S. 479, 494 (1965); *Roe v. Wade*, 410 U.S. 113, 154 (1973).

153. *See generally* *Griswold*, 381 U.S. 479 (invalidating a Connecticut statute that prohibited the use of contraceptives). The majority opinion was written by Justice Douglas and the concurrences were written by Goldberg and Harlan – all three opinions provided different sources for a constitutional right to privacy.

154. *See, e.g.,* *Roe*, 410 U.S. at 152.

155. *See generally* *Griswold*, 381 U.S. at 487.

156. *See* *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (invalidating a local housing ordinance that prevented a grandmother from living with her two grandchildren, who were first cousins to each other because they were not a single nuclear family).

157. *See* *Roe*, 410 U.S. at 164.

158. *Griswold*, 381 U.S. at 485.

159. *See generally* *Lawrence v. Hardwick*, 539 U.S. 558 (2003) (holding a Texas anti-sodomy statute unconstitutional as a violation of the right to privacy).

160. *See, e.g.,* *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

161. In *Carey v. Population Services International*, a plurality of the Supreme Court held that “the right to privacy in connection with decisions affecting procreation extends to minors as well as adults.” *Carey v. Population Servs. Int'l*, 431 U.S. 678, 693 (1977); *see also* *Bellotti v. Baird* (*Bellotti II*), 443 U.S. 622, 633 (1979) (holding parental consent laws valid if some judicial bypass proceeding exists so that a minor who is competent to make the decision about whether to terminate her pregnancy could get judicial authorization to have an abortion); *Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 74 (1976) (“Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority.”).

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do have a right, albeit with limitations, to privacy in some respects.<sup>162</sup> The Supreme Court in *In re Gault* discussed the role of privacy in the context of juvenile courts.<sup>163</sup> The Court notes that this privacy is not absolute and deems it “more rhetoric than reality.”<sup>164</sup> In the context of juvenile courts, this right to privacy can be eclipsed by the justice system’s interest in and commitment to due process for a juvenile.<sup>165</sup> In its discussion of due process, the Court concludes that privacy can be maintained in the juvenile justice system while still allowing for constitutional due process.<sup>166</sup>

Privacy in juvenile courts is also complicated by the constitutional rights of other interested groups. In 1979, the Supreme Court reversed convictions related to a newspaper publishing the names of juvenile offenders based on the First and Fourteenth Amendment.<sup>167</sup> In a concurring opinion, Justice Rehnquist discusses the function of privacy in the juvenile court context:

The prohibition of publication of a juvenile’s name is designed to protect the young person from the stigma of his misconduct and is rooted in the principle that a court concerned with juvenile affairs serves as a rehabilitative and protective agency of the State . . . . Publication of the names of juvenile offenders may seriously impair the rehabilitative goals of the juvenile justice system and handicap the youths’ prospects for adjustment in society and acceptance by the public. This exposure brings undue embarrassment to the families of youthful offenders and may cause the juvenile to lose employment opportunities or provide the hardcore delinquent the kind of attention he seeks, thereby encouraging him to commit further antisocial acts.<sup>168</sup>

In spite of the importance of confidentiality and privacy in the juvenile justice system, the state’s legitimate interest in protecting the identity of juvenile offenders did not outweigh the right of the press in

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162. *Bellotti II*, 443 U.S. at 633 (“A child, merely on account of his minority, is not beyond the protection of the Constitution.”).

163. *See In re Gault*, 387 U.S. 1, 24-26 (1967).

164. *Id.* at 24.

165. *See id.*

166. *Id.* at 25.

167. *See Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 103-06 (1979).

168. *Id.* at 107-08. Publicity “place[s] additional stress on [the juvenile] during a difficult period of adjustment in the community, and it interfere[s] with his adjustment at various points when he [is] otherwise proceeding adequately.” *Id.* (Rehnquist, J., concurring) (quoting David C. Howard et al., *Publicity and Juvenile Court Proceedings*, 11 CLEARINGHOUSE REV. 203, 210 (1977)).

this instance.<sup>169</sup> The Court held that criminal sanctions against individuals who lawfully acquired the identity of juvenile offenders and then publish the identities violate freedom of speech and freedom of press.<sup>170</sup> The right of a juvenile to rehabilitate with the aid of confidentiality and privacy are far from an absolute although still an important feature for rehabilitation of juveniles.

The Supreme Court, in *In re Gault*, noted that “the juvenile court planners envisaged a system that would practically immunize juveniles from ‘punishment’ for ‘crimes’ in an effort to save them from youthful indiscretions and stigmas due to criminal charges or convictions.”<sup>171</sup> Much of the impetus behind providing privacy to juvenile offenders is the notion that juveniles have diminished capacity.<sup>172</sup> Their age alone makes them less culpable.<sup>173</sup> Children have a lack of maturity and thus need a less punitive response to their misdeeds.<sup>174</sup>

Juvenile courts must afford juveniles constitutional rights, but they may allow privacy and confidentiality to remain a priority as the system conducts its business given the unique nature of dealing with criminal behavior from children. States are certainly not required to protect the identity or privacy of juveniles—privacy and confidentiality in the juvenile courts are not a constitutional right.<sup>175</sup> Unfortunately other state interests and policy concerns may often outweigh any need for or commitment to juvenile confidentiality.<sup>176</sup>

As with the constitutionally recognized freedom of the press, other constitutionally recognized freedoms make privacy and confidentiality in the juvenile courts more complicated. In *Davis v. Alaska*, the juvenile’s right to confidentiality of proceedings was overcome by the constitutional right of confrontation.<sup>177</sup> There, the Court held

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169. *See id.*

The sole interest advanced by the State to justify its criminal statute is to protect the anonymity of the juvenile offender. It is asserted that confidentiality will further his rehabilitation because publication of the name may encourage further antisocial conduct and also may cause the juvenile to lose future employment or suffer other consequences for this single offense.

*Id.* at 104.

170. *See id.*

171. *In re Gault*, 387 U.S. at 60.

172. *See* Van Vleet, *supra* note 22, at 208; *see also* Martin R. Gardner, *The Right of Juvenile Offenders to Be Punished: Some Implications of Treating Kids as Persons*, 68 NEB. L. REV. 182, 191 (1989).

173. Gardner, *supra* note 172, at 191.

174. *Id.*

175. Oddo, *supra* note 10, at 111.

176. *Id.*

177. *Davis v. Alaska*, 415 U.S. 308, 320 (1974).

“that the State’s desire that Green [the juvenile] fulfill his public duty to testify free from embarrassment and with his reputation unblemished must fall before the right of petitioner to seek out the truth in the process of defending himself.”<sup>178</sup> The Court acknowledged the state’s valid and important interest in protecting juveniles and ensuring that the juvenile courts fulfill their rehabilitative purpose.<sup>179</sup> However, the Court viewed the disclosure of a juvenile’s record from juvenile court for purposes of impeachment as only a “temporary embarrassment.”<sup>180</sup>

A juvenile’s enjoyment of privacy and confidentiality in the courts comes second to the exercise of other constitutional rights.<sup>181</sup> The holdings and dicta in *Kent v. United States*<sup>182</sup> and *In re Gault*<sup>183</sup> indicate that juveniles must be provided due process rights and procedural fairness even in juvenile court.<sup>184</sup> These guarantees conflict with closed proceedings and confidentiality; and ultimately, it seems that the promise of due process supersedes any commitment to or promise of juvenile privacy and confidentiality something with no real constitutional protection.<sup>185</sup>

### 3. Current State of Confidentiality in Juvenile Courts

American jurisdictions have four general approaches to juvenile confidentiality.<sup>186</sup> These approaches vary in the degree of confidentiality provided and in who retains the discretion and authority over confidentiality.<sup>187</sup> The approaches are as follows: (1) allowing juvenile judges the discretion to disclose juvenile records with some statutory guidelines and standards; (2) allowing juvenile courts to disclose juvenile records to school officials; (3) allowing disclosure of juvenile

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178. *Id.*

179. *Id.* at 319.

180. *Id.* I disagree with the Court’s claim that disclosing the juvenile record will only be a “temporary embarrassment.” The events that take place in a courtroom do not stay in the courtroom. These events are often reported by the media, and thus disclosing the juvenile record will not be temporary. What was previously private will now be known by many and the facts surrounding that juvenile record will now be known to the public. This is especially true given the internet. If information is reported by the media, it will be available on the internet and will never again be private.

181. See *In re Gault*, 387 U.S. 1 (1967); *Kent v. United States*, 383 U.S. 541, 555 (1966).

182. *Kent*, 383 U.S. at 555.

183. *In re Gault*, 387 U.S. at 71-72.

184. See Blum, *supra* note 10, at 372-75.

185. *Id.* at 375; Paul R. Kfoury, *Confidentiality and the Juvenile Offender*, 17 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 55, 64 (1991).

186. See Blum, *supra* note 10, at 377-78.

187. *Id.*

records when juveniles are adjudicated as delinquent for certain serious felonies; and (4) allowing almost full access to juvenile courts and full disclosure of juvenile records.<sup>188</sup> A jurisdiction's choice on how to treat a juvenile's identity and record can be representative of how the jurisdiction balances juvenile rehabilitation and concerns for public safety.<sup>189</sup> For example, Colorado allows public disclosure of all juveniles adjudicated as delinquent of committing felonies or crimes involving weapons, and Kansas allows public disclosure of court records for juvenile felons over the age of fourteen.<sup>190</sup> These practices indicate a some degree of commitment to privacy in juvenile justice but a compromise of that commitment when the crime is of a more serious nature.

#### 4. Arguments Against Privacy in Juvenile Courts

There are many strong calls for eliminating privacy and confidentiality in the juvenile justice system.<sup>191</sup> These calls come from community leaders, politicians, citizens, those involved in the system, and judges who adjudicate offenses committed by juveniles.<sup>192</sup> The motivations are often similar. Most seek to increase the effectiveness of the courts, improve accountability for the youth and the adults involved, and keep the community safe.<sup>193</sup> The American Prosecutors Research Institute, which is in favor of increasing public access, believes "[t]he public has the right to know the identities of serious, violent, and habitual offenders who commit crimes in their communities . . . the opening of juvenile court proceedings in these cases will ensure greater accountability for the juvenile offender and the process [as] a whole."<sup>194</sup>

In Texas, there is proposed legislation that would reveal juvenile records.<sup>195</sup> This legislation would reveal to teachers and other service providers the juvenile records of a student in an effort to ensure that

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188. *Id.* at 378-79.

189. *See id.* at 387.

190. *Id.* at 380.

191. *Id.* at 352; Oddo, *supra* note 10, at 111.

192. *See* Blum, *supra* note 10, at 380; Martin, *supra* note 95, at 404-08; Oddo, *supra* note 10, at 105.

193. *See* Blum, *supra* note 10, at 352; Oddo, *supra* note 10, at 111.

194. AMERICAN PROSECUTORS RESEARCH INST., PROSECUTORS' POLICY RECOMMENDATIONS ON SERIOUS, VIOLENT, AND HABITUAL YOUTHFUL OFFENDERS 22 (1996), available at <https://www.ncjrs.gov/pdffiles1/Digitization/166791NCJRS.pdf>.

195. S.B. 1106, 2011 Leg., 82nd Sess. (Tex. 2011), available at <http://www.hro.house.state.tx.us/pdf/ba82r/sb1106.pdf>.

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those who work with the student are well advised of a student's violent nature.<sup>196</sup> This statute is very much an effort to keep the community safe rather than protect the privacy of juveniles.

For some, the call to end juvenile confidentiality is a rejection of the notion that juveniles are not responsible for their crimes and need to be reformed rather than punished.<sup>197</sup> Others still advocate for the goals of rehabilitation for juveniles, but further contend that the objectives of public safety and greater accountability for juvenile offenders are incompatible with the goal of rehabilitation.<sup>198</sup>

In *In re Gault*, one of the justifications presented by the Supreme Court for juvenile confidentiality was hiding what the Court described as "youthful errors" from public scrutiny.<sup>199</sup> Those who argue for stronger consequences for juveniles do not feel that crimes such as murder, rape, and other serious felonies are properly described as "youthful errors" and thus do not deserve to be shielded from the public.<sup>200</sup>

Proponents of ending confidentiality in juvenile court contend that there are many benefits to the disclosure of juvenile identity and juvenile records and public scrutiny of the juvenile courts.<sup>201</sup> In general, open criminal proceedings promote informed discussion and understanding of the judicial system, provide assurances that the judicial system is functioning fairly, boost public confidence in the judicial system, provide an avenue for the community to express its concerns, provide a check on the judicial system which serves to prevent corruption, and serve to encourage higher performance from those involved.<sup>202</sup>

Specifically, two supposed benefits to ending confidentiality in the juvenile courts are that it provides warnings to the community of who may pose a threat to the safety of the community and that it allows the community an opportunity to express their moral outrage for the criminal acts of juveniles.<sup>203</sup> Other benefits for the community include a sense of security that the juvenile courts are working to pro-

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196. *Id.*

197. Blum, *supra* note 10, at 380-81.

198. Kfoury, *supra* note 185, at 67.

199. *In re Gault*, 387 U.S. 1, 24 (1967).

200. *See* Blum, *supra* note 10, at 387-88.

201. *Id.*; Oddo, *supra* note 10.

202. *See* United States v. Criden, 675 F.2d 550, 556 (3d Cir. 1982).

203. Blum, *supra* note 10, at 389-90.

tect the community.<sup>204</sup> It is argued that eliminating privacy in the juvenile courts will help to rebuild the community's trust and faith in the system and calm the community's fears about juvenile crime.<sup>205</sup>

Some also believe that ending privacy and confidentiality in the juvenile courts will also benefit the juveniles themselves.<sup>206</sup> Public scrutiny and disapproval, it is believed, will encourage rehabilitation.<sup>207</sup> More open proceedings will also lead to greater fairness for the youth involved<sup>208</sup> and a reduction of abuses as seen in Luzerne County, Pennsylvania.<sup>209</sup> Another argument in favor of ending privacy and confidentiality is the general argument for deterrence. As with adults, some believe that public scrutiny of juvenile offenders will "provide a good teaching model of social values and promote general deterrence of delinquent activity among the youthful community."<sup>210</sup> One of the most common arguments for ending privacy and confidentiality is a belief that public scrutiny will make juvenile courts more effective and produce better results.<sup>211</sup> The public eye will force juvenile courts to be more effective and efficient in how they deal with juvenile crime and rehabilitation.<sup>212</sup>

Some argue that the secrecy of these proceedings was intended to hide the arbitrary and discriminatory decisions made in juvenile courts.<sup>213</sup> Others contend confidentiality and privacy are needed to ensure the goals of rehabilitating youth are met.<sup>214</sup> The advocates of privacy and confidentiality view juveniles as "highly salvageable," and, thus, they need a non-punishment oriented adjudication.<sup>215</sup>

Arguments for maintaining privacy and confidentiality in the juvenile justice system often center on protecting the goal of rehabilitation for juveniles.<sup>216</sup> "Indeed, when [juvenile] records become an obstacle to a youth's ability to become a productive member of mainstream society, those records reduce community protection and un-

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204. Kfoury, *supra* note 185, at 57.  
205. Martin, *supra* note 95, at 394-95.  
206. See Blum, *supra* note 10, at 400.  
207. *Id.*  
208. Kfoury, *supra* note 185, at 57.  
209. Janoski, *supra*, note 100.  
210. Kfoury, *supra* note 185, at 57.  
211. See Janoski, *supra* note 100.  
212. *Id.*  
213. CHAMPION, *supra* note 15, at 19.  
214. Kfoury, *supra* note 185, at 56.  
215. *Id.*  
216. Oddo, *supra* note 10, at 109.

dermine important societal goals.”<sup>217</sup> Ending confidentiality and anonymity would serve as a punishment for youth and may result in their stigmatization and community shunning.<sup>218</sup> Another argument for maintaining confidentiality is that publicizing the identity of juvenile offenders may in fact give some juvenile offenders a form of celebrity status, thus serving to encourage juvenile crime.<sup>219</sup> Ultimately, those who wish to maintain privacy and confidentiality in the juvenile justice system believe that these aspects of the system are in the juveniles’ and the system’s best interests and further promote society’s interest in rehabilitation.

### III. THE LASTING EFFECTS OF ADJUDICATION IN JUVENILE COURT

#### A. The Collateral Consequences Experienced by Juvenile Offenders

The term “collateral consequences” refers to the varied and lasting consequences of criminal convictions.<sup>220</sup> This term is “used to describe the harms that a sentencing judge may not have intended to inflict on a criminal defendant . . . [that] are dictated by law or inflicted by social custom.”<sup>221</sup> These consequences may include loss of voting rights, loss of employment, and loss of child custody.<sup>222</sup> Collateral consequences have become an incredibly important topic in the criminal justice system after the Supreme Court’s decision in *Padilla v. Kentucky*.<sup>223</sup> In *Padilla*, the Supreme Court greatly expanded the Sixth Amendment rights of criminal defendants, holding that defense attorneys must warn clients of immigration consequences for criminal convictions and pleas.<sup>224</sup>

For juveniles, there are collateral consequences associated with their experience and encounters in the juvenile justice system despite

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217. JUVENILE LAW CENTER, JUVENILE RECORD EXPUNGEMENT 3 (2007), available at [www.jlc.org/files/publications/expungeguide.pdf](http://www.jlc.org/files/publications/expungeguide.pdf).

218. Martin, *supra* note 95, at 401-02.

219. *Id.* at 402.

220. See Andrew Taslitz, *Destroying the Village to Save It: The Warfare Analogy (or Dis-Analogy?) and the Moral Imperative to Address Collateral Consequences*, 54 HOW. L.J. 501, 504 (2011).

221. *Id.*

222. See COLLATERAL CONSEQUENCES OF CRIMINAL CHARGES - NEW YORK STATE, [http://www2.law.columbia.edu/fourcs/subject\\_areas.htm](http://www2.law.columbia.edu/fourcs/subject_areas.htm) (last visited Nov. 13, 2011).

223. *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

224. *See id.*

the fact that juvenile court proceedings do not result in convictions.<sup>225</sup> In the juvenile context, *Padilla* may serve to expand the duties and responsibilities of attorneys in juvenile court. As described by the Supreme Court, juvenile courts have often been called “kangaroo courts.”<sup>226</sup> This view of juvenile courts is partly attributable to the level of lawyering that occurs in these courts.<sup>227</sup> Because the stakes are viewed as lower in juvenile court, since punishment cannot extend beyond a juvenile’s twenty-first birthday, lawyers may work with less diligence and defense attorneys, in particular, may advocate with less rigor.<sup>228</sup> *Padilla* may change these sad realities and put more pressure on the “kangaroo courts” to work more effectively. Juvenile defense attorneys may now need to consider the collateral consequences for their juvenile clients as they advise their clients about plea agreements or proceeding to trial. They may also choose to use the knowledge of these collateral consequences in negotiating with prosecutors and working with juvenile court judges.

While juvenile adjudications are distinguished from adult criminal court, the consequences of their experience with the juvenile justice system has the potential to impact their access to the justice system, their anonymity and privacy, their immigration status, education, employment opportunities, and housing.<sup>229</sup> Overall, any encounter with the juvenile justice system can dramatically alter the trajectory of a child’s life.

For juveniles with previous involvement in the juvenile justice system, they may no longer have access to the juvenile court for future acts of misbehavior.<sup>230</sup> Prosecutors may exercise their discretion, or a statute may require that once a juvenile has already been adjudicated in juvenile court, he or she must then be removed to adult criminal court.<sup>231</sup> In addition, a juvenile with a previous record may have his

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225. See OJJDP FACT SHEET, *supra* note 19.

226. *In re Gault*, 387 U.S. 1, 28 (1967) The Supreme Court described juvenile courts as “kangaroo courts” for the lack of due process provided to juvenile offenders. *Id.*

227. See AMERICAN BAR ASS’N JUVENILE JUSTICE CTR., JUVENILE LAW CENTER, AND YOUTH LAW CENTER, A CALL FOR JUSTICE (2002), available at <http://www.njdc.info/pdf/cjfull.pdf>.

228. *Id.*

229. See discussion *infra* Part III.A-B.

230. Robert E. Shepherd Jr., *Collateral Consequences of Juvenile Proceedings: Part II*, 15 CRIM. JUST. 41, 41 (2000).

231. U.S. GEN. ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, JUVENILE JUSTICE: JUVENILES PROCESSED IN CRIMINAL COURT AND CASE DISPOSITIONS 16 (1995), available at [www.gao.gov/archive/1995/gg95170.pdf](http://www.gao.gov/archive/1995/gg95170.pdf).

or her sentence enhanced because of a juvenile record.<sup>232</sup> In Pennsylvania, the relevant sentencing statute provides “a range of sentences of increased severity for defendants previously . . . adjudicated of one or more misdemeanor or felony offenses committed prior to the current offense.”<sup>233</sup> Enhancement is triggered only for offenses committed after the defendant’s fourteenth birthday, which may include juvenile delinquency adjudications.<sup>234</sup> The Federal Armed Career Criminal Act mandates a fifteen-year minimum sentence for “felons in possession” of an authorized firearm and “a convicted felon” is a juvenile adjudicated as delinquent.<sup>235</sup> Thus, involvement in the juvenile justice system can worsen the impact of subsequent recidivism.

Due to involvement in the juvenile justice system, the anonymity and privacy rights of a juvenile outside of court can also be affected. Juveniles may have to register as sex offenders and, thus, their identities, addresses, and the nature of their offenses will forever be public record.<sup>236</sup> They may also be required to submit their DNA to a registry and their fingerprints and police photographs may become available to law enforcement.<sup>237</sup> Juvenile records may be admitted to impeach by showing specific bias or to impeach a witness who testified untruthfully about their character.<sup>238</sup> Juveniles adjudicated as delinquent may also be denied licenses to possess firearms.<sup>239</sup> Their driving privileges may also be suspended.<sup>240</sup> Thus, involvement in the juvenile justice system may severely affect general privacy as well as the ability to exercise some rights and privileges.

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232. *See generally id.*

233. 42 PA. CONS. STAT. § 2154 (a)(2) (2011).

234. *Id.*

235. 18 U.S.C. § 922 (2006).

236. *See Shepherd, supra* note 230, at 41; *see also* Elizabeth Garfinkle, *Coming of Age in America: The Misapplication of Sex-Offender Registration and Community-Notification Laws to Juveniles*, 91 CAL. L. REV. 163, 177 (2003) (“Although the federal legislative debates never mentioned juvenile sex offenders, the laws of twenty-eight states and the federal Megan’s Law specifically require registration and community notification for juveniles adjudicated delinquent for certain crimes.”).

237. *Shepherd, supra* note 230, at 41.

238. *Id.*; *see also* FED. R. EVID. 609(d) (“Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.”).

239. *See* 18 PA. CONS. STAT. § 6105(c)(7) (2008).

240. *See* 75 PA. CONS. STAT. § 1532(a)(1) (2011).

Juveniles involved in the juvenile justice system may find their immigration status in jeopardy. Currently, juvenile delinquency adjudications are not considered convictions and are, thus, not eligible for mandatory deportation.<sup>241</sup> However, a juvenile transferred to adult criminal court does face the threat of deportation if they are not born a U.S. citizen.<sup>242</sup>

The armed forces are a positive choice for many youth, but a juvenile record may also jeopardize this opportunity. The U.S. Army has four classifications for criminal offenses and juvenile delinquency adjudications are considered criminal offenses in their recruitment criteria.<sup>243</sup> The classifications are minor traffic, minor nontraffic, misdemeanors, and felonies.<sup>244</sup> If an individual has been convicted of a domestic violence crime, two felonies, or one felony and two misdemeanors, they are disqualified from joining the army.<sup>245</sup> For other types of convictions, including one felony or three or more misdemeanors, a waiver must be obtained.<sup>246</sup> In light of difficulty recruiting, waivers are more freely given, but the hurdle still exists.<sup>247</sup> Thus, a juvenile record can preclude, or at least jeopardize, the opportunity of serving in the armed forces.

Educational opportunity is an important tool in rehabilitation and preventing recidivism amongst juveniles. A juvenile's access to education is complicated due to involvement in the juvenile justice system. If nothing else, participating in the proceedings in juvenile court means time absent from school. If a child is detained, like the forty-three percent of juveniles in the D.C. system,<sup>248</sup> he or she is taken away from school and begins to accrue absences from the classes. These absences are likely to hinder the student's academic progress and may even result in failing classes and being unable to advance to the next grade level. This disruption to a child's education can lead to a juvenile failing to graduate from high school or at the very least, result in entering the workforce or college unprepared. If a

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241. Shepherd, *supra* note 230, at 41. For adults who are not U.S. citizens, any conviction that involves moral turpitude may be grounds for deportation. Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(ii) (2006 & Supp. 2009).

242. Shepherd, *supra* note 230, at 41.

243. *Id.* at 41-42.

244. *Id.*

245. *Id.* at 42.

246. *Id.*

247. *Id.*

248. See McNulty, *supra* note 79.

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child is adjudicated involved<sup>249</sup> and given a sentence of incarceration, that child's education will be disrupted and ultimately affected.<sup>250</sup>

A juvenile record can also jeopardize access to higher education.<sup>251</sup> Adjudication as a delinquent or as involved in juvenile court is not a criminal conviction and thus college applicants need not disclose their experiences in juvenile courts when specifically asked if they have been convicted of a crime. However, colleges and universities have found ways to solicit this information in their applications.<sup>252</sup> The questions on such applications are worded so as to specifically solicit information regarding juvenile adjudications or arrests.<sup>253</sup> Thus, youth seeking higher education are plagued with the dilemma of whether or not to provide a truthful and complete answer, possibly jeopardizing their chance of admission; whether to ask the admissions departments for guidance regarding these questions, and, thus, indicating something about their application to those decision-makers; or whether or not to supply false or incomplete answers that may prove more damaging later.<sup>254</sup>

Gina Grant's story makes these potential collateral consequences more real.<sup>255</sup> Gina Grant was accepted to Harvard University in 1995, but her offer of admission was rescinded after they learned of her juvenile record.<sup>256</sup> Gina Grant had pled no contest to a charge of manslaughter in the death of her mother. She served time in a juvenile center and completed probation. The circumstances surrounding her mother's death are still unclear and included allegations that Gina's mom was an alcoholic and was abusive.<sup>257</sup> Gina did not disclose the circumstances of her mother's death to Harvard nor did she reveal

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249. See *Juvenile vs. Adult Justice*, *supra* note 29.

250. See generally LARRY J. SIEGEL & BRANDON C. WELSH, *JUVENILE DELINQUENCY: THEORY, PRACTICE, AND LAW* ch. 10 (10th ed. 2009) (analyzing the relationship between schools and delinquency); see also COALITION FOR JUVENILE JUSTICE, *AIN'T NO PLACE ANYBODY WOULD WANT TO BE: CONDITIONS OF CONFINEMENT FOR YOUTH 19-20* (1999) (describing conditions at the Giddings State Home and School in Texas); Katherine Tworney, *The Right to Education in Juvenile Detention Under State Constitutions*, 94 VA. L. REV. 765, 772-73 (2008).

251. *Applying for College or the Military with a Juvenile Record*, JUV. LAW CENTER, [http://www.jlc.org/factsheets/applying\\_for\\_college\\_or\\_the\\_military\\_with\\_a\\_juvenile\\_record/](http://www.jlc.org/factsheets/applying_for_college_or_the_military_with_a_juvenile_record/) (last visited Nov. 13, 2011) [hereinafter *Applying for College*].

252. Shepherd, *supra* note 230, at 41.

253. *Id.*

254. See *Applying for College or the Military*, *supra* note 251.

255. Martin, *supra* note 95, at 402.

256. William Honan, *For Student Who Killed Her Mother, Acceptance*, N.Y. TIMES, June 11, 1995, at 34.

257. Jane Mayer, *Rejecting Gina*, NEW YORKER, June 5, 1995, at 43.

that she had a juvenile record.<sup>258</sup> When Harvard learned of this through an anonymous source, it quickly rescinded its offer.<sup>259</sup> Gina Grant attended Tufts University after Columbia and Barnard also rescinded their offers.<sup>260</sup> This story illustrates the quandary that youth with a juvenile record face. It demonstrates that a past mistake can compromise and threaten opportunity and that public scrutiny can be unforgiving even after a youth has shown signs of remorse and rehabilitation. Gina was fortunate to still have the opportunity to pursue higher education but many others may not enjoy that chance. Gina's story shows us that a child's mistake can have life-long consequences that are imposed by our justice system. "[Gina now] knows what thousands of people who have served time in jail or who have police records already know: our society seldom forgives."<sup>261</sup>

Youth with juvenile records face similar problems in employment. Employment applications are also specifically worded to solicit information regarding juvenile adjudications.<sup>262</sup> Thus, the chance of finding employment is harmed by truthful and complete responses to questions regarding the applicant's juvenile record.<sup>263</sup>

Juveniles and their families may also lose access to public housing. Public housing authorities have the right to evict families of delinquent children.<sup>264</sup> In addition, a family of a juvenile offender will lose their public housing assistance if the Public Housing Authority determines that a household member has violated the family's obligation not to engage in violent criminal activity.<sup>265</sup> An interaction with the juvenile justice system could result in homelessness for the juvenile and his or her family.

Other government benefits and privileges may be lost because of a juvenile record. Adjudications for certain drug-related crimes can result in a lifetime ban on Temporary Assistance for Needy Families

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258. Honan, *supra* note 256.

259. *Id.*

260. *Id.*

261. Patricia Gaines, *When Do We Start Forgiving?*, CHI. TRI., June 4, 1995, at 6 (alteration in original).

262. See generally *Getting a Job with a Juvenile Record In Pennsylvania*, JUVENILE LAW CENTER, [http://www.jlc.org/factsheets/getting\\_a\\_job\\_with\\_a\\_juvenile\\_record/](http://www.jlc.org/factsheets/getting_a_job_with_a_juvenile_record/) (last visited on Nov. 13, 2011) (detailing how employment applications are phrased to solicit information regarding criminal and juvenile records).

263. See Shepherd, *supra* note 230, at 41.

264. See *Dep't of HUD v. Rucker*, 535 U.S. 125, 133-36 (2002) ("[I]t was reasonable for Congress to permit no-fault evictions in order to 'provide public and other federally assisted low-income housing that is decent, safe, and free from illegal drugs'").

265. 24 C.F.R. § 982.553 (2011).

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(“TANF”) and Food Stamps.<sup>266</sup> Adjudications for offenses that would be considered felony drug convictions if committed by an adult will prohibit someone from ever receiving federal public benefits.<sup>267</sup> A juvenile record may preclude someone from retaining custody of his or her minor child if the court finds that the return of the child to the parent is not best suited for the child’s safety, protection, physical, mental, or moral welfare.<sup>268</sup> Certain types of adjudications may also preclude an individual from approval as a foster or adoptive parent or from having a job that requires working with children.<sup>269</sup>

Any involvement with the juvenile justice system has long-lasting effects on the juvenile, his family, and community. These effects can be legal, social, or psychological. Ultimately, involvement in the system can mean the loss of opportunity for a child. The descriptor of “collateral consequence” does not seem appropriate because being precluded from higher education, or a desired or meaningful job, is not at all collateral, but rather very central to a child’s life.

B. Collateral Consequences Worsened by the Elimination of Privacy

Eliminating privacy in the juvenile justice system will dramatically worsen the collateral consequences that already exist for juveniles involved in the juvenile justice system. Without any privacy protections, the mistakes that some children make when they are only minors could affect them for the rest of their lives. While such dire consequences may seem appropriate to some, the loss of educational or employment opportunities do not serve the goal of rehabilitation and thus undermines the very purpose of the juvenile justice system. Furthermore, not every child who appears before the juvenile justice system are more likely to reoffend. Exposing them to collateral consequences for life is neither appropriate nor just.<sup>270</sup>

Rehabilitation, as defined by Black’s Law Dictionary, is the “process of seeking to improve a criminal’s character and outlook so that

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266. See Shepherd, *supra* note 230, at 41.

267. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, *amended by* Balanced Budget Act of 1987, Pub. L. No. 105-33.

268. See, e.g., 42 PA. CONS. STAT. § 6351 (e)(2) (2010).

269. See, e.g., 42 U.S.C. §§ 671(a)(20)(A)(i)-(ii) (2010).

270. See generally THOMAS GRISSO & ROBERT G. SCHWARTZ, YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE (2000) (acknowledging that an enlightened justice system cannot ignore the developmental psychological realities of adolescence).

he or she can function in society without committing other crimes.”<sup>271</sup> Depriving juveniles of opportunities will not improve the juvenile’s character or outlook, and it will not help the juvenile to better function in society nor prevent the juvenile from committing other crimes. In fact, the collateral consequences associated with the juvenile justice system severely jeopardize a child’s ability to make better choices and avoid the criminal justice system.

Adding public scrutiny to these existing collateral consequences will only compound the effect of the consequences and further jeopardize rehabilitation. With the loss of privacy and confidentiality, the collateral consequences that may only potentially affect a juvenile are much more likely to be a reality. For example, if a juvenile record is public and there is no confidentiality for the juvenile offender, such information will be uncovered easily and will follow a person throughout their life. That information will prevent someone from securing employment or pursuing higher education. It could also be used as a “strike” to increase the adult sentencing.<sup>272</sup> Rehabilitation cannot be accomplished if a young person cannot find a job or receive higher education. Without those opportunities, young people are more likely to reoffend and return to the criminal justice system.

Another serious consequence of increased public access and loss of privacy is that a juvenile record, even if expunged or sealed, could follow someone for his or her entire life. Data-mining companies<sup>273</sup> hold on to juvenile arrest or court records even after they have been expunged or sealed.<sup>274</sup> Thus, when someone is applying for a job as an adult, their sealed or expunged juvenile record may still appear in a background check because a data-mining company has stored the information and sold it to prospective employers.<sup>275</sup> In addition, once information regarding a juvenile is on the internet, it cannot be reclaimed, and any efforts to expunge or seal that information are entirely moot.<sup>276</sup>

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271. BLACK’S LAW DICTIONARY 1398-99 (9th ed. 2009).

272. Pacheco, *supra* note 71, at 49.

273. Data-mining companies collect information about individuals and sell such information for profit to interested parties, which could include marketing groups or those conducting background checks. See Joel Stein, *Data Mining: How Companies Now Know Everything About You*, TIME (Mar. 10, 2011) <http://www.time.com/time/magazine/article/0,9171,2058205,00.html#ixzz1XCwzT5i9>.

274. Sarah Montana Hart, *The Collateral Consequences of Juvenile Publicity*, 36 MONT. L. REV. 7, 25 (2011).

275. *Id.*

276. *See id.*

Some collateral consequences will remain regardless of privacy or anonymity. For example, the court system will have access to a juvenile record when they are sentencing someone in juvenile court or an adult in criminal court as most jurisdictions currently operate.<sup>277</sup> In addition, the impact of school absences will be felt regardless of privacy or confidentiality. And, the overall trauma of appearing in juvenile court and dealing with the sentence imposed if he or she is adjudicated involved will exist regardless of privacy or confidentiality. While retaining privacy and confidentiality cannot and should not totally eradicate the impact of being involved in the juvenile justice system, these protections help to ensure that rehabilitation for the youth is not compromised.

#### IV. REFORMING THE JUVENILE JUSTICE SYSTEM WITH PRIVACY AND ANONYMITY INTACT

##### A. Keeping Privacy and Confidentiality Intact

Removing privacy and confidentiality in the juvenile courts will not serve to decrease juvenile crime, restore the public's faith in the juvenile justice system, make the community safer, or promote the rehabilitation of juveniles. A more open juvenile justice system with no protection of privacy and no confidentiality will impede rehabilitation by increasing the severity of consequences for youth involved with the juvenile courts. Children will be harmed, and, thus, the greater community will also suffer.

Those who argue that increased access to the juvenile courts will result in a decrease in juvenile crime are wrong. The causes of juvenile crime are not rooted in the anonymity associated with the juvenile justice system. Instead, juvenile crime can be better explained by looking at the juvenile's childhood and the community and circumstances in which the child developed.<sup>278</sup> Juvenile crime has been explained by many as related most closely to family, community, and society.<sup>279</sup> The United States Office of Juvenile Justice and Delinquency Prevention has concluded that factors such as family, community, school, individual, and peer group can increase the risk of

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277. See 42 PA. CONS. STAT. ANN. § 2154(a)(2) (West 2010) (citation omitted).

278. Oddo, *supra* note 10, at 132 (citing the Children's Defense Fund's claim that being abused and neglected increases the likelihood of juvenile arrest and The Center for Disease Control's claim that "the strongest predictors of violent crime are personal and neighborhood income"). *Id.*

279. *Id.* at 134.

delinquency.<sup>280</sup> It has concluded that “child abuse and family disintegration, economic and social deprivation, low neighborhood attachment, parental attitudes condoning law-violating behavior, academic failure, truancy, school drop-out, lack of bonding with society, fighting with peers, and early initiation of problem behaviors” further increase the risk.<sup>281</sup> There are more factors that may contribute to juvenile delinquency such as “mental disorders, association with delinquents, low income, bad housing, a poor education, lack of extended family support, marital separation, racial prejudice, and media influences. Empirical studies posit that a child exposed to several risk factors is more likely than other children to develop delinquent behavior.”<sup>282</sup>

The notion that juveniles commit crimes because they know they will be shielded by the juvenile justice system is preposterous. That contention assumes juveniles who commit crime, who are most likely adolescents, make extremely rational choices and consider the long-term impact of what they will do. Anyone who knows a teenager knows that they are impulsive, controlled by their whims, and rarely consider the long-term consequences of their choices.<sup>283</sup> A juvenile’s knowledge that his or her record will be public will most likely have no deterring effect, and, thus, there will likely be no decrease in juvenile crime as a result of eliminating privacy in juvenile court.<sup>284</sup> In addition, the majority of juvenile offenders in detention centers are

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280. Tami Scarola, *Creating Problems Rather Than Solving Them: Why Criminal Parental Responsibility Laws Do Not Fit Within Our Understanding of Justice*, 66 *FORDHAM L. REV.* 1029, 1038 (1997).

281. *Id.*

282. *Id.* Others cite similar factors which contribute to juvenile crime.

Indicators of future delinquency are well-known, since youthful offenders have similar backgrounds and risk factors. Profiles of youths who commit violent crimes are strikingly similar: (1) impoverished upbringing, (2) sub-standard housing and health care, (3) inadequate education and (4) serious domestic problems ranging from parental absence and neglect to physical and sexual abuse. In a 1989 study, children born in the same hospitals and living in the same communities were compared, and it was discovered that those abused or neglected were significantly more likely to be arrested for violent crimes.

Zierdt, *supra* note 72, at 426 (citing Laureen D’Ambra, *A Legal Response to Juvenile Crime: Why Waiver of Juvenile Offenders is Not a Panacea*, 2 *ROGER WILLIAMS U. L. REV.* 277, 299-300 (1997)).

283. See Slobogin & Fondacaro, *supra* note 31, at 11. (“More recent writers, supported by empirical findings that adolescents are more impulsive, less future-oriented, and more subject to peer influence than adults, have made an even more nuanced case for maintaining a separate juvenile system grounded on the assumption that youth who commit crime have diminished responsibility.”).

284. See generally *Does Treating Kids like Adults Make a Difference?*, *FRONTLINE*, <http://www.pbs.org/wgbh/pages/frontline/shows/juvenile/stats/kidlikeadults.html> (last visited Nov. 13, 2011) (citing studies that show how trying juveniles as adults has little to no deterrent effect).

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nonviolent criminals<sup>285</sup> and, thus, would not be subject to public scrutiny under legislation such as that pending in D.C.

Exposing the juvenile justice system to public scrutiny will not restore the public's faith in the system. Public access and public scrutiny play a vital role in the administration of justice in our country.<sup>286</sup> Providing opportunities so that juveniles rehabilitate and do not reoffend will be more effective in restoring the public's faith in the system. Furthermore, the harm associated with public access will far outweigh any increased public opinion.

As the loss of privacy in juvenile court is unlikely to deter juvenile crime, juvenile crime will most likely not decrease, and, thus, there is no causal link between eliminating privacy and community safety. Some have argued that knowing the identity of the juveniles who are involved in the juvenile justice system will make communities safer because there can be some form of community policing.<sup>287</sup> It is argued that if members of the community know of the identity of juvenile offenders, the community will be safer because they will be watchful of these juveniles and able to apprehend them quickly if they do commit a crime. In some cases this may be true; however, the definite and palpable harm caused by disclosing the identity of juveniles far outweigh any potential isolated incidents of crime prevention.

The elimination of privacy in juvenile courts will not promote rehabilitation. Courts have repeatedly noted that privacy and confidentiality are critical to rehabilitation, "[t]he primary purpose . . . [for] providing that in general the public shall be excluded from juvenile proceedings, is to preserve the anonymity of juvenile respondents in order to foster an atmosphere conducive to rehabilitation."<sup>288</sup> Placing

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285. Oddo, *supra* note 10, at 134.

286. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571-72 (1980).

[W]hen a shocking crime occurs, a community reaction of outrage and public protest often follows. Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion . . . . The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is "done in a corner [or] in any covert manner." Where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. To work effectively, it is important that society's criminal process "satisfy the appearance of justice," [which] can best be provided by allowing people to observe it.

*Id.*

287. See Blum *supra* note 10, at 389.

288. *In re J.D.C.*, 594 A.2d 70, 72 (D.C. 1991) (alteration in original); see also *In re J.S.*, 140 Vt. 458, 438 A.2d 1124 (1981); *Brian W. v. Superior Court*, 574 P.2d 788, 791 (Cal. 1978) ("The provisions for confidentiality in the juvenile court law . . . were included to prevent the underlying rehabilitative philosophy from being thwarted by unduly stigmatizing the juvenile of-

juveniles who are accused of crimes or who are later adjudicated involved or delinquent in the public eye will not help them to become contributing members of society. It will ostracize and alienate them. Removing privacy and confidentiality will likely make these children more like hardened criminals and greatly inhibit any chance at ensuring they stay out of the criminal justice system. When the potential benefits of increasing public access are weighed against the serious harms that juveniles will experience, the only appropriate choice for those invested in the rehabilitation of juveniles is to abandon such reforms.

B. Realistic Solutions that Promote Rehabilitation and the Safety of the Community

While juvenile courts should be deeply concerned with what is in the best interest of the child, efforts to reform the juvenile justice system cannot be focused solely on how to deal with each individual child. There must be focus on the system and society as a whole. More specifically, “[a]midst stern insistence that youth be held accountable . . . we must ask whether the justice system furthers its stated goals of retribution, rehabilitation and deterrence effectively and proportionately, [w]here have youth gone wrong and where have we collectively, as a community, gone wrong with youth.”<sup>289</sup>

In the context of the juvenile justice system, allowing privacy and confidentiality in the system allows the juveniles involved to have some measure of control over the personal information and some control over whom they choose to be. By shielding juveniles from public scrutiny, the system ensures that the details of their delinquency or alleged delinquency are not used to their disadvantage. In addition, the privacy afforded in juvenile court ensures that the juveniles need not be defined by their mistakes or the crimes they committed. They have some measure of control over the personhood. They can define who they are rather than allowing society to define them by what may have been one moment of indiscretion or an isolated lapse in judgment. The closed doors of the juvenile justice system and the zone of privacy created serve an important function in achieving the goals of rehabilitation and preventing recidivism.

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fender.”); *Florida Publ’g Co. v. Morgan*, 322 S.E.2d 233, 235-36 (Ga. 1984) (“The asserted state interest in the closure of the hearing was the protection of the anonymity of the juvenile offender in order to further his or her rehabilitation.”).

289. *See Soung*, *supra* note 1, at 444 (alteration in original).

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In addition, the closed nature of the juvenile courts will allow a more individualized and personal approach to the process. Because of the privacy afforded the juvenile and his or her family, juvenile court judges can delve deeper into the issues before them. Rather than simply hearing about the charges and the facts of that particular case, judges can speak candidly with the juvenile, his or her family, and other relevant people.<sup>290</sup>

Ultimately, society wants less crime, fewer criminals, and fewer juvenile offenders. It is generally undisputed that the juvenile justice system needs to be reformed. However, reform for reform's sake will not lead to less juvenile crime and better result for juveniles. The reforms implemented must balance the interests of juveniles with the interests of the community. Juveniles must still be rehabilitated, and, so, reform must aim to provide structures, resources, and opportunities so that juveniles will not reoffend. In addition, the system must serve to keep the community safe and informed so that people have confidence in it. Removing privacy and confidentiality will not achieve those two goals.

There are reforms that can effectively balance these two interests of juveniles with those of their community. These reforms include better connections between the courts and schools, better support for families when juveniles are under court supervision and after, more resources for juvenile centers, and more staff and funding for the juvenile justice system.<sup>291</sup> The most important reform is the creation of stronger relationships between the courts and the schools. The schools have a constant relationship with the child and have a great potential to affect a child positively. If there is a stronger connection between courts and schools, rehabilitation will be a more attainable goal. Again, rehabilitation requires efforts to improve the character of a criminal in the hopes that the criminal will not reoffend. In the

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290. Such relevant people include probation officers, representatives of social services, members of the juvenile's school, and other important people in the juvenile's family such as a coach or mentor.

291. Given the current economic climate, any requests for increased funding will be difficult to achieve. However, investing in the juvenile justice system is an investment in children and such an investment will not be wasted. As many researchers have noted, it costs far more to imprison a person than it does to educate them. For example, in North Carolina, the 2010 cost to imprison a person for one year under minimum custody is \$23,575. NORTH CAROLINA DEPARTMENT OF CORRECTIONS, <http://www.doc.state.nc.us/dop/cost/> (last visited Nov. 13, 2011). However, the 2009 per pupil spending was only \$8,567 in North Carolina. *Federal Education Budget Program*, NEW AM. FOUNDATION, <http://febp.newamerica.net/k12/NC> (last visited Nov. 13, 2011).

case of juveniles, rehabilitation is about teaching a child how to make better choices. In order to enable them to make better choices, children must be given the opportunity to do so. If we want children to avoid crime, we must allow them the opportunity to develop themselves, acquire skills, and earn money in a productive manner. In order to do those things, they must be able to succeed in school.

Strong relationships between the courts and the schools will enable juveniles to achieve academic success. When a juvenile comes under the supervision of the juvenile courts, his or her home school must remain involved to ensure the courts have accurate information about the juvenile's academics so that the juvenile can continue to progress academically rather than stagnate or fall behind. After the court has completed its supervision, the court should apprise the school of the juvenile's progress so they can support the juvenile in his or her transition back to regular life. This kind of relationship and communication can serve the goal of rehabilitation and is only one example of the kind of reform that should be implemented in the juvenile justice system.

A very critical reform must be to increase accountability and efficiency in the juvenile justice system. This requires public support, political will, and money. Bureaucracies such as DYRS cannot continue to be ineffective. It is unacceptable that children can be officially in DYRS' custody, with no one in the organization actually supervising them or ensuring their safety or the community's. The system itself needs to be improved. This improvement should begin by looking at the practices of jurisdictions around the country. There are jurisdictions with successfully functioning juvenile justice systems, and D.C. needs to learn from and borrow from them. It is unfair to place all the blame on the children in the system when the system itself is failing and the adults are not doing their job.

Most importantly, reform of the juvenile justice system must address the actual causes of juvenile crime and must not be mere reactions to public pressure. The current Mayor of D.C., Vincent Gray, has acknowledged what kind of reform is needed, stating, "[t]his overhaul must go hand-in-hand with addressing the root causes of crime perpetrated by children and teenagers on the front end, so they won't get caught up in a vicious cycle of violence."<sup>292</sup> It is still unclear if Gray will in fact work to reform the juvenile justice system in a mean-

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292. See Anderson & Cella, *supra* note 125, at A01.

### *Keep the Court Room Doors Closed*

ingful way. He may choose to institute reforms such as making changes to privacy in an effort to appeal to constituents, which would essentially put a band-aid on the problem of juvenile crime in Washington, D.C. He could focus on overhauling DYRS and ensuring that the agency functions efficiently and effectively.

The benefits of a closed and private juvenile justice system are not felt only by the youth involved—the community will also benefit. The greater community will benefit if youth involved in the juvenile justice system are in fact being rehabilitated and not reoffending. Minimizing collateral consequences<sup>293</sup> by keeping privacy intact can serve to help youth, their family, and the community. For example, if a juvenile commits a crime and successfully rehabilitates, his family need not fear that they will be evicted from public housing because of criminal behavior, and his family can be hopeful and optimistic about future educational and employment opportunities. Limiting the impact of collateral consequences will further rehabilitation goals and allow juveniles to become contributing members of their family and of society as a whole—a desired result for the greater community.

### CONCLUSION

The juvenile justice system needs reform because far too many children are not served by our current system. A child who goes through the juvenile justice system should not appear before the criminal justice system again—this would be realization of the goal of rehabilitation. We all know that the juvenile justice system falls short of achieving this goal. Too many juveniles recidivate, and too many juveniles leave the juvenile justice system worse off than when they entered. There is an urgent need for reform. Reform efforts cannot, however, be aimed at relieving fear and treating juveniles as criminals. These reforms must serve the juvenile justice system's goal of rehabilitation and must continue to treat juvenile offenders as children. The juvenile justice system was not created to punish nor should it serve that purpose today. Reforms that eliminate privacy or limit confidentiality in the juvenile justice system must be abandoned because they do not serve the goals of rehabilitation. Instead, such reforms hamper rehabilitation by increasing the stigma of being in the juvenile justice system and denying juveniles the opportunity to become contributing members of society by increasing their exposure to collateral conse-

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293. See discussion *supra* Part III for a discussion of collateral consequences.

quences. Again, our juvenile justice system should treat the youth who come before its mercy as children—they should be shielded from the public and allowed to make amends for their mistakes while also being supported in building a strong future for themselves. The juvenile justice system and all interested parties should embrace reforms aimed at serving the best interest of the child while still safeguarding the community.

## COMMENT

# Federal Judges Gone Wild: The Copyright Act of 1976 and Technology, Rejecting the Independent Economic Value Test

BETSELOT A. ZELEKE\*

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### INTRODUCTION

Imagine it is 1980, and you have been laboring for months or even years to create a music album. Finally, you have a complete album. You promptly copyright each song from your new album. A few months later, while browsing through records at a music store, you stumble upon a familiar record—your album. After confronting the store manager, you learn that the store has been selling your album without your permission. You are furious. You contact your attorney and demand immediate action to remedy this injustice. What are your remedies? Fortunately, Congress enacted The Copyright Act of 1976 (“the Copyright Act,” “the Act,” or “the 1976 Act”) to come to your rescue by punishing the music store for infringing on your federally protected copyrights.

The Copyright Act of 1976 provides a remedy against anyone who is caught infringing on the rights of copyright holders.<sup>1</sup> The Act penalizes violators of the copyright for each “work” they infringe upon.<sup>2</sup> In the example above, if you elect to seek statutory damages under the Act, a court may award you single statutory damages for that one album.<sup>3</sup> This award is justified because you have copyrighted only one work—an album comprised of songs, which in the 1980s, could only be sold at once, together in one album.

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1. Copyright Act of 1976, 17 U.S.C. § 504(c)(1) (2006).

2. *See id.* (“[T]he copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually . . . in a sum of not less than \$500 or more than \$20,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.”).

3. *See* 17 U.S.C. § 504(c). Note the statute does not define what constitutes a work thereby leaving it to the courts to define what is considered a work for the purposes of a statutory damages award. *Id.*; *see also infra* Part I.B.

To add a twist to your story, suppose it is now 2011. You have enjoyed some success from your previous album and decide to release another one. This time, learning from your experience in the 1980s, you copyright *each song* on the album prior to its release. Unfortunately, following this album's release, you discover that a music vendor has been selling your music without your permission. Only this time, the music vendor has been selling each of your songs separately on iTunes.<sup>4</sup> You bring suit immediately, seeking statutory damages under the Act. Should the court award you the same amount of statutory damages that the 1980 court previously awarded you? Alternatively, should the court award you more statutory damages because, unlike in your 1980 suit, technology has allowed infringers to separately sell individual songs from your album?

This is precisely the issue that the Second Circuit confronted in *Bryant v. Media Right Productions, Inc.* Although the 1980s and the 2011 hypotheticals deal with the same issue of copyright infringement on a music album, new technological advancements, such as iTunes, have complicated the task of assessing damages for copyright violations. The complication arises because we now have technology that allows infringers to dissect an album and sell individual songs online. In *Media Right*, the court held that, despite the current technological advances, a copyright holder is generally entitled only to single statutory damages for an infringement on a music album.<sup>5</sup> Therefore, if you filed your 2011 suit in the Second Circuit, the court likely will only award you single statutory damages for the entire album, even though you have copyrighted each song. Thus, if the court decides that the copyright infringement damages amount to \$9,000, you will only receive \$9,000 regardless of how many songs the defendant sold separately. However, if you file suit in a court like the First Circuit, Ninth Circuit, Eleventh Circuit, or the District of Columbia Circuit, you will probably receive \$9,000 for *each song* on your album that the music vendor infringed upon.<sup>6</sup>

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4. iTunes, introduced in 2001 by Apple, is a music sharing software that customers can download for free; iTunes has evolved, and is currently on its 9th version, allowing customers to instantaneously burn CDs/DVDs, to purchase digital music, songs/albums or movies, and to sync data with other external digital players. See Michael Simon, *The Complete iTunes History—SoundJam MP to iTunes 9*, MAC LIFE (Sept. 11, 2009, 2:36 PM), [http://www.maclife.com/article/feature/complete\\_itunes\\_history\\_soundjam\\_mp\\_itunes\\_9?page=0,2](http://www.maclife.com/article/feature/complete_itunes_history_soundjam_mp_itunes_9?page=0,2).

5. See *Bryant v. Media Right Prods., Inc.*, 603 F.3d 135, 140 (2d Cir. 2010).

6. See *Columbia Pictures Television v. Krypton Broad. of Birmingham, Inc.*, 106 F.3d 284, 295 (9th Cir. 1997) (holding that an owner of copyrights in television programs is entitled to statutory damages per episode of a single television series because each episode has independent

The difference between the Second Circuit approach and the other circuits' approach is the independent economic value test. Some courts determine what qualifies as "work" for the purposes of calculating statutory damages under an independent economic value test.<sup>7</sup> This test allows copyright holders to collect damages for parts of a single "work" when each part has an independent economic value.<sup>8</sup> On the other hand, the Second Circuit refuses to recognize this independent economic value test claiming the Act does not allow for such interpretation.<sup>9</sup> A court rejecting the independent economic value test may reason that, since The Copyright Act of 1976 directs courts to award single statutory damages for "any" compilation of a "work," regardless of the copyright viability of the independent parts, the plain meaning of the statute is broad enough to preclude any exceptions, including the independent economic value test.<sup>10</sup> Accordingly, the Second Circuit defines "work," for the purpose of the statutory damages provision, by inquiring whether the copyright holders or the defendants released a compilation.<sup>11</sup> Therefore, in the 2011 hypothetical, because you, the artist, are the one who released the songs as a compilation (in other words, an album), the court should award you single statutory damages. However, if you released each song separately and the defendant compiles your songs into an album without

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economic value); *MCA Television Ltd. v. Feltner*, 89 F.3d 766, 771 (11th Cir. 1996) (awarding the owner of television programs \$10,000 in statutory damages for each of the 900 unauthorized programs aired); *Gamma Audio & Video, Inc., v. Ean-Chea*, 11 F.3d 1106, 1116-17 (1st Cir. 1993) (holding that the plaintiff can be awarded statutory damages for each episode of a single television show if the court determines that each episode has an independent economic value and is viable); *Walt Disney Co. v. Powell*, 897 F.2d 565, 569-70 (D.C. Cir. 1990) (awarding \$15,000 for each infringement of Mickey and Minnie Mouse because they have separate economic value).

7. *See supra* note 6.

8. *See infra* discussion Part III.B.

9. *See, e.g., Media Right*, 603 F.3d at 141 (citations omitted) ("Based on a plain reading of the statute, therefore, infringement of an album should result in only one statutory damage award. The fact that each song may have received a separate copyright is irrelevant to this analysis.").

10. *See* 17 U.S.C. § 501(c) (2006); *see also infra* Part II.

11. *Compare Media Right*, 603 F.3d at 141 (holding that because the copyright holders chose to release their songs as albums, "the plain language of the Copyright Act limits the copyright holders' statutory damage award to one for each Album"), *with* *WB Music Corp. v. RTV Comm'n Grp., Inc.*, 445 F.3d 538, 541 (2d Cir. 2006) (awarding separate statutory damage awards for each song in a compilation album because there was "no evidence . . . that any of the separately copyrighted [songs] were included in a compilation authorized by the copyright owners"), *and* *Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1366, 1380-81, 83 (2d Cir. 1993) (awarding eight statutory damages for each of the eight teleplays of a television show because the defendant was the one who included the shows in a compilation without the permission of the copyright holders).

your authorization, you should be entitled to statutory damages for each song on the album.

The Second Circuit's decision in *Media Right* is important because it was the first time a circuit court explicitly rejected the independent economic value test.<sup>12</sup> It was also the first time a circuit court considered what constitutes "work" for the purposes of assessing statutory damages in the context of infringement of copyrighted music.<sup>13</sup> Because technology easily allows individuals to sell copyrighted songs on the internet, an independent economic value test analysis almost always will lead to numerous statutory damages for a single album—thereby leading to extremely excessive statutory damages awards.

This Comment argues that all the federal circuit courts should explicitly reject the independent economic value test and apply the Second Circuit's analysis in *Media Right*. Rejecting the test provides a more workable solution that is consistent with the plain meaning of the Copyright Act, the purpose of the Act, and the limited role of the judicial system. In addition to the *Media Right* court's brief rationale, this Comment provides additional reasons for why the *Media Right* court's analysis of what qualifies as a "work" is a more appropriate analysis than the independent economic value test.

This Comment proceeds in four parts. Part I discusses the history of copyright laws in the United States. This part covers copyright laws passed before and after The Copyright Act of 1976. Part II analyzes the federal circuits' attempts to define "work" for the purposes of assessing statutory damages under the Copyright Act. Specifically, this section discusses the Second Circuit cases that reject the independent economic value test and the other circuit cases that adopt and apply the test. Part III proposes that all the federal circuits reject the independent economic value test and apply the *Media Right* court's analysis in determining what constitutes a "work" for the purposes of assessing statutory damages in copyright infringement cases, especially in music copyright infringement cases. This section argues that the *Media Right* court's analysis is a more workable solution than the independent economic value test because the plain meaning of The Copyright Act of 1976 and the Act's legislative history do not permit such a test. In addition, this Comment asserts that the *Media Right* court's narrower definition of what constitutes a "work" is a more ap-

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12. *Media Right*, 603 F.3d at 141.

13. See *infra* notes 78-89 and accompanying text.

propriate interpretation than the independent economic value test because drafting copyright laws, which are public purpose statutes, inevitably involve special interest groups and the limitations of the judiciary when dealing with new technology issues affecting copyright law. Finally, Part IV discusses the future implications of all the federal circuits' rejection of the independent economic value test.

## I. THE HISTORY OF THE COPYRIGHT ACT

### A. Pre-1976 Copyright Laws

The United States Constitution gives Congress the power to create and pass copyright laws.<sup>14</sup> Specifically, the Constitution gives Congress the authority “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>15</sup> Accordingly, to further this constitutionally mandated purpose, Congress enacted The Copyright Act of 1790. This law gave copyright owners the right to print, publish, and sell their work.<sup>16</sup> These indivisible rights grant copyright holders *exclusive control* over the printing, publishing, and selling of the copyrighted work and are the heart of the protection afforded by the United States copyright laws.<sup>17</sup>

In 1856, Congress expanded these enumerated rights by extending protection to public performance rights.<sup>18</sup> Finally, in 1897, Congress provided copyright protection for musical works.<sup>19</sup> The Copyright Act of 1909 (“the 1909 Act”) allowed plaintiffs to collect statutory damages rather than collecting damages for actual harm suffered plus the amount of profit the defendant generated as a result of

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14. See U.S. CONST. art. I, § 8, cl. 8.

15. *Id.*

16. See Lydia Pallas Loren, *The Evolving Role of “For Profit” Use in Copyright Law: Lessons from the 1909 Act*, 26 SANTA CLARA COMPUTER & HIGH TECH. L.J. 255, 259-60 (2010) (citing the Copyright Act of May 31, 1790).

17. See *id.* at 260 (“This set of exclusive privileges to control the printing and vending of a work was the core of copyright protection.”). Loren also notes that copyright holders generally were not allowed to divide these rights. *Id.* (citing 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 10.01(a) (rev. ed. 2009)).

18. See *id.* (observing that Congress added the public performance right, but limited this right to only dramatic works because dramatic works were not so much the works that were sold in copies, but rather the value for such works stems from remuneration to their creators through performance).

19. See *id.* at 260-61 (“In 1897, Congress extended the public performance right to musical works.”); see also Copyright Act of Jan. 6, 1897, ch. 4, § 4966, 29 Stat. 481, 482.

the copyright infringement.<sup>20</sup> The 1909 Act also allowed courts to assess punitive damages if the copyright infringement was willful.<sup>21</sup> The concept of statutory damages became available to plaintiffs to allow compensation in situations where proving actual damages became difficult.<sup>22</sup> In addition, the statutory damages provision of the 1909 Act gave courts the discretion to award what they deemed just, so long as the awards were within the range of the minimum \$250 and the maximum \$5,000 for each infringement.<sup>23</sup> The 1909 Act also gave courts non-mandatory recommendations regarding the amount of statutory damages to award for common infringement on copyrighted works such as a painting or a sculpture.<sup>24</sup> As evident from these provisions, through the passage of the 1909 Act, Congress expressly granted courts the discretion to consider the circumstances and award what they considered to be just, so long as the amount of statutory damages awarded stayed within \$250 and \$5000 for each infringement.

One important aspect of the 1909 Act is that Congress expressly conveyed that the statutory damages were not to be used by courts as a punitive measure.<sup>25</sup> However, this did not mean “that statutory damage awards under the 1909 Act lacked deterrent purposes and functions. By setting a floor of \$250 and giving courts discretion to award up to \$5,000, Congress surely intended to deter infringement, but the compensatory impulse was most evident in the law as applied.”<sup>26</sup> Therefore, although the 1909 Act eliminated the “penal” language, it still retained its deterrent purpose.<sup>27</sup>

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20. See Copyright Act of 1909, § 28, 35 Stat. 1075, 1082 (1909) (codified at 17 U.S.C. § 504(c) (2006)).

21. See § 25, 35 Stat. at 1081-82.

22. See Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 448 (2009) (“[S]tatutory damages, available ‘in lieu’ of actual damages and profits, which could overcome the severe difficulties of proof of damages and profits about which participants in the legislative history had so vigorously complained.”).

23. See *id.*

24. See 17 U.S.C. § 101(b) (2006).

25. See 17 U.S.C. § 101(b) (1909) (repealed) (“such damages . . . shall not be regarded as a penalty.”).

26. Samuelson & Wheatland, *supra* note 22, at 451.

27. *Id.*

B. Post-1976 Copyright Laws: A Departure from the Copyright Act of 1909 and the Advent of the Digital Media Copyright Act

After leaving The Copyright Act of 1909 unchanged for more than half a century, Congress began to consider revising United States copyright laws. Based on the report from the Register of Copyrights, Congress decided that the statutory damages provision in the 1909 Act needed a major revision.<sup>28</sup> Among other things, the report recommended eliminating the provisions of the 1909 Act that suggested awarding a specific amount of damages for some of the most common types of infringement.<sup>29</sup> Additionally, the Register of Copyrights report suggested that Congress raise the \$5000 maximum per infringement cap on statutory damages.<sup>30</sup> Moreover, the report recommended the creation of a new “innocent” provision that would allow for lesser awards against those defendants violating the copyright laws due to innocent actions.<sup>31</sup>

Based on the backdrop provided by the 1909 Act and the report, it is apparent that Congress became concerned that the 1909 Act’s “per infringement” provision sometimes led to excessive damages awards.<sup>32</sup> To lessen the risk of awarding excessive damages, Congress changed the “per infringement” provision to a more restrictive provision that instructed courts to award damages “per infringement of work.”<sup>33</sup>

With the Register of Copyrights report in mind, Congress amended the statutory damages provision of the 1909 Act.<sup>34</sup> Among other things, The Copyright Act of 1976 allowed courts to award less than the minimum amount of \$250 when dealing with an innocent copyright infringer; it authorized courts to award greater than the maximum range when dealing with willful infringers; and, it required that, before seeking a statutory damage award, plaintiffs register their work within three weeks of its publication.<sup>35</sup>

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28. *See id.*

29. *See id.* n.45 (citing H. COMM. ON THE JUDICIARY, 87th CONG., REP. OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 103-106 (Comm. Print 1961), *reprinted in* 3 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (George S. Grossman ed., 1976) [hereinafter REPORT OF THE REGISTER OF COPYRIGHTS]).

30. *See id.* at 451 (citing REPORT OF THE REGISTER OF COPYRIGHTS).

31. *See id.* (citing REPORT OF THE REGISTER OF COPYRIGHTS).

32. *See id.* at 448.

33. *See id.* at 458.

34. *See* Copyright Act of 1976, 17 U.S.C. § 504(c) (2006).

35. *See id.* § 504(c)(2).

Furthermore, The Copyright Act of 1976 omitted the provision in The Copyright Act of 1909 that stated that the amount of statutory damages awarded should not be penal.<sup>36</sup> By omitting the express statement in the 1909 Act that banned penal awards, yet retaining judicial discretion to award compensation, it is reasonable to infer that Congress intended the statutory damages provision to balance the scale by moving away from the penal purpose of the statute while maintaining its deterrent purpose.<sup>37</sup>

This assertion that the 1976 Act attempted to move away from the penal language while maintaining the Act's deterrent purpose is further bolstered by Congress' simultaneous addition of the willful infringement provision. This provision allows courts to award higher monetary damages than the cap set for non-willful infringers in cases of willful acts of infringement.<sup>38</sup> Moreover, one of the most subtle yet monumental changes in the 1976 Act is the provision allowing copyright damages to be awarded "per infringed work" instead of "per infringement" as prescribed in the 1909 Act.<sup>39</sup>

It is useful to note that even though The Copyright Act of 1909 allowed courts to award damages on a "per infringement" basis, the legislative history shows that this provision was controversial and intensely debated because of fear that the ambiguity of the instructional language would lead to excessive damages.<sup>40</sup> Specifically, the controversy derived from the difficulty of finding a workable definition of "single infringement" in the context of the statutory damages provision of the 1909 Act.<sup>41</sup> During the drafting of The Copyright Act 1976, this issue reappeared again as Congress became worried that this per infringement provision sometimes led to the awarding of excessive statutory damages due to the broad nature of the "per infringement" instruction.<sup>42</sup> To subdue this concern, Congress

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36. *See id.* § 504(c).

37. *See id.*

38. *See* Samuelson & Wheatland, *supra* note 22, at 458.

39. *See* 17 U.S.C. § 504(c)(1).

40. *See* COMM. ON THE JUDICIARY SUB COMM. REP., 86TH CONG., ON PATENTS, COPYRIGHTS, AND TRADEMARKS, THE DAMAGE PROVISIONS OF THE COPYRIGHT LAW 102-03 (Comm. Print 1960), *reprinted in* 2 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY 7, 10-11 (George S. Grossman ed., 2001), *available at* [http://www.copyright.gov/history/index\\_new.html](http://www.copyright.gov/history/index_new.html).

41. *See id.* at 7.

42. *See id.* at 7, 10; Samuelson & Wheatland, *supra* note 22, at 453 ("The legislative history of the 1976 Act reveals that Congress was persuaded that the 'per infringement' standard had sometimes resulted in excessive awards. The change to a 'per infringed work' standard was intended to lessen this risk.").

introduced the “per infringed work” provision, which allowed the awarding of only single statutory damages per “work” regardless of how many times the infringer violated the copyrighted work.<sup>43</sup> To show the significance of this change, a basic understanding of what The Copyright Act of 1976 protects and how the Act defines certain terms is necessary.

The Copyright Act of 1976 provides protection to “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”<sup>44</sup> The Copyright Act provides that once a copyright infringement occurs,

the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work . . . in a sum of not less than \$750 or more than \$30,000 as the court considers just.<sup>45</sup>

The Copyright Act defines “compilation” as “a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.”<sup>46</sup> In further interpreting the definition of compilation, courts have explained that “the term compilation includes collected works, which are defined as works ‘in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective work.’”<sup>47</sup>

The Copyright Act does not define what constitutes a “work” for the purpose of awarding statutory damages.<sup>48</sup> The Act’s legislative history shows that Congress described compilations as a result that occurs after a process of putting together previously existing materials regardless of whether the individual materials can be copyrighted on

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43. *See id.* at 458.

44. 17 U.S.C. § 504(c)(1).

45. *Id.*

46. *Id.*

47. *See Bryant v. Media Right Prods., Inc.*, 603 F.3d 135, 140 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 656 (2010) (citing 17 U.S.C. § 101 (2006)); *see Columbia Pictures Television, Inc. v. Krypton Broad. of Birmingham, Inc.*, 259 F.3d 1186, 1193 (“In addition, § 504(c)(1) states that ‘all the parts of a compilation or derivative work constitutes one *work*.’”); *Walt Disney Co. v. Power*, 847 F.2d 565, 569 (D.C. Cir. 1990) (“All the parts of a compilation or derivative work constitute one work.”).

48. *See Walt Disney Co.*, 897 F.2d at 569.

their own.<sup>49</sup> Therefore, Congress clearly stated that a single statutory damage should be awarded for each compilation of “work.” However, the Act leaves it to the court to decide what constitutes a “work” within the meaning of The Copyright Act.

The next major amendment came in 1998 when Congress amended The Copyright Act of 1976 with the passage of the Digital Millennium Copyright Act (“DMCA”).<sup>50</sup> The DMCA

codified provisions of two treaties signed by the United States in 1996, known jointly as the World Property Organization (“WIPO”) treaties, which required signing countries to pass legislation to create stronger copyright protections in response to new technology. Among other things, the DMCA criminalized circumventing the digital protection for a copyrighted work, selling devices that can circumvent this protection, and interfering with copyright management information (“CMI”).<sup>51</sup>

Under the DMCA, plaintiffs can seek both civil and criminal remedies.<sup>52</sup> Similar to The Copyright Act of 1976, plaintiffs seeking a remedy under the DMCA can elect to sue for actual damages—which includes any profits earned by the defendant as a result of the infringement—or statutory damages.<sup>53</sup> However, unlike The Copyright Act of 1976’s statutory damages provision, the DMCA’s provisions do not enhance damages for willful infringers and does not expressly limit statutory damages to a single “work.”<sup>54</sup>

Because the law did not go into effect until 2000, there are very few consistent judicial opinions analyzing the DMCA’s statutory damages provisions.<sup>55</sup> Some courts have resolved to use prior court decisions interpreting The Copyright Act of 1976’s statutory damages

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49. See H.R. REP. NO. 94-1476, at 12 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5670 (stating that “[a] ‘compilation’ results from a process of selecting, bringing together, organizing, and arranging previously existing material of all kinds, regardless of whether the individual items in the material have been or ever could have been subject to copyright.”).

50. Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860.

51. Karen A. Chesley, *Calculating Damages Under the Digital Millennium Copyright Act: How Far Should Courts Go When Multiplying Statutory Awards?*, 57 J. COPYRIGHT SOC’Y U.S.A., WINTER 2010, at 1, 2.

52. See 17 U.S.C §§ 1203-1204 (2006).

53. See *id.* § 1203(c).

54. See Chesley, *supra* note 51, at 25 (citing 17 U.S.C. § 1203(c)(3) (2006)). Although, the court can triple the damages award if the defendant repeats the offense within three years. *Id.*

55. See *id.* at 3. Compare *MGE UPS Sys. Inc. v. GE Consumer & Indus. Inc.*, 612 F.3d 760, 763, 765-66 (5th Cir. 2010) (holding that cracking a code that prevents the usage of copyrighted work does not violate the DMCA), with *MDY Indus., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 953-54 (9th Cir. 2010) (holding that cracking a circumvention device to use a copyrighted work can violate the DMCA).

provision as a framework to interpret the DMCA's statutory damages provisions.<sup>56</sup>

The DMCA aims to address copyright issues raised by the new digital age.<sup>57</sup> This Act protects digital works by punishing infringers who bypass the technological controls that copyright owners place on their work. In addition, it punishes those who traffic in technology that facilitates such circumvention.<sup>58</sup> Therefore, due to the complications the digital age adds to the copyright world, once courts begin to utilize it extensively, the DMCA will have a major impact in resolving modern and future copyright issues.

## II. FEDERAL CIRCUITS DEFINING "WORK"

As mentioned, federal circuit courts have been grappling with how to best define a "work" for the purposes of assessing statutory damages under the Copyright Act. In defining a "work," the Second Circuit focuses on the manner in which the copyright holder released the copyrighted material to the public.<sup>59</sup> Because of such a narrow interpretation, the Second Circuit in *Media Right* easily rejected a copyright holder's attempt to obtain numerous statutory damages awards for a single album that the infringer sold on iTunes.<sup>60</sup> In contrast, other circuits have adopted the independent economic value test when determining what constitutes a "work."<sup>61</sup> Although these circuits have not yet applied the independent economic value test in the context of music copyright violation cases, a copyright holder, such as the one in *Media Right*, can successfully argue for multiple statutory damages awards under the independent economic value test. There-

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56. See Chesley, *supra* note 51, at 28.

57. See *id.* at 8. The Senate Judicial Committees indicated that the goal of the DMCA was to "make digital networks safe places to disseminate and exploit copyrighted materials." *Id.* (quoting S. REP. NO. 105-190, at 1-2 (1998) (Conf. Rep.)). Congressman Barney Frank explained that, "What we wanted to do was to come up with ways to adapt the protection of intellectual property to a modern technological era without unduly diminishing people's rights to enjoy things." 144 CONG. REC. H7092 (statement of Rep. Barney Frank).

58. See Christina Bohannon, *Construing the Copyright Act After Eldred*, 27 (Univ. Iowa Coll. Law, Legal Research Paper No. 05-07, 2005), available at <http://ssrn.com/abstract=677522>.

The DMCA was enacted as a response to copyright owners' first fear about cyberspace. The fear was that copyright control was effectively dead; the response was to find technologies that might compensate . . . . The DMCA was a bit of law intended to back up the [technological] protection . . . designed to protect copyrighted material.

*Id.* at 25 n.100 (quoting LAWRENCE LESSING, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 157 (2004)).

59. See discussion *infra* Part III.B.

60. See *infra* notes 82-87 and accompanying text.

61. See discussion *infra* Part III.A.

fore, it is appropriate to discuss the rationale behind these two approaches.

A. The Second Circuit's Approach – The Road to *Media Right*

The Second Circuit has had numerous opportunities to weigh in on how to best define what constitutes a “work” for purposes of assessing statutory damages under the Copyright Act. The circuit addressed this issue in 1975 when it considered *Robert Stigwood Group Ltd. v. O'Reilly*.<sup>62</sup> In *Stigwood*, the Second Circuit held that each of the forty-eight performances of a rock opera tour constituted separate infringements for purposes of assessing statutory damages under the 1909 Act.<sup>63</sup> Furthermore, in *Twin Peaks Productions, Inc. v. Publications International, Ltd.*, the court revisited this statutory damages issue under the current Act.<sup>64</sup> In *Twin Peaks*, the copyright holder issued episodes of a television show sequentially; the defendant then compiled the episodes into one book and sold them without the copyright holder's authorization.<sup>65</sup> The Second Circuit awarded separate statutory damages for each episode of the series because, despite the fact that the plot from each episode continued from one episode to

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62. See *Robert Stigwood Group Ltd. v. O'Reilly*, 530 F.2d 1096, 1100 (2d Cir. 1976), cert. denied, 429 U.S. 848, 97 S. Ct. 135 (1976). Note, the court decided this case under the 1909 Act which allowed statutory damages per “each infringement that was separate” because the 1976 Act which allowed statutory damages per “each infringed work” did not go into effect at this time. Compare 17 U.S.C. § 101(b) (1909) (instructing courts to award statutory damages per “each infringement that was separate”), and *Stigwood*, 530 F.2d at 1102 (observing that the Act of 1909 requires a court to award statutory damages for each infringement that was separate), with 17 U.S.C. § 504(c)(1)(2006) (adding the “per each infringed work” language to the Copyright Act), *Venegas-Hernandez v. Sonlux Records*, 370 F.3d 183, 192-93 (2004) (restating the “per each infringed work” language of the Copyright Act of 1976), and *Bryant v. Media Right Prods., Inc.*, 603 F.3d 135, 140 (2d Cir. 2010), cert. denied, 131 S. Ct. 656 (2010) (applying the “per each infringed work” language of the Copyright Act of 1976). Therefore, this Comment uses the *Stigwood* decision generally to serve as a backdrop and to provide historical context of the Second Circuit's jurisprudence in interpreting the statutory damages provision.

63. See *Stigwood*, 530 F.2d at 1103. The defendants argued that the forty-eight performances should be treated as a single infringement because all the performances occurred during a “single” tour. The court rejected the single tour argument because the defendants acts were “heterogeneous” acts that constituted separate infringing acts, i.e. each act included different “tortfeasors . . . different locales, different theaters and different financial arrangements.” *Id.* The court also refused to award damages for each of the songs performed during each performance because the songs are overlapping copyrights in one performance. See *id.* at 1104 (asserting that “overlapping copyrights on substantial parts of the entire work” would support only a single award).

64. See *Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1366, 1380-82 (2d Cir. 1993) (discussing the statutory damages award under the 1976 Act).

65. See *id.* at 1381. The infringement involved the “Twin Peaks” violation of eight teleplay copyrights in which the basic plot—who killed Laura?—continued throughout the eight episodes at issue in this case. *Id.*

another, this plaintiff did not release the episodes as a single “work.”<sup>66</sup> The court distinguished *Twin Peaks* from *Stigwood* because the latter did not apply to written episodes of a weekly television series.<sup>67</sup>

Thus far, the cases decided by the Second Circuit seem to favor an expanded definition of a “work,” consistent with the independent economic value test, without explicit mention of the test. Specifically, the Second Circuit allowed copyright holders to receive multiple statutory damages awards for each of the forty-eight performances of a single tour and for each episode of a single television show.<sup>68</sup>

Continuing with this trend, in *WB Music Corp. v. RTV Communication Group, Inc.*, the Second Circuit awarded statutory damages for each of the thirteen songs on the seven CDs.<sup>69</sup> Just as in *Twin Peaks*, the court reasoned that because the defendant created the compilation of CDs without the copyright holder’s authorization, each song constituted a separate “work.”<sup>70</sup> Therefore, the Second Circuit’s cases, thus far, seem to indicate that the manner in which the plaintiff released the songs are a critical factor in determining what constitutes a “work” for the purposes of assessing statutory damages.

Even though the Second Circuit had yet to mention the independent economic value test, as early as the year 2000, the District Court for the Southern District of New York, in *UMG Recordings, Inc. v. MP3.COM, Inc.*, explicitly acknowledged that the Second Circuit had not adopted the test and went on to reject it.<sup>71</sup> In *UMG*, a plaintiff brought a suit for copyright infringement on two albums.<sup>72</sup> Although the plaintiff conceded that a CD is a compilation within the language of the Copyright Act, the plaintiff argued that damages for each individually copyrighted song is appropriate because each song has an in-

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66. *See id.* (stating that “[w]e might well have a different situation if a book written as a single work was then adapted for television as a group of episodes”). The court went on to state that “[e]ven in such circumstances, though there would be but one book infringed, there might be separate awards for infringement of each televised episode.” *Id.*

67. *See id.* (“Whatever the scope of the *Stigwood* ruling concerning ‘overlapping’ copyrights in related components of a single musical production might be under the 1976 Act . . . it has no application to separately written teleplays prepared to become episodes of a weekly television series.”).

68. *See, e.g., Twin Peaks*, 996 F.2d at 1366; *Stigwood*, 530 F.2d at 1103-04.

69. *See WB Music Corp. v. RTV Commc’n Grp., Inc.*, 445 F.3d 538, 541 (2d Cir. 2006). Initially, the district court awarded seven statutory damages because the thirteen songs were compiled into seven CDs, thereby creating seven works for the purposes of assessing statutory damages. *Id.* at 540.

70. *See id.*

71. *See UMG Recordings, Inc. v. MP3.COM, Inc.*, 109 F. Supp. 2d 223, 225 (S.D.N.Y. 2000).

72. *See id.* at 224.

dependent economic value.<sup>73</sup> The district court observed that the Second Circuit had not adopted the independent economic value test and went on to award single statutory damages for copyright infringement of each CD instead of each song.<sup>74</sup> In rejecting the independent economic value test, the court emphatically declared that it is the court's duty to decline to adopt a test that is clearly against Congress' mandate because defying Congress would be unconstitutional.<sup>75</sup> The court stated that:

More generally, it is hard to see the appropriateness of an "independent economic value" test to statutory damages—as opposed to actual damages, for which every copyright holder remains free to sue on a "per-song" rather than "per-CD" basis. If such a test were applied, the result would be to make a total mockery of Congress' express mandate that all parts of a compilation must be treated as a single "work" for purposes of computing statutory damages, since, as the House Report expressly recognizes, the copyrighted parts of a compilation will often constitute "independent works for other purposes."<sup>76</sup>

*UMG* served as the guiding analysis for the Second Circuit as the court later utilized *UMG's* rationale, in *Media Right*, to clarify its definition of what constitutes a "work" for the purposes of assessing statutory damages.<sup>77</sup> In *Media Right*, the plaintiffs—songwriters and their record company—filed suit alleging a violation of the Copyright Act.<sup>78</sup> Plaintiffs produced and released two albums of music, each containing ten songs.<sup>79</sup> Plaintiffs copyrighted some of the songs inde-

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73. See *id.* at 225. The court rejected plaintiffs' argument that although an album is a compilation, this case is similar to *Twin Peaks* where the court awarded eight statutory damages for copyright violations of eight episodes of a single television show. *Id.* The court also rejected the plaintiffs' argument that because the defendant had sold and marketed the songs individually, the court should treat the songs as individual works. *Id.* These arguments would have allowed the plaintiffs to collect damages for each song on the CD instead of per CD.

74. See *id.* Despite the district court's acknowledgement that the Second Circuit had not adopted the independent economic value test, a subsequent court can easily limit this assertion to the context of music copyright issues. See, e.g., *U2 Home Entm't, Inc. v. Hong Wei Int'l Trading, Inc.*, No. 04 Civ. 6189 (JFK), 2008 WL 3906889, at \*13 (S.D.N.Y. Aug. 21, 2008) (distinguishing *UMG Recordings* on the ground that "[t]hat case involved separate musical compositions embodied on a compact disk . . . not separate television programs").

75. See *UMG Recordings*, 109 F. Supp. 2d at 225 (declaring that "[w]hen Congress speaks, the courts must listen: so our constitution mandates. When, as here, Congress' statement is clear, to disregard that message would be nothing less than an unconstitutional arrogation of power by the judiciary. The Court declines plaintiffs' invitation to tread that treacherous path").

76. *Id.* (citations omitted).

77. See *Bryant v. Media Right Prods., Inc.* 603 F.3d 135, 137-38 (2d Cir. 2010).

78. See *id.* at 139.

79. See *id.* at 138.

pendently prior to releasing the album.<sup>80</sup> Defendant gave the albums to a co-defendant who illegally copied and sold them.<sup>81</sup> The defendants sold the album in physical copies and on iTunes, where customers purchased individual songs from the two albums.<sup>82</sup> The Second Circuit affirmed the lower court's decision to award statutory damages for each album as opposed to for each song.<sup>83</sup> The court reasoned that although some of the songs were copyrighted separately, each album constituted a compilation of one "work" under the plain meaning of The Copyright Act of 1976.<sup>84</sup> For the first time, the Second Circuit explicitly rejected the independent economic value test.<sup>85</sup> The Second Circuit declared that creating an independent economic value exception goes against the plain meaning of the statute—which does not allow for any exceptions.<sup>86</sup>

The Second Circuit used this opportunity to briefly synthesize the cases it decided in the past and clarify how to determine what constitutes a "work" for purposes of assessing statutory damages. The court pointed out that the proper inquiry is "whether the plaintiff—copyright holder—issued its works separately, or together as a unit."<sup>87</sup> The plaintiffs appealed the Second Circuit's decision to the United States Supreme Court; however, the Court denied certiorari.<sup>88</sup>

According to the Second Circuit, once a court decides that the infringement occurred on a compilation of a single "work," the statute does not authorize the court to look any further to see whether parts

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80. *See id.*

81. *See id.*

82. *See id.* Having found the defendants infringed on the copyright, the district court awarded one statutory damage award for each album infringed by the defendants, instead of awarding statutory damages for each song on the albums. *Id.*

83. *See id.*

84. *See id.* at 141. Plaintiffs argued that because the internet allows customers to listen to and purchase copies of these independently copyrighted songs, each song on the album has an independent economic value deserving of an independent statutory damages award. *Id.*

85. *See id.* at 142 ("This court has never adopted the independent economic value test, and we decline to do so in this case.")

86. *See id.* ("The Act specifically states that all parts of a compilation must be treated as one work for the purpose of calculating statutory damages. This language provides no exception for a part of a compilation that has independent economic value.")

87. *Id.* at 141. The copyright holder compiled songs into two albums and released them; therefore, the court awarded the copyright holder two statutory damages awards instead of the thirteen statutory damages awards the copyright holder sought. *Id.*; *see also* *WB Music Corp. v. RTV Comm'n Grp., Inc.*, 445 F.3d 538, 541 (2d Cir. 2006) (awarding statutory damages for each song on the albums because the defendant, instead of the plaintiff, compiled these songs into a CD without authorization); *Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1366, 1381 (2d Cir. 1993) (awarding several statutory damages awards for episodes of a single television show compiled into a book by the defendant).

88. *See Media Right*, 603 F.3d 135, (2d Cir. 2010), *cert. denied*, 131 S. Ct. 656 (2010).

of the single “work” have any independent economic value.<sup>89</sup> This approach follows the judicial philosophy that if the plain meaning of the statute is unambiguous, a court does not have authority to look beyond the meaning of the statute and read in its own interpretation.<sup>90</sup>

B. The Other Circuits – The Road to the Independent Economic Value Test

Though the Second Circuit has rejected the independent economic value test, the First Circuit, the Ninth Circuit, the Eleventh Circuit, and the District of Columbia Circuit have crafted and adopted the test. These circuits utilize this test when defining what constitutes a “work” for purposes of awarding statutory damages under the Copyright Act.<sup>91</sup>

In 1990, the District of Columbia Circuit (“D.C. Circuit”) considered *Walt Disney Corp. v. Powell*, where a street vendor infringed on Disney’s copyrighted works.<sup>92</sup> In this particular lawsuit, the vendor sold merchandise with cartoon characters that resembled Disney’s “Mickey” and “Minnie Mouse.”<sup>93</sup> Plaintiff, Disney, brought suit, claiming copyright infringement.<sup>94</sup> The vendor claimed that after his involvement in suits for infringing on other copyrighted works, he re-

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89. See, e.g., *id.* at 142 (declaring that the plain meaning of The Copyright Act of 1976 prevents a court from inquiring into the copyrightability of the components in a compilation of work for purpose of statutory damages). In short, under a plain meaning approach, once a court decides an album is a compilation of work, it has no authority to look into the independent value of each song on the album.

90. See generally Daniel A. Farber, *Do Theories of Statutory Interpretation Matter? A Case Study*, 94 Nw. U. L. REV. 1409 (2000) (explaining the perspectives of plain meaning advocates when it comes to statute interpretation).

91. See *Columbia Pictures Television v. Krypton Broad. of Birmingham, Inc.*, 106 F.3d 284, 295 (9th Cir. 1997) (holding that an owner of copyrights in television programs is entitled to statutory damages for each episode of a single television show because each episode has independent economic value); *MCA Television Ltd. v. Feltner*, 89 F.3d 766, 768-70 (11th Cir. 1996) (awarding the owner of television show programs \$10,000 in statutory damages for each of the 900 unauthorized airings); *Gamma Audio & Video, Inc., v. Ean-Chea*, 11 F.3d 1106, 1116-17 (1st Cir. 1993) (holding that the plaintiff can be awarded statutory damages for each episode of a single television show if the court determines that each episode has an independent economic value and is viable); *Walt Disney Co. v. Powell*, 897 F.2d 565, 567 (D.C. Cir. 1990) (awarding \$15,000 each of infringements on Mickey and Minnie Mouse because they have separate economic value).

92. See *Powell*, 897 F.2d at 569. The defendant engaged in a wholesale souvenir business that sold items on the street to local tourists, including shirts that resembled Mickey and Minnie Mouse. *Id.* at 567.

93. See *id.*

94. See *id.*

frained from further infringing on Disney's copyrights.<sup>95</sup> Holding that the vendor had willfully infringed upon the copyrighted works, the district court found the vendor guilty of six infringements and awarded Disney \$15,000 per infringement, in addition to attorney fees.<sup>96</sup> The D.C. Circuit upheld the findings, but concluded that the vendor infringed only on two copyrighted works, Mickey and Minnie Mouse.<sup>97</sup> The court reasoned that "Mickey and Minnie are certainly distinct, viable works with separate economic value and copyright lives of their own."<sup>98</sup>

Following suit, the First Circuit, in *Gamma Audio & Video Inc. v. Ean-Chea*, held that four episodes of a single television show constituted four separate works for the purposes of assessing statutory damages.<sup>99</sup> The court reasoned that several copyrighted works registered on one single registration form can still qualify as separate works when considering damages.<sup>100</sup> In addition, the court rejected the lower court's argument that the distributor's decision to sell or rent only complete sets of a series makes it appropriate to treat the four episodes as one "work."<sup>101</sup> Interestingly, the court relied on the Second Circuit's reasoning in *Twin Peaks*—to assert that the manner in which a copyright holder released the copyrighted works "in no way

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95. *See id.* While selling the shirts resembling Mickey and Minnie Mouse, the defendant also sold items that infringed on Hard Rock Café's copyrights resulting in a raid to execute a search and seizure order against the defendant. *Id.*

96. *See id.* at 569. The lower court reasoned that the defendant engaged in six "different infringements . . . . These violations are not overlapping . . . . The Court assesses \$15,000 for each violation." *Id.*

97. *See id.* at 565. The court pointed out that the lower court mistakenly awarded damages for each *infringement or violation* instead of for each violation of a work. *Id.* at 570. In other words, if there is one work being infringed upon, the copyright holder is entitled to single statutory damages regardless of how many times the defendant infringed upon the same copyrighted work.

98. *Id.* The court refused to award six separate statutory damage awards because copyrights of Mickey and Minnie in different poses cannot constitute as viable work with separate economic value and copyright lives of their own. *Id.*

99. *See Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106, 1118 (1st Cir. 1993). The lower court awarded single statutory damages because the court found the four episodes to constitute one "work." *Id.* at 1117.

100. *See id.* The court is responding to the lower court's rationale that the copyright for these four episodes being registered on one form is a major factor in treating the four episodes as one "work" for damages purposes. *Id.*

101. *See id.* The lower court's analysis seems to be aligned with the Second Circuit's analysis in *Media Right*, noting that the proper inquiry is the matter in which the copyright holder released the copyrighted works to the public. *Bryant v. Media Right Prods., Inc.*, 603 F.3d 135, 141 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 656 (2010).

indicates that each episode in the series is unable to stand alone.”<sup>102</sup> Therefore, the First Circuit relied on the Second Circuit’s rationale to advance the independent economic value test, which the First Circuit incorrectly assumed the Second Circuit adopted.<sup>103</sup>

Moreover, in *MCA Television Ltd. v. Feltner*, the Eleventh Circuit also determined what constitutes a “work” when assessing statutory damages for copyright purposes.<sup>104</sup> MCA, an owner of television programs, entered into an agreement with Feltner, an owner of television stations, allowing Feltner to show certain MCA programs.<sup>105</sup> Feltner failed to comply with the payment plan as stipulated in the agreement, resulting in MCA suspending Feltner’s right to air the programs.<sup>106</sup> Feltner continued to air the programs without attempting to resolve the payment issue.<sup>107</sup> MCA filed suit against Feltner alleging 900 separate acts of copyright infringement, one for each unauthorized program aired.<sup>108</sup> The district court awarded MCA \$9,000,000.<sup>109</sup> The Eleventh Circuit affirmed, holding that each unauthorized program Feltner aired constituted a separate “work.”<sup>110</sup> Among other factors, the Eleventh Circuit noted that because each episode had been copyrighted individually, there was a compelling reason to award single statutory damages for each episode of the show.<sup>111</sup> The *Feltner* court awarded multiple statutory damages for

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102. *Gamma Audio*, 11 F.3d at 1117-18. Instead, the court found that the more significant facts are that: (1) viewers who rent these videos can view any number of episodes at a time, and (2) each episode was produced separately. *Id.* at 1117.

103. The First Circuit thinking that the Second Circuit relies on the same economic value test analysis is ironic. As discussed above, the Second Circuit, in *Media Right*, has explicitly stated that the controlling reason for awarding multiple statutory damages for eight episodes of a single television show, in the *Twin Peaks* case, is the fact that the copyright holder released these episodes independently—an argument advanced by the lower court in the *Gamma Audio* case, but rejected by the First Circuit. *See Media Right*, 603 F.3d at 141 (discussing the *Twin Peaks* case). However, the confusion is understandable since the Second Circuit did not explicitly reject the independent economic value test until 2010 in *Media Right*.

104. *See MCA Television Ltd. v. Feltner*, 89 F.3d 766, 769 (11th Cir. 1996).

105. *Id.* at 768. These television programs included the “The A Team” and “Kojak.” *Id.*

106. *See id.*

107. *See id.*

108. *Id.*

109. *Id.* at 768. (noting that the lower court reasoned that each episode that aired constituted a separate work thereby allowing \$10,000 in statutory damages for each of the 900 unauthorized programs).

110. *See id.* at 768-70. Again, as the First Circuit did in *Gamma Audio*, the Eleventh Circuit also assumed the Second Circuit agreed with the independent economic value test. *Id.* at 769 (“[W]e agree with the test adopted by [these] other circuits in defining ‘work.’”).

111. *See id.* at 769-70. The Eleventh Circuit also found that a “[copyright holder] sell[ing] television series as a block, rather than as individual shows, in no way indicates that each episode in a series is unable to stand alone. Each episode was produced independently from the other episodes and each was aired independently from preceding and subsequent episodes.” *Id.* at

each “work” because it recognized the independent economic value test.<sup>112</sup>

The Ninth Circuit also recognizes the independent economic value test. In *Columbia Pictures Television v. Krypton Broadcasting of Birmingham, Inc.*, the Ninth Circuit affirmed multiple statutory awards for episodes of a television show because the viewers could watch as few or as many episodes as they wanted and the episodes could be broadcast and re-aired in different orders.<sup>113</sup>

Taken together, these types of cases adopt the perspective that in copyright infringement cases, courts should look at the value of each piece being infringed upon. In assessing the independent economic value of the “work” infringed upon, the courts look to see whether customers have access to the parts of the copyrighted “work” at issue.<sup>114</sup> Thus, courts are mainly concerned with whether the infringed upon “work” had parts that were accessible to customers in a manner that created “separate economic value and copyright lives of their own.”<sup>115</sup>

### III. ALL OF THE FEDERAL CIRCUITS SHOULD REJECT THE INDEPENDENT ECONOMIC VALUE TEST

Due to the lack of guidance from Congress on what constitutes a “work,” some circuits have awarded more than single statutory damages for a single work when part of the work “has an independent economic value and is, in itself, viable.”<sup>116</sup> In contrast, the Second Circuit has continued to award single statutory damages regardless of the economic value of each part of a single “work.”<sup>117</sup> Because of this discrepancy, copyright holders are protected in different manners

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769. It is important to note that the court would not have awarded separate statutory awards for multiple airings of the same episodes, which was the case here, had the defendant raised this issue in the lower court. *Id.* at 770-771.

112. *See id.* at 769 (“This test focuses on whether each expression has an independent economic value and is, in itself, viable.”).

113. *See Columbia Pictures Television v. Krypton Broad. of Birmingham, Inc.*, 106 F.3d 284, 295 (9th Cir. 1997). The court also reasoned that the episodes were not compiled as a collective whole. *Id.* Again, like the other circuits, the Ninth Circuit assumed that the Second Circuit adheres to the independent economic value test. *Id.*

114. *See discussion infra* Part III.A. Unlike the Second Circuit’s approach, that looks at the manner in which the copyright holder released the songs. *See discussion infra* Part III.B.

115. *Walt Disney Co. v. Powell*, 897 F.2d 565, 569-70 (D.C. Cir. 1990)

116. *See, e.g., Feltner*, 89 F.3d at 769; *Powell*, 897 F.2d at 569.

117. *See Bryant v. Media Right Prods., Inc.*, 603 F.3d 135, 141 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 656 (2010) (The court refused to apply an independent economic value test and stated that “infringement of an album should result in only one statutory damage award. The fact that each song may have received a separate copyright is irrelevant to this analysis.”).

based on the jurisdiction in which they file their lawsuit. To date, the circuits that adhere to the independent economic value test have not considered it in the context of music albums. However, the rationale advanced by these courts in applying the test to other copyrighted works, such as television shows, supports copyright holders' argument that each song of an album should be considered a part of a "work" with an independent economic value of its own.

Returning to the 2011 hypothetical in the Introduction, assume that after finding out the defendant has infringed on your copyrighted album, you decide to file suit. If you file suit in the Second Circuit, the court will ask whether you, the copyright holder, have released these songs as a compilation. Because you have compiled your songs into an album and released them as an album, the court likely will award you single statutory damages regardless of how many independently registered songs the defendant sold.<sup>118</sup> Thus, if the defendant sold only one of your songs and the court calculates that you should receive statutory damages in the amount of \$1,000, you will receive \$1,000. Moreover, if the defendant sold ten of your independently registered songs from your album, you still will receive only \$1,000. Note, it is important to distinguish this scenario from a situation where you release songs individually, throughout the years, and the defendant compiles your songs into an album. In this situation, you will be entitled to receive statutory damages for each song because the defendant, not you, compiled these independently released songs into an album without your authorization.<sup>119</sup>

On the contrary, if you file suit in a jurisdiction like the First Circuit, the court likely will award you single statutory damages for each part of your album that has an independent economic value.<sup>120</sup> Thus, even if you compiled your songs into an album and sold it, you could receive multiple statutory damages, for each of your songs. Therefore, if the defendant sold only one of your songs on iTunes and the court calculates that your damages are \$1,000, you will receive \$1,000. Moreover, if the defendant sold ten of your independently registered songs from your album, you will receive \$10,000. The key factor here

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118. *See id.*

119. *See id.* (stating that the proper inquiry is "whether the plaintiff-the copyright holder-issued its works separately, or together as a unit").

120. *See, e.g.,* Gamma Audio & Video, Inc. v. Ean-Chea, 11 F.3d 1106, 1116-17 (1st Cir. 1993) (awarding multiple statutory damages for each episode of a single television show because the court determined that each episode has an independent economic value and is viable).

is whether the customer had the option of buying one, two, or as many songs as the customer wished to buy from the album.

These two scenarios, although simplistic, highlight the division between courts in defining what constitutes “work” for purposes of assessing statutory damages under the Copyright Act. In your case, your copyright infringement suit involved infringement on the same music album. However, there is a \$9,000 difference in the damages you may receive based upon the court where you file suit. These disparities are especially troublesome in the music industry because an independent economic value test adopts such a broad definition of what constitutes “work”; therefore, it is highly possible that courts adopting that test will award extremely excessive statutory damages.<sup>121</sup> How can this disparity be resolved while consistently achieving the constitutionally mandated purpose of promoting science and relevant arts through the Copyright Act?<sup>122</sup>

The *Media Right* court provided a possible solution by explicitly rejecting the independent economic value test and clarifying the standard it uses to determine what constitutes “work.”<sup>123</sup> Specifically, a court should award multiple statutory damages only if the copyright holder has not released the work as a compilation. All of the federal circuit courts should follow suit and adopt the Second Circuit’s standard of determining what constitutes a “work” because the plain meaning of the Copyright Act and its legislative history do not allow for an independent economic value test. Moreover, the Second Circuit’s approach provides a narrower interpretation than the independent economic value test. A narrow interpretation is critical in the context of copyright laws. Due to excessive special interest involvement during the drafting of copyright laws,<sup>124</sup> the statute should be narrowly construed against infringement so as not to confer benefit on a special interest group that has not bargained for such an advantage during negotiations. Moreover, courts should not use the independent economic value test to address modern copyright issues arising out of

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121. See, e.g., *Sony BMG Music Entm’t v. Tenenbaum*, No.10–2052, 2011 WL 4133920 (1st Cir. Sept. 16, 2011) (reducing plaintiffs’ damages award against the defendant because the award constituted excessive punishment that violated defendant’s due process rights).

122. U.S. CONST. art. I, § 8, cl. 8 (authorizing the creation of a federal copyright law “[t]o promote the Progress of Science and useful Arts”).

123. See *Media Right*, 603 F.3d at 141-42.

124. See, e.g., Bohannon, *supra* note 58, at 19-20 (discussing the extensive music industry involvement in drafting the 1976 Act and the DMCA). For more discussion of this assertion, see *infra* Part III.B.

modern technology developments because the legislative process is best equipped to address this issue by forcing all interested parties to compromise and internalize the cost of any advantage the statute might confer upon them.

A. The Copyright Act's Language and Legislative History Do Not Support the Application of an Independent Economic Value Test

The Copyright Act clearly states that, upon a copyright infringement, a court should award single statutory damages for each compilation of “work” regardless of the copyrightability of the parts of that particular work.<sup>125</sup> While the Act gives a judge the discretion to award damages anywhere between the ranges provided in the statute, it explicitly limits this discretion by a judge to award requiring single statutory damages per “work.”<sup>126</sup> The “per infringed work” provision in The Copyright Act of 1976 was included to curtail the possibility of excessive statutory damages due to the previous provision in The Copyright Act of 1909 that allowed copyright holders to receive damages for each infringement of the same “work.”<sup>127</sup> Under the 1909 Act’s “per infringement” provision, a plaintiff was allowed to recover for each infringement by a defendant.<sup>128</sup> However, under the 1976 Act, the result under the same scenario would be different because the new “per infringement work” provision limits the statutory damages to only one award regardless of the number of infringements on the same “work.”

To compensate for this limitation on statutory damages, Congress removed the previous no penalty provision while retaining the discretion the 1909 Act provided the court—it allows courts to award statutory damages as they deem just.<sup>129</sup> In addition, Congress left, to the courts, the definition of what constitutes a “work” for copyright purposes.<sup>130</sup> These are very important discretionary powers because they

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125. See Copyright Act of 1976, 17 U.S.C. § 504(c)(1) (2006); see also *supra* Part I.B.

126. See *id.* (“[T]he copyright owner may elect . . . statutory damages for . . . any one work . . . in a sum of not less than \$750 or more than \$30,000 as the court considers just.”); see also *supra* Part I.B.

127. Compare 17 U.S.C. § 101(b) (1909) (allowing damages for each infringement of each work), with 17 U.S.C. § 504(c) (2006) (limiting damages to single statutory damages per each work).

128. See 17 U.S.C. § 101(b) (1909); see also *supra* Part I.A.

129. See 17 U.S.C. § 504(c) (2006); see also *supra* Part I.B.

130. See *MCA Television Ltd. v. Feltner*, 89 F.3d 766, 769 (11th Cir. 1996) (observing that the Copyright Act does not define the term “work”).

give judges the flexibility needed to compensate copyright holders and deter copyright infringers while staying abreast of the evolution of what constitutes a “work” under copyright law. However, the courts did not have the authority to award more than one statutory damage for each “work,” regardless of whether the judge felt that parts of the “work” had their own copyright ability.

Although the underlying concern and purpose of the statutory damages revision in The Copyright Act of 1976 was to guard against awarding excessive statutory damages,<sup>131</sup> in reality, the changes have opened the gate to the high risk of a court awarding excessive damages. This is so because the 1976 Act sets a higher range of damages; encourages using statutory damages as both penal and compensatory measures; and adds a “willful infringement” provision, which courts regularly utilize despite Congress’ instruction to use this provision only for exceptional circumstances.<sup>132</sup>

To exacerbate these current problems, an independent economic value test removes the Act’s few limits on the courts by allowing a judge to inquire into the economic viability of parts of a compilation of “work” and award multiple statutory damages for a single compilation of “work.” In contrast, the Second Circuit’s approach is a narrower analysis that prevents copyright holders from receiving multiple statutory damages awards for copyrighted works they have released as compilations.

Furthermore, the concept of an independent economic value test analysis will interfere with the rationale for another damages provision of the Copyright Act: the actual harm provision that allows a copyright holder to elect, at any time before final judgment, to seek actual damages, plus the infringer’s additional profits.<sup>133</sup> While discussing this issue in the context of music copyright infringement claims, the Second Circuit endorsed a lower court’s reasoning that awarding statutory damages instead of actual damages for each song as opposed to a CD would deviate from Congress’ mandate. A House Report ex-

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131. See COMM. ON THE JUDICIARY SUB COMM. REP., 86TH CONG., ON PATENTS, COPYRIGHTS, AND TRADEMARKS, THE DAMAGE PROVISIONS OF THE COPYRIGHT LAW (Comm. Print 1960), reprinted in 2 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY, 7, 10-11 (George S. Grossman ed., 2001), available at [http://www.copyright.gov/history/index\\_new.html](http://www.copyright.gov/history/index_new.html); see also *supra* Part I.B.

132. See Samuelson & Wheatland, *supra* note 22, at 459; see also *supra* Part I.B.

133. See 17 U.S.C. § 504(a).

pressed that parts of a compilation will be considered independent works for other functions.<sup>134</sup>

Moreover, in recent years, Congress has confirmed this rationale. Special interest groups presented a bill to Congress that attempted to disaggregate the parts of a copyrighted “work” when calculating damages.<sup>135</sup> Immediately, Congress held a meeting to discuss the provision with industry officials, which resulted in a position paper stating:

[A]ltering the ‘one work’ rule would harm a ‘central underpinning of statutory damages: ensuring that the damages award for infringement of a compilation does not result in catastrophic multiple awards through a separate award for each component of that compilation’ . . . ‘a carefully designed compromise crafted by the Copyright Office to balance competing approaches to statutory damages.’ With no evidence to demonstrate that the application of the ‘one work’ limitation has led to unjust results, the paper argued no change was necessary.<sup>136</sup>

Because the independent economic value test similarly attempts to authorize judges to award statutory damages for each part of a compilation of a “work” instead of the required single statutory damages per “work,” it alters the one “work” rule. Therefore, courts should reject the rationale just as Congress has recently rejected it. Although the Second Circuit’s approach will also award multiple statutory awards where the defendant has compiled the copyrighted works, this is fair because it does not look to disaggregate parts of a compilation of copyrighted works released by the copyright holder. Therefore, the Second Circuit’s approach has a much lower possibility of indirectly altering the one “work” rule because it does not inquire into the economic viability of parts of copyrighted works.

Also, an independent economic value test goes against the underlying purpose of the Copyright Act: to promote science and creativity.<sup>137</sup> Statutory damages attempted to carry out this purpose by incentivizing creation and sharing.<sup>138</sup> The independent economic value test transforms the statutory damages provision’s attempt to incentivize creation and sharing, into a purely profit maximizing

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134. *UMG Recordings, Inc. v. MP3.COM, Inc.*, 109 F. Supp. 2d 223, 225 (S.D.N.Y. 2000).

135. *See Chesley, supra* note 51, at 26.

136. *Id.* at 26 (citation omitted).

137. *See supra* Part I.

138. *See Chesley, supra* note 51, at 7 (citing Pamela Samuelson, *Should Economics Play a Role in Copyright Law and Policy?*, 1 U. OTTAWA L. & TECH. J. 3, 3 (2004) (stating that the main goal of intellectual property law is to incentivize creation)).

scheme. If the statutory damages provision's purpose is purely to maximize profit, Congress would have simply allowed judges to award more than a single statutory damages for a single "work." Instead, Congress specifically limited single statutory damages awards to each compilation of "work" despite the copyrightability of each independent part of the compilation.

Additionally, Congress rejected a subsequent attempt to expand the statutory damages right.<sup>139</sup> This rejection shows that Congress is not willing to expand plaintiffs' rights under the statutory damages provision of the Copyright Act. An independent economic value test heavily tilts the balancing scale towards private rights at the expense of the public's right to free sharing. Such consequence is contrary to the ultimate purpose of the Copyright Act: promoting science, creativity, and sharing.

#### B. The Copyright Act's Statutory Damages Provision Should Be Construed Narrowly Against Infringement

As discussed above, the Second Circuit's approach is a much narrower interpretation of what constitutes a "work" for purposes of assessing damages than the independent economic value test. Courts should narrowly construe the statutory damages provision of the Copyright Act because the statute promotes a public interest—promoting science and creative work.<sup>140</sup> Traditionally, when engaging in statutory interpretation, judges were entitled to assume that legislatures would act reasonably by legislating pursuant to public interest.<sup>141</sup> However, the public choice theory challenges this assumption by arguing that a benign attempt to serve the public interest does not drive legislatures; rather, the economic self-interest of participants in the political process drive legislatures.<sup>142</sup>

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139. *See id.* at 26 ("[T]he most relevant provision was H.R. 4279 § 104, which sought to disaggregate the parts of a copyrighted work for the purposes of calculating damages."). Congress struck down H.R. 4279 from its text. *See* Anne Broache, *House Panel Deletes Part of Music Industry-Backed Copyright Bill*, CNET NEWS (Mar. 6, 2008, 8:45 AM), [http://www.news.com/8301-10784\\_3-9887568-7.html](http://www.news.com/8301-10784_3-9887568-7.html).

140. *See* Bohannon, *supra* note 58, at 49 (advocating a narrow interpretation of copyrights to enforce the Act's public-interest purpose).

141. *See id.* at 7 (citing Cass Sunstein, *Interpreting Statutes in the Regulatory State*, 104 HARV. L. REV. 405, 434-35 (1989)).

142. *See id.* at 7-8. Bohannon goes on to assert that legislatures are "interested in obtaining campaign contributions, the support of high profile individuals and businesses, and anything else that helps maximize the odds of re-election." *Id.* at 8.

Furthermore, even legislatures who are acting solely on behalf of the public interest receive much of their information from special interest groups acting to maximize their own benefits.<sup>143</sup> To balance these special interest forces, scholars advocate for a narrow construction of statutes that resulted from special interest negotiations.<sup>144</sup>

Courts should narrowly construe the Copyright Act because special interests played a significant role in drafting the Act.<sup>145</sup> A court should give significant weight to the role that special interests played in the drafting of the Copyright Act.<sup>146</sup> The Copyright Act of 1976 is a result of negotiations, not between the legislature and lobbyists, but between representatives of opposing interests.<sup>147</sup> Litman, a leading commenter on the legislative history of the copyright acts, states that:

[The Copyright Act of 1976] represented precisely what one might have expected to evolve from negotiations among parties with economic interests in copyright. The bill granted authors expansive rights covering any conceivable present and future uses of copyrighted works, and defined those uses very broadly. It then provided specific, detailed exemptions for those interests whose representatives had the bargaining power to negotiate them.<sup>148</sup>

The special interest influence on the copyright acts continued even after the passage of the 1976 Act. For example, during the passage of the 1995 Digital Performance Rights Act:

Copyright interest groups hold fund raisers for members of Congress, write campaign songs, invite members of Congress (and their staff) to private movie screenings or sold-out concerts, and draft legislation they expect Congress to pass without any changes. In the 104th Congress, they are drafting the committee reports and haggling among themselves about what needs to be in the report . . . . With the 104th Congress we have, I believe, reached a point where legislative history must be ignored because not even the hands of congressional staff have touched committee reports.<sup>149</sup>

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143. *See id.*

144. *See, e.g.*, Frank H. Easterbrook, *The Court and the Economic System*, 98 HARV. L. REV. 4, 16 (1984).

145. *See* Bohannon, *supra* note 58, at 19-20 (discussing the extensive involvement of special interest groups in the The Copyright Act of 1976 and the DMCA's drafting).

146. *See id.* at 1 (“[C]ourts should not ignore [special-interest] influences when dealing with statutory construction of . . . provisions of the Copyright Act.”).

147. *See* Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 881 (1987).

148. *Id.* at 883; *see also* Bohannon, *supra* note 58, at 20.

149. William F. Patry, *Copyright and the Legislative Process: A Personal Perspective*, 14 CARDOZO ARTS & ENT. L.J. 139, 141 (1996); *see also* Bohannon, *supra* note 58, at 20.

Because the Act is a result of compromises between interest groups who have already mobilized and lobbied to promote their interests, the statutory damages provision should be construed narrowly against finding infringement.<sup>150</sup> The independent economic value test does the exact opposite—it allows courts to apply an expansive interpretation of the statutory damages provisions. The Second Circuit’s approach prevents this by simply focusing on whether the copyright holder released the copyrighted items as compilations. Thus, the independent economic value test’s expanded reading of the statutory damages provision of the Copyright Act heavily tilts the highly debated compromises in favor of special interest groups that have not paid the price for receiving such an advantage.

Narrowly construing the Act will force special interest groups to declare their interests explicitly during the statute’s drafting, thereby requiring special interest groups to internalize the true cost of obtaining legislation that cuts against the public interest.<sup>151</sup> Therefore, those special interest groups that benefit from the independent economic value test should not retain such an advantage through the judicial system; instead, they should negotiate for it through the legislative process.

C. The Legislature, Not the Judiciary, Is Best Equipped and Positioned to Address the Current Valid Copyright Concerns Resulting from Technological Advances

Although modern technology has severely complicated the current copyright laws, the legislative system should address this issue, not the judicial system. The independent economic value test has evolved into a judicially crafted attempt to meet the challenges raised by modern technology.

It is not an understatement to declare that modern technology has severely complicated and hindered current copyright protections, especially in the music industry. Music was once recorded on records, then on tape recorders, and now on CDs. For a period, a person did not have the option of buying different songs from an album.

However, technology began to develop in a manner that allowed individuals to dissect not just albums but songs on albums. In a 2007 article, the *Wall Street Journal* captured some of the dramatic and

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150. See Bohannon, *supra* note 58, at 47-49.

151. See *id.* at 48-49.

challenging interplay between modern technology and its effect on the music industry:

In a dramatic acceleration of the seven-year sales decline that has battered the music industry, compact-disc sales for the first three months of this year [2007] plunged 20% from a year earlier, the latest sign of the seismic shift in the way consumers acquire music. The sharp slide in sales of CDs, which still account for more than 85% of music sold, has far eclipsed the growth in sales of digital downloads . . . .[B]ecause of the Internet, those consumers have more ways to obtain music now than they did a decade ago, when walking into a store and buying it was the only option . . . . Today popular songs and albums—and countless lesser-known works—can be easily found online, in either legal or pirated forms. While the music industry hopes that those songs will be purchased through legal services like Apple’s iTunes Store, consumers can often listen to them on MySpace pages or download them free from other sources, such as so-called MP3 Blogs.<sup>152</sup>

In today’s world, CD sales continue to decline at a much faster rate because customers are turning more and more to online websites to buy their music.<sup>153</sup> For example, in *Media Right*, the defendant infringed on the plaintiff’s copyright by selling the entire album and individual songs from the album on iTunes.<sup>154</sup> These types of historical developments show that the nature and character of what we normally think of as an album has changed. Today, an album constitutes one “work” in the traditional sense: the artist published a compilation of songs that can only be sold together under one album title. However, because infringers can easily market and sell individual songs from an album, traditional analysis might not be sufficient to address these new issues. Therefore, it is imperative that the legislature reassess how to provide better protection for music albums in the digital age.

These technological advances and the problems they will pose were not lost on Congress. Back in 1998, Congress passed the DMCA, anticipating the shift from CDs and DVDs to the digital age.<sup>155</sup> The DMCA attempted to address these challenges by, among other things, punishing anyone who tried to circumvent the protections authors

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152. Ethan Smith, *Sales of Music, Long in Decline, Plunge Sharply; Rise in Downloading Fails to Boost Industry; a Retailing Shakeout*, WALL ST. J., Mar. 21, 2007, at A1.

153. *See id.*

154. *Bryant v. Media Right Prods., Inc.*, 603 F.3d 135, 137-38 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 656 (2010).

155. *See Chesley, supra* note 51, at 2.

placed on their digitized “work.”<sup>156</sup> However, the DMCA has not been widely applied because it just recently went into effect.<sup>157</sup> Within the past decade, courts interpreting the DMCA have experienced several complications.<sup>158</sup> Thus, the extent the DMCA will address the current, intertwined, technology and copyright issues remains to be seen.

Therefore, it is absolutely correct to assert that in light of modern technological advances and their severe impact on the music industry, there is a need to reassess the way music albums are treated. After all, not many musicians can afford to temper this technological problem by refusing to sell their music online like country music mega star Garth Brooks or the legendary AC/DC band;<sup>159</sup> or have the music album leak online a week before its release date and still go platinum within weeks like rap music superstars Kanye West and Lil’ Wayne.<sup>160</sup> These technological issues are real concerns for most in the music industry because most artists do not have the star power or the resources to use creative methods to temper disadvantages the technology world creates.<sup>161</sup>

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156. See Bohannon, *supra* note 58, at 5, 25-26.

157. Chesley, *supra* note 51, at 35 (noting that the Act went into effect in 2000).

158. Compare *MGE UPS Sys. Inc. v. GE Consumer & Indus. Inc.*, 612 F.3d 760, 763, 765-66 (5th Cir. 2010) (holding that cracking a code that prevents the usage of copyrighted work does not violate the DMCA), with *MDY Indus., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 953-54 (9th Cir. 2010) (holding that cracking a circumvention device to use a copyrighted work can violate the DMCA).

159. Bianca Bosker, *iTunes Holdouts: 8 Artists Apple STILL Doesn’t Have*, HUFFINGTON POST (Nov. 16, 2010, 12:26 PM), [http://www.huffingtonpost.com/2010/11/16/itunes-holdoutsapple\\_n\\_784222.html?s183567&title=ACDC](http://www.huffingtonpost.com/2010/11/16/itunes-holdoutsapple_n_784222.html?s183567&title=ACDC).

160. Compare D.L. Chandler, *Will Tha Carter IV Sell 1 Million Copies in its First Week?*, MTV (Aug. 28, 2011, 3:33 PM), <http://rapfix.mtv.com/2011/08/28/will-tha-carter-iv-sell-1-million-copies-in-its-first-week/> (“Young Money captain Lil Wayne wasn’t as lucky with his ninth studio album *Tha Carter IV* leaking last week to the Web . . .”), and Brenna Ehrlich, *Kanye West’s New Album Leaks to Rave Reviews*, MASHABLE (Nov. 09, 2010), <http://mashable.com/2010/11/09/kanye-wests-album-leak/> (“Kanye West’s upcoming disc, *My Beautiful Dark Twisted Fantasy*[.] . . [leaked] online today, weeks before its November 22 drop date.”), with Katherine St Asaph, *Lil Wayne’s “Tha Carter IV” Goes Platinum, as it was Always Going to*, POPDUST (Sep. 14, 2011 3:03 PM), <http://popdust.com/2011/09/14/lil-wayne-tha-carter-iv-platinum/> (“*Tha Carter IV* has now sold more than a million copies . . .”), and Joseph Patterson, *Kanye West’s ‘My Beautiful Dark Twisted Fantasy’ Goes Platinum*, MTV (Jan. 17, 2011, 6:43 A.M.), <http://www.mtv.co.uk/music/urban/253634-kanye-west-s-my-beautiful-dark-twisted-fantasy-goes-platinum> (“Kanye West’s [*My Beautiful Dark Twisted Fantasy*] album has officially been certified platinum.”).

161. Especially in the hip-hop community, very few artists have been successful in preventing their high profile album from “leaking” online prior to the album’s official release date. See, e.g., Matthew Perpetua, *Jay-Z and Kanye West Avoid ‘Watch the Throne’ Leak*, ROLLING STONE (Aug. 8, 2011, 12:20 PM), <http://www.rollingstone.com/music/news/jay-z-and-kanye-west-avoid-watch-the-throne-leak-20110808> (“Jay-Z and Kanye West’s long awaited collaborative album

However, it would be a grave error to conclude that the judicial system is equipped to address this problem with judicially crafted experiments. Because the independent economic value test goes against the Copyright Act's legislative history and its plain language, the test is purely a judicially crafted attempt, outside of the court's statutorily granted power, to meet the copyright challenges of modern technological issues. While it is a noble effort to help the law evolve and stay at pace with technology, this duty is best served by the legislative system.

This legislative role in shaping the laws affecting copyright and technology issues is a critical point that must not be taken lightly. As the United States Supreme Court wisely declared:

[I]t is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product. Because this task involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand, our patent and copyright statutes have been amended repeatedly . . . . [T]he law of copyright has developed in response to significant changes in technology . . . . Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.<sup>162</sup>

Therefore, despite some courts' best intentions, the independent economic value test is highly inappropriate because the court's application of such test cuts into the role of the legislature, which is best equipped to address the problem.

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*Watch the Throne* was released on iTunes yesterday, making it one of the rare high-profile records to come out over the past few years without leaking.”)

162. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429-31 (1984). “When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of [its] basic purpose.” *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

#### IV. THE IMPLICATIONS OF REJECTING THE INDEPENDENT ECONOMIC VALUE TEST

If all of the federal circuits reject the independent economic value test and Congress deems it necessary, Congress will have to weigh in explicitly on whether it approves or disapproves of this test. If Congress expressly rejects the courts' decision through legislation, it will have to bring all special interest parties to the negotiation table and force them to internalize the cost of gaining expansive copyrights under the statute. This will also provide an opportunity for Congress to reassess the already excessive non-compensatory damages that are awarded.

The current compensation for statutory damages are excessively high. If a court recognizes an independent economic value test, the court will exacerbate the current abysmal condition by encouraging courts to award damages to compilations of a single "work"—contrary to the plain reading of the statute. After all, if the argument is that currently courts are awarding excessive amounts of damages, it will be catastrophic to give the courts more authority to award more excessive statutory damages for copyright infringement cases. Consider the following example: if a court finds that an infringement in a particular album caused damages in the amount of \$10,000, and this finding is excessive to begin with, an independent economic value test will exacerbate the situation by giving the same court the power to award \$10,000 for each song infringed upon instead of the one award for the entire album.

Thus, rejecting the expansive independent economic value test analysis and endorsing the Second Circuit's much narrower analysis of determining what constitutes a "work" would mitigate the current excessive damages awards problem. Although they are referred to as compensatory damages, in reality the statutory damages awarded have a compensatory and a non-compensatory component.<sup>163</sup> The compensatory damage component provides relief to the copyright holder based on the actual loss he or she suffered.<sup>164</sup> On the other hand, the non-compensatory damage component serves as a punitive measure to punish the copyright infringer and to deter others from

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163. See generally Blaine Evanson, Note, *Due Process in Statutory Damages*, 3 GEO. J.L. & PUB. POL'Y 601 (2005) (discussing the distinction between compensatory and non-compensatory damages).

164. *Id.*

infringing on copyrighted works.<sup>165</sup> Congress has enhanced these types of punitive measures in “the Copyright Act through the provisions of 17 U.S.C. § 504(c)(2), which allow increases to an award of statutory damages in cases of willful infringement.”<sup>166</sup> Eliminating the independent economic value test will curb some of these excessive compensatory and punitive damages.

The excessive damages argument raises a critical concern. The damages, which also serve as punitive measures, can be so extreme as to amount to a criminal penalty imposed without providing the defendant with the benefits of the safeguards the criminal law system provides.<sup>167</sup> Thus, awarding statutory damages for each part of a “work,” having an independent economic value, might lead to an extremely excessive punishment, making it unconstitutional.<sup>168</sup>

Rejecting the independent economic value test will prevent further exacerbation of the excessive damages awards problem embedded in previous and modern United States copyright laws. If the copyright laws need to adopt an independent economic value test, Congress, the judicial branch, and others in the legal community will be forced to come together and resolve these discrepancies.

## CONCLUSION

Rejecting the independent economic value test and adopting the Second Circuit’s analysis brings some uniformity to the current chaotic state of copyright law.<sup>169</sup> No longer will one plaintiff on one side of the country be given higher protection than another plaintiff on another side of the country. Congress has failed to update copyright legislation in light of existing copyright issues that have emerged due to modern technology, and the independent economic value test adds to the problem by perpetuating the excessive damages problem.

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165. *Id.*

166. *Davis v. Gap, Inc.*, 246 F.3d 152, 172 (2d Cir. 2001).

167. *Evanson*, *supra* note 163, at 603-04 (“Since punitive damages act in a quasi-criminal manner, ‘straddling’ civil and criminal penalties, they run the risk of imposing what amount to criminal penalties without the increased safeguards that criminal law offers.”).

168. J. Cam Barker, *Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement*, 83 *TEX. L. REV.* 525, 526 (2004). (“These [copyright] lawsuits illustrate that the punitive effect of even the minimum statutory damage award, when aggregated across a large number of similar acts, can grow so enormous that it becomes an unconstitutionally excessive punishment.”).

169. Of course, endorsing the independent economic test can unify the copyright law on this issue as well. However, rejecting the test provides unity while staying within the plain reading of the statute.

Congress could have defined what constitutes a “work,” but it did not. Taking into account the shift from “per infringement” to the stricter “per infringed work” standard due to concerns over excessive damages, it is dangerous to adopt an independent economic value test that will give plaintiffs more damages. The test’s application in the context of music albums is a disaster waiting to happen. Luckily, the Second Circuit is the only circuit that has considered this issue in the context of a music album. Because the Second Circuit adopted a much narrower definition of what constitutes a “work” for assessing statutory damages, the court was able to avert a catastrophic blow to copyright laws—allowing copyright holders to collect absurd amounts of damages. The other circuits that use the independent economic value test will not be as fortunate when tasked with a copyright infringement on a music album, because a copyright holder can successfully argue for receiving damages for each song on a an album.

While it is true that current copyright law is lagging behind modern technology’s impact on the music industry, the judiciary is not authorized to address the dynamics of this relationship. This change should be left to the legislative system where special interest groups can advocate for their rights and internalize the cost of attaining specific rights through negotiations.

Rejecting the independent economic value test allows courts to adhere to the important “per infringement work” provision because it will prevent a court from awarding multiple statutory damages to a copyright holder who releases a compilation of a single “work.” While courts still maintain the discretion to define what constitutes a “work” for copyright infringement cases, that discretion does not extend to inquiring as to whether the work’s parts have independent economic values.

If there is a need for an independent economic value test, Congress will step in and reinstate the independent economic value test by simply amending the Act to allow such an interpretation. The real reason for Congress’ silence thus far is subject to speculation. By recognizing that legislation is often reactive instead of proactive, courts like the Eleventh Circuit have attempted to compensate for Congress’ failure to legislate in this area. Accordingly, by crafting the independent economic value test, courts attempted to provide the flexibility needed to meet the challenges posed by modern technological advancements. However, such an approach is outside the judiciary’s powers because it strays from the court’s limited discretion to award

*Federal Judges Gone Wild*

single statutory damages per each infringement of a “work” regardless of the independent economic value of each sub-component of the work.

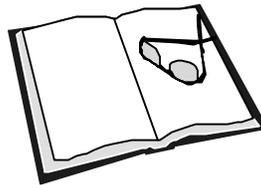


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